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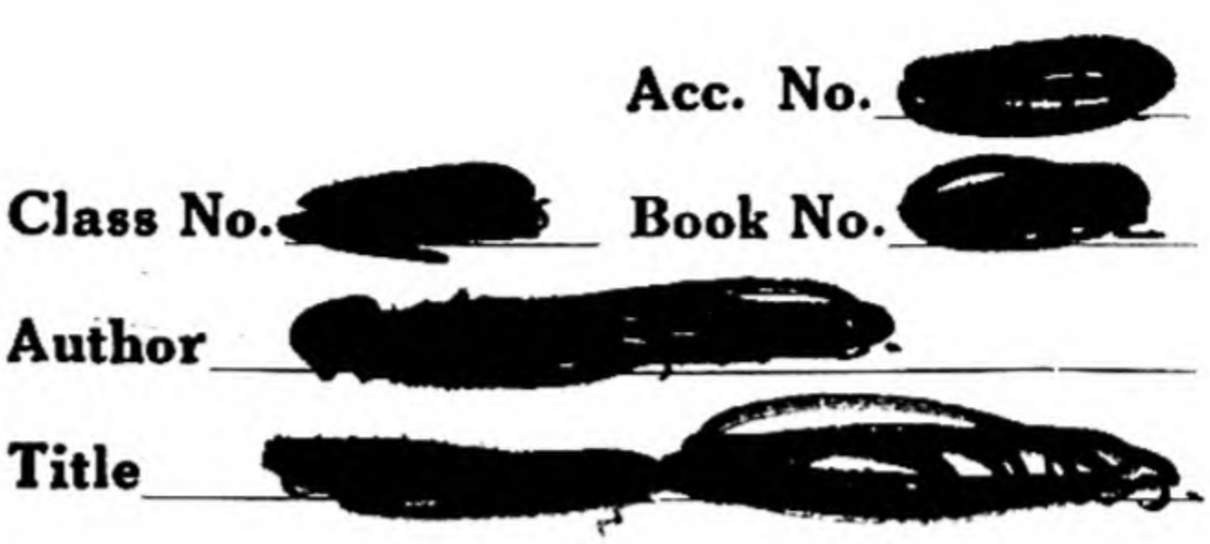

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N.B.—Column No. 1 denotes pages of OTHER JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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1	1918	*P*	398	132	1917	*P*	132	255	1918	*P*	507	396	1918	*P*	345	509	1918	*P*	138
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40	"	"	85	141	1918	"	420	287	"	"	672	409	"	"	525	516	"	"	636
43	1918	"	139	143	1917	"	61	291	"	"	179	412	"	"	249	518	"	"	626
51	1917	"	65	145	1918	"	675	302	"	"	588	415	"	"	673	522	"	"	548
63	1918	"	171	147	"	"	197	306	"	"	537	419	"	"	193	533	"	"	391
67	1917	"	79	156	"	"	598	310	"	"	599	423	1917	"	121	537	"	"	155
71	"	"	62	160	"	"	295	316	"	"	237	426	1918	"	175	565	"	"	257
74	"	"	26	162	"	"	316	317	"	"	566	433	"	"	250	563	"	"	459
78	"	"	11	166	1917	"	152	327	"	"	570	435	"	"	352	571	"	"	395
83	"	"	86	168	"	"	146	339	1917	"	126	438	"	"	234	573	"	"	301
88	"	"	103	176	1918	"	384	346	1918	"	270	443	"	"	210	576	"	"	468
92	"	"	100	178	"	"	329	351	"	"	255	446	"	"	196	579	"	"	483
	"	"	108	179	"	"	303	354	"	"	314	448	"	"	487	580	"	"	536
95	1918	"	427	182	"	"	217	355	"	"	351	452	"	"	496	581	"	"	103
96	"	"	219	188	"	"	320	358	"	"	502	454	"	"	646	630	"	"	485
99	1917	"	100	192	"	"	240	361	"	"	609	456	"	"	214	632	"	"	272
101	1918	"	623	194	"	"	482	367	"	"	396	460	"	"	452	636	1919	"	404
103	"	"	296	197	"	"	145	372	"	"	647	465	"	"	185	639	1918	"	590
106	"	"	451	199	"	"	469	376	"	"	390	475	"	"	529	641	"	"	227
112	"	"	416	218	"	"	341	377	"	"	377	478	"	"	492	645	"	"	297
116	"	"	260	229	"	"	432	379	"	"	660	481	"	"	256	648	"	"	296
119	1917	"	157	243	"	"	663	386	"	"	274	484	"	"	336	649	"	"	262
122	1918	"	125	248	"	"	383	389	"	"	653	490	"	"	322	651	"	"	261
124	"	"	168	250	"	"	486	390	"	"	265	493	"	"	613	653	"	"	308
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1	1917	*P*	77	50	1917	*P*	37	152	1918	*P*	618	238	1918	*P*	647	287	1918	*P*	653
3	"	"	153	55	"	"	121	156	1917	"	117	241	"	"	626	288	"	"	536
5	1918	"	412	57	1918	"	179	162	1918	"	70	243	"	"	306	289	"	"	369
8	"	"	598	64	1917	"	35	164	"	"	348	246	"	"	377	294	"	"	462
11	1917	"	46	65	1918	"	392	166	1917	"	30	247	"	"	570	302	"	"	214
12	"	"	8	69	"	"	522	170	"	"	74	254	"	"	193	305	"	"	240
13	1918	"	448	71	1917	"	104	175	1918	"	279	257	"	"	65	318	"	"	135
17	"	"	341	76	1918	"	299	178	"	"	413	259	"	"	196	323	"	"	230
21	1917	"	50	78	"	"	152	181	"	"	469	261	"	"	234	328	"	"	345
24	"	"	14	81	1917	"	126	192	"	"	257	264	"	"	210	333	1917	"	4
26	"	"	52	86	"	"	92	193	"	"	507	265	"	"	67	337	1918	"	100
30	"	"	15	95	1918	"	459	210	"	"	330	269	"	"	613	343	"	"	599
33	1918	"	266	97	"	"	155	218	1917	"	54	273	"	"	496	347	"	"	607
36*a*	1917	"	32	130	"	"	457	220	1918	"	452	274	"	"	322	349	"	"	673
36*b*	"	"	111	131	"	"	633	223	"	"	131	276	"	"	525	352	"	"	251
44	"	"	141	134	"	"	63	225	"	"	609	278	"	"	534	353	"	"	454
47	"	"	40	138	"	"	364	229	"	"	265	281	"	"	418	357	"	"	505
48	"	"	17	141	"	"	217	232	1919	"	400	284	"	"	352	359	"	"	308
49	1918	"	383	145	"	"	537	236	1918	"	256	285	"	"	252	366	1919	"	416

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1	1917	*PC*	146	52	1917	*PC*	196	86	1917	*P*	34	114	1918	*P*	350	143	1918	*P*	190
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21	"	"	165	60	"	"	69	98	"	*P*	43	120	"	"	146	153	"	"	597
27	1917	*PC*	181	62	"	"	129	100	1918	"	260	129	"	"	483	155	"	"	236
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39	1918	"	653	70	1917	"	121	104	"	"	383	133	1918	"	383	181	"	"	195
40	"	"	628	72	1918	"	637	105	"	"	343	134	"	"	171	183	"	"	578
44	"	"	448	75	"	"	341	108	"	"	522	136	"	"	504	189	"	"	633
47	1917	"	54	84	"	"	675	109	"	"	468	138	"	"	217	192	"	"	630
50	"	"	124	85	"	"	646	111	"	"	193	141	1917	"	35				

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PLW	AIR			PLW	AIR			PLW	AIR			PLW	AIR			PLW	AIR		
195	1918	*P*	625	233	1918	*P*	485	299	1918	*P*	618	342	1917	*P*	77	377	1918	*P*	469
197	1917	*PC*	105	234	"	"	481	303	"	"	60_9	345	"	"	153	391	"	"	154
209	1918	*P*	635	237	"	"	595	307	"	"	65_2	347	1918	"	412	393	"	"	507
210	"	"	70	240	"	"	566	310	1917	*PC*	121	349	"	*PC*	3	412	"	"	192
212	"	"	660	247	"	"	654	316	1918	*P*	330	354	"	*P*	663	414	"	"	364
213	"	"	537	249	1917	*PC*	111	324	"	"	457	357	"	"	672	417	"	"	356
216	"	"	384	256	1918	*P*	432	325	"	"	459	359	"	"	197	428	"	"	422
218	"	"	277	279	"	"	457	327	"	"	588	366	"	"	376	437	"	"	345
220	"	"	461	281	"	"	131	329	"	"	523	368	"	"	145	445	"	"	71
221	1917	*PC*	95	283	"	"	570	331	1917	"	104	369	"	"	413	448	"	"	268
226	"	"	188	291	"	"	323	337	"	"	74	373	"	"	211	449	"	"	505
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PLW	AIR			PLW	AIR			PLW	AIR			PLW	AIR			PLW	AIR		
1	1918	*PC*	8	64	1918	*PC*	41	132	1918	*P*	418	194	1918	*P*	234	238	1917	*P*	55
6	1917	*P*	2	72	1917	"	128	136	"	"	336	199	"	"	392	250	1918	"	214
9	1918	"	63	83	1918	"	35	141	"	"	306	205	"	"	547	254	1917	"	71
15	"	"	352	88	"	"	34	144	"	"	322	208	"	"	67	255	1918	*PC*	77
16	"	"	420	92	"	*P*	520	147	"	"	626	213	1917	"	52	263	1917	*P*	142
18	1917	"	26	97	"	"	320	151	"	"	636	216	1918	"	525	267	1918	*PC*	81
21	1918	"	296	101	"	"	239	153	"	"	138	219	"	"	534	276	"	"	11
24	"	"	240	103	"	"	301	157	"	"	536	223	"	"	210	294	"	"	70
25	1917	*PC*	116	104	"	"	452	159	"	*PC*	53	226	"	"	252	302	"	"	45
34	1918	*P*	168	109	"	"	643	167	"	*P*	462	227	"	"	377	309	"	*P*	651
40	"	"	676	114	"	"	667	179	"	*PC*	74	229	1917	"	72	311	1917	"	134
45	1917	"	126	117	"	"	613	185	"	*P*	604	230	"	"	41	316	"	"	117
52	1918	"	497	122	"	"	281	191	"	"	65	232	1918	"	369	324	1918	"	103
57	"	*PC*	37	127	"	"	530												

19 Criminal Law Journal & 43 to 48 Indian Cases=All India Reporter.

Please refer to COMPARATIVE TABLE *No. I in* **A. I. R. 1918 Lahore.**

TABLE No. II

Showing seriatim the pages of ALL INDIA REPORTER, 1918 PATNA with corresponding references of other REPORTS, JOURNALS, and PERIODICALS.

N. B.—Column 1 denotes pages of the ALL INDIA REPORTER, 1918 PATNA.

Column 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1918 Patna=Other Journals

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	48	*I C*	625	61	1	*P L W*	538	71	4	*P L J*	202	103	3	*P L J*	581
FB	3	*P L J*	663		1919	*P H C C*	120	73	42	*I C*	399	**FB**	5	*P L W*	324
	1919	*P H C C*	162	62	48	*I C*	192		3	*P L W*	149		1919	*P H C C*	1
40	37	*I C*	424		1919	*P H C C*	32		2	*P L J*	725		19	*Cr L J*	833
	2	*P L J*	42	63	45	*I C*	895		1919	*P H C C*	426		46	*I C*	977
	1919	*P H C C*	352		1918	*P H C C*	134	79	48	*I C*	936	125	3	*P L J*	122
41	48	*I C*	245		5	*P L W*	9		1919	*P H C C*	404		1919	*PHCC*	399
	4	*P L J*	213		4	*P L J*	29	82	47	*I C*	654		3	*P L W*	264
	1919	*P H C C*	121	65	48	*I C*	183		4	*P L J*	55		44	*I C*	532
52	39	*I C*	653		1918	*P H C C*	257	83	48	*I C*	711	126	4	*P L J*	141
	2	*P L J*	206		5	*P L W*	191		4	*P L J*	394		1919	*PHCC*	155
	3	*P L W*	423		4	*P L J*	336	91	44	*I C*	146		48	*I C*	943
	1919	*P H C C*	282	67	47	*I C*	154		4	*P L J*	38	131	4	*P L J*	191
54	41	*I C*	705		1918	*P H C C*	265	95	48	*I C*	728		4	*P L W*	281
	3	*P L W*	198		5	*P L W*	208		1919	*P H C C*	46		1918	*PHCC*	223
	1919	*P H C C*	441		4	*P L J*	330		4	*P L J*	365		44	*I C*	891
59	42	*I C*	602	69	48	*I C*	415	98	4	*P L J*	7	132	1919	*PHCC*	141
	2	*P L W*	79		4	*P L J*	35		19	*Cr L J*	899		48	*I C*	953
	1919	*P H C C*	255	70	44	*I C*	292		47	*I C*	95	135	4	*P L J*	1
	18	*Cr L J*	986		4	*P L W*	210	99	4	*P L J*	362		1918	*PHCC*	318
60	46	*I C*	655		4	*P L J*	106		46	*I C*	921		47	*I C*	705
	3	*P L J*	513		1918	*P H C C*	162	100	4	*P L J*	20	138	3	*P L J*	509
	1919	*P H C C*	137	71	45	*I C*	920		1918	*P H C C*	337		5	*P L W*	153
61	42	*I C*	859		4	*P L W*	445		47	*I C*	719		1919	*PHCC*	218

A. I. R. 1918 Patna=Other Journals—(*Contd.*)

AIR	Other Journals		
138	48	*I C*	348
	19	*Cr L J*	1008
139	3	*P L J*	43
	3	*P L W*	141
	1919	*PHCC*	373
	43	*I C*	282
142	1919	*PHCC*	62
	48	*I C*	949
145 (1)	45	*I C*	568
	3	*P L J*	197
	4	*P L W*	368
145 (2)	43	*I C*	404
	19	*Cr L J*	116
146	46	*I C*	709
	4	*P L W*	120
	19	*Cr L J*	789
152	43	*I C*	407
	1918	*PHCC*	78
	19	*Cr L J*	119
154	45	*I C*	650
	4	*P L W*	391
155	44	*I C*	185
FB	3	*P L J*	537
	4	*P LW*	157
	1918	*PHCC*	97
	19	*Cr L J*	281
165	43	*I C*	409
	4	*P L W*	21
	19	*Cr L J*	121
168	46	*I C*	33
	3	*P L J*	124
	5	*P L W*	34
	19	*Cr L J*	673
171	44	*I C*	79
	3	*P L J*	63
	4	*P L W*	134
172	43	*I C*	414
	19	*Cr L J*	126
174	45	*I C*	642
175	46	*I C*	162
	3	*P L J*	426
179	43	*I C*	423
SB	4	*P L W*	14
	3	*P L J*	291
	1918	*PHCC*	57
	19	*Cr L J*	135
183	44	*I C*	38
	19	*Cr L J*	246
185	46	*I C*	534
	3	*P L J*	465
190	43	*I C*	434
	2	*P L J*	688
	4	*P L W*	143
	19	*Cr L J*	146
192	45	*I C*	665
	4	*P L W*	412
193	44	*I C*	33
	3	*P L J*	419
	4	*P L W*	111
	1918	*PHCC*	254
	19	*Cr L J*	241
195	43	*I C*	437
	2	*P L J*	692
	4	*P L W*	181
	19	*Cr L J*	149
196	45	*I C*	551
	3	*P L J*	446
	1918	*PHCC*	259
197	3	*P L J*	147
	4	*P L W*	359
	1917	*PHCC*	363
197	19	*Cr L J*	249
	44	*I C*	41
201	47	*I C*	82
	19	*Cr L J*	886
210	44	*I C*	50
	3	*P L J*	443
	5	*P L W*	223
	1918	*PHCC*	264
211 (1)	43	*I C*	70
	4	*P L W*	119
	1917	*PHCC*	283
211 (2)	45	*I C*	253
	4	*P L W*	373
214	46	*I C*	224
	3	*P L J*	456
	5	*P L W*	250
	1918	*PHCC*	302
216	48	*I C*	704
217	43	*I C*	396
	3	*P L J*	182
	4	*P L W*	138
	1918	*PHCC*	141
219	44	*I C*	418
	3	*P L J*	96
220	46	*I C*	229
227	48	*I C*	677
	3	*P L J*	641
	20	*Cr L J*	37
228	43	*I C*	401
	3	*P L W*	353
	19	*Cr L J*	113
230	48	*I C*	746
	1918	*PHCC*	323
234	47	*I C*	102
	3	*P L J*	438
	5	*P L W*	194
	1918	*PHCC*	261
236	44	*I C*	579
	4	*P L W*	155
	19	*Cr L J*	355
237 (1)	45	*I C*	848
	3	*P L J*	316
	19	*Cr L J*	656
237 (2)	48	*I C*	755
239	46	*I C*	413
	5	*P L W*	101
	19	*Cr L J*	733
240 (1)	44	*I C*	970
	3	*P L J*	192
	5	*P L W*	24
	19	*Cr L J*	442
240 (2)	47	*I C*	179
	1918	*PHCC*	305
249	46	*I C*	418
	3	*P L J*	412
250	44	*I C*	974
	19	*Cr L J*	446
	3	*P L J*	433
251	48	*I C*	894
	1918	*PHCC*	352
	20	*Cr L J*	94
252	48	*I C*	340
	1918	*P H C C*	285
	5	*P L W*	226
	19	*Cr L J*	1000
253	44	*I C*	670
	3	*P L W*	385
254	48	*I C*	187
255	47	*I C*	34
	3	*P L J*	351
256	46	*I C*	488
256	1918	*P H C C*	236
	3	*P L J*	481
257	46	*I C*	415
	3	*P L J*	565
	1918	*P H C C*	192
	19	*Cr L J*	735
259	46	*I C*	492
260	43	*I C*	855
	1917	*P H C C*	377
	4	*P L W*	100
	3	*P L J*	116
261	48	*I C*	197
	3	*P L J*	651
	48	*I C*	608
262	3	*P L J*	649
263	45	*I C*	318
265	45	*I C*	684
SB	3	*P L J*	390
	19	*Cr L J*	636
	1918	*P H C C*	229
266	44	*I C*	412
	1918	*P H C C*	33
268	45	*I C*	916
	4	*P L W*	448
269	45	*I C*	901
270	47	*I C*	70
	3	*P L J*	346
	19	*Cr L J*	874
272	47	*I C*	274
	3	*P L J*	632
	19	*Cr L J*	902
273	47	*I C*	132
274	46	*I C*	293
	3	*P L J*	386
	19	*Cr L J*	709
275	47	*I C*	141
277	44	*I C*	887
	4	*P L W*	218
278	48	*I C*	765
279	46	*I C*	842
	1918	*P H C C*	175
	19	*Cr L J*	826
281	46	*I C*	255
	5	*P L W*	122
289	47	*I C*	710
291	43	*I C*	857
	3	*P L W*	213
295	44	*I C*	733
	3	*P L J*	160
296 (1)	48	*I C*	613
	3	*P L J*	648
296 (2)	44	*I C*	560
	3	*P L J*	103
	5	*P L W*	21
297	48	*I C*	560
	3	*P L J*	645
299	44	*I C*	726
	1918	*P H C C*	76
300	48	*I C*	342
	19	*Cr L J*	1002
301 (1)	46	*I C*	517
	5	*P L W*	103
	19	*Cr L J*	741
301 (2)	48	*I C*	133
	3	*P L J*	573
301	44	*I C*	731
	3	*P L J*	179
304	48	*I C*	175
	19	*Cr L J*	995
306	46	*I C*	465
	1918	*P H C C*	243
306	5	*P L W*	141
308	48	*I C*	163
	3	*P L J*	653
	1918	*P H C C*	359
	19	*Cr L J*	983
312	45	*I C*	679
	19	*Cr L J*	631
313	46	*I C*	878
314	47	*I C*	80
	3	*P L J*	354
	19	*Cr L J*	884
315	46	*I C*	892
316	43	*I C*	917
	3	*P L J*	162
320	43	*I C*	393
	3	*P L J*	188
	5	*P L W*	97
322	46	*I C*	479
	3	*P L J*	490
	5	*P L W*	144
	1918	*P H C C*	274
323	44	*I C*	451
	4	*P L W*	291
	19	*Cr L J*	339
327	48	*I C*	670
329	44	*I C*	723
	3	*P L J*	178
330	45	*I C*	294
	4	*P L W*	316
	1918	*P H C C*	210
335	44	*I C*	658
	3	*P L W*	364
336	46	*I C*	509
	3	*P L J*	484
	5	*P L W*	136
338	48	*I C*	533
341	43	*I C*	925
SB	1918	*P H C C*	17
	4	*P L W*	75
	3	*P L J*	218
343	44	*I C*	47
	4	*P L W*	105
	19	*Cr L J*	255
345	46	*I C*	27
	4	*P L W*	437
	3	*P L J*	396
	1918	*P H C C*	328
348	43	*I C*	359
	3	*P L W*	266
	1918	*P H C C*	164
350	44	*I C*	119
	4	*P L W*	114
	19	*Cr L J*	263
351	47	*I C*	27
	3	*P L J*	355
352 (1)	46	*I C*	84
	5	*P L W*	15
	1918	*P H C C*	284
352 (2)	48	*I C*	107
	3	*P L J*	435
354	43	*I C*	374
	3	*P L W*	283
356	45	*I C*	691
	4	*P L W*	417
364	45	*I C*	177
	1918	*P H C C*	138
	4	*P L W*	414
366	47	*I C*	166
369	48	*I C*	359
	1918	*P H C C*	289
	5	*P L W*	232

A. I. R. 1918 Patna=Other Journals.—(*Contd.*)

AIR	Other Journals		
372	43	*I C*	455
	2	*P L J*	682
373	48	*I C*	685
	20	*Cr L J*	45
374	47	*I C*	204
376	45	*I C*	189
	4	*P L W*	366
377 (1)	46	*I C*	137
	3	*P L J*	377
	1918	*P H C C*	246
	5	*P L W*	227
377 (2)	44	*I C*	129
380	46	*I C*	169
383 (1)	43	*I C*	457
	2	*P L J*	684
	1918	*P H C C*	49
	4	*P L W*	133
383 (2)	44	*I C*	122
	4	*P L W*	104
	3	*P L J*	248
	19	*Cr L J*	266
384	43	*I C*	454
	4	*P L W*	216
	3	*P L J*	176
385	44	*I C*	153
	4	*P L W*	146
387	44	*I C*	240
388	43	*I C*	451
	1	*P L W*	608
389	46	*I C*	98
	3	*P L J*	394
390	46	*I C*	176
	3	*P L J*	376
391	47	*I C*	212
	3	*P L J*	533
392	45	*I C*	72
	1918	*P H C C*	65
	5	*P L W*	199
395	48	*I C*	129
	3	*P L J*	571
396	47	*I C*	47
	3	*P L J*	367
398	44	*I C*	94
FB	3	*P L J*	1
412	43	*I C*	534
	1918	*P H C C*	5
	4	*P L W*	347
413	45	*I C*	197
	4	*P L W*	369
	1918	*P H C C*	178
415	44	*I C*	661
	4	*P L W*	296
416	44	*I C*	593
	3	*P L J*	112
418	46	*I C*	275
	1918	*P H C C*	281
	5	*P L W*	132
420	44	*I C*	587
	3	*P L J*	141
	5	*P L W*	16
	19	*Cr L J*	363
421	47	*I C*	224
422	45	*I C*	706
	4	*P L W*	428
427	44	*I C*	296
	3	*P L J*	95
428	48	*I C*	694
432	44	*I C*	817
SB	3	*P L J*	229
	4	*P L W*	256
448	43	*I C*	585
448	1918	*P H C C*	13
	4	*P L W*	44
	19	*Cr L J*	169
451	44	*I C*	737
	3	*P L J*	106
	19	*Cr L J*	385
452	46	*I C*	179
	5	*P L W*	104
	1918	*P H C C*	220
	3	*P L J*	460
454	48	*I C*	786
	1918	*P H C C*	353
457 (1)	45	*I C*	203
	1918	*P H C C*	130
	3	*P L J*	285
	4	*P L W*	324
457 (2)	44	*I C*	654
	4	*P L W*	279
459	45	*I C*	272
	1918	*P H C C*	95
	4	*P L W*	325
	3	*P L J*	568
	19	*Cr L J*	512
460	45	*I C*	928
461	44	*I C*	751
	4	*P L W*	220
	19	*Cr L J*	399
462	47	*I C*	55
	5	*P L W*	167
	1918	*P H C C*	294
468	43	*I C*	965
	4	*P L W*	109
	3	*P L J*	576
469	45	*I C*	749
SB	1918	*P H C C*	181
	3	*P L J*	199
	4	*P L W*	377
477	47	*I C*	697
481	44	*I C*	748
	4	*P L W*	234
	19	*Cr L J*	396
482	45	*I C*	238
	3	*P L J*	194
483	43	*I C*	969
	4	*P L W*	129
	3	*P L J*	579
484	19	*Cr L J*	719
	46	*I C*	303
485	44	*I C*	406
	4	*P L W*	233
	3	*P L J*	630
486	43	*I C*	951
	4	*P L W*	102
	3	*P L J*	250
487	46	*I C*	385
	3	*P L J*	448
488	47	*I C*	725
489 (1)	46	*I C*	238
489 (2)	47	*I C*	667
	19	*Cr L J*	943
492	46	*I C*	569
	3	*P L J*	478
493	44	*I C*	19
494	46	*I C*	562
496	46	*I C*	271
	3	*P L J*	452
	1918	*P H C C*	273
497	46	*I C*	580
	5	*P L W*	52
500	46	*I C*	296
	19	*Cr L J*	712
502	47	*I C*	37
	3	*P L J*	358
504	43	*I C*	955
	4	*P L W*	136
505 (1)	43	*I C*	959
	3	*P L J*	253
	4	*P L W*	449
505 (2)	47	*I C*	798
	1918	*P H C C*	357
507	46	*I C*	358
SB	3	*P L J*	255
	4	*P L W*	393
	1918	*P H C C*	193
520	46	*I C*	316
	5	*P L W*	92
522	43	*I C*	915
	1918	*P H C C*	69
	4	*P L W*	108
523	45	*I C*	276
	4	*P L W*	329
	19	*Cr L J*	516
525	46	*I C*	398
	3	*P L J*	409
	1918	*P H C C*	276
	5	*P L W*	216
526 (1)	44	*I C*	470
	4	*P L W*	152
526 (2)	47	*I C*	685
529	46	*I C*	556
	3	*P L J*	475
530	46	*I C*	529
	5	*P L W*	127
533	47	*I C*	790
534	48	*I C*	228
	1919	*P H C C*	278
	5	*P L W*	219
536 (1)	48	*I C*	141
	3	*P L J*	580
536 (2)	47	*I C*	73
	5	*P L W*	157
	1918	*P H C C*	288
	19	*Cr L J*	877
537	44	*I C*	422
	4	*P L W*	213
	1918	*P H C C*	145
	3	*P L J*	306
543	43	*I C*	973
546	47	*I C*	844
547	47	*I C*	993
	5	*P L W*	205
548	46	*I C*	627
	3	*P L J*	522
563	45	*I C*	794
564	46	*I C*	252
566	44	*I C*	475
	4	*P L W*	240
	3	*P L J*	317
570	47	*I C*	290
	1918	*P H C C*	247
	4	*P L W*	283
	3	*P L J*	327
575	46	*I C*	392
	3	*P L J*	404
578	43	*I C*	103
	19	*Cr L J*	71
	4	*P L W*	183
581	43	*I C*	126
	1917	*P H C C*	264
582 (1)	44	*I C*	496
582 (2)	43	*I C*	103
	1917	*P H C C*	87
582 (2)	3	*P L W*	224
	19	*Cr L J*	77
583	45	*I C*	418
584	43	*I C*	95
	19	*Cr L J*	63
588	45	*I C*	397
	4	*P L W*	327
	3	*P L J*	302
	19	*Cr L J*	589
590 (1)	46	*I C*	884
	3	*P L J*	639
590 (2)	43	*I C*	793
	4	*P L W*	65
	19	*Cr L J*	217
593	45	*I C*	303
595	44	*I C*	399
	4	*P L W*	237
597	43	*I C*	439
	2	*P L J*	695
	4	*P L W*	153
	19	*Cr L J*	151
598	43	*I C*	120
	1918	*P H C C*	8
	4	*P L W*	116
	3	*P L J*	156
599	45	*I C*	589
	3	*P L J*	310
	1918	*P H C C*	343
602	43	*I C*	93
	1917	*P H C C*	265
	19	*Cr L J*	61
604	47	*I C*	29
	5	*P L W*	185
605	43	*I C*	971
606	43	*I C*	811
607	48	*I C*	930
	1918	*P H C C*	347
608	43	*I C*	772
	1917	*P H C C*	181
609 (1)	46	*I C*	815
609 (2)	45	*I C*	432
	4	*P L W*	303
	3	*P L J*	361
	1918	*P H C C*	225
612	43	*I C*	54
	2	*P L W*	221
	2	*P L J*	720
613	46	*I C*	523
	1918	*P H C C*	269
	3	*P L J*	493
	5	*P L W*	117
	19	*Cr L J*	747
615	43	*I C*	570
618	45	*I C*	326
	4	*P L W*	299
	1918	*P H C C*	152
621	45	*I C*	834
	19	*Cr L J*	642
623	43	*I C*	489
	3	*P L J*	101
624	43	*I C*	15
	1917	*P H C C*	80
	3	*P L W*	132
625 (1)	44	*I C*	336
	4	*P L W*	195
	19	*Cr L J*	320
625 (2)	43	*I C*	17
	2	*P L J*	615
626	46	*I C*	670
	5	*P L W*	147
	1918	*P H C C*	241

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A.I.R.		Other Journals	
626	3	*P L J*	518
628	43	*I C*	618
	4	*P L W*	40
	19	*Cr L J*	202
630	44	*I C*	244
	4	*P L W*	192
632	43	*I C*	49
	3	*P L W*	339
633	44	*I C*	262
	4	*P L W*	189
	1918	*P H C C*	131
635	43	*I C*	459
	2	*P L J*	673
	4	*P L W*	209
636	46	*I C*	614
	3	*P L J*	516
	5	*P L W*	151
637	43	*I C*	777
	4	*P L W*	72
639	45	*I C*	677
	19	*Cr L J*	629
640	43	*I C*	828
	19	*Cr L J*	236
643	46	*I C*	525
	5	*P L W*	109
	19	*Cr L J*	749
646 (1)	43	*I C*	351
	1917	*P H C C*	348
	4	*P L W*	85
646 (2)	46	*I C*	473
	3	*P L J*	454
647	45	*I C*	316
	3	*P L J*	372
	1918	*P H C C*	238
649	43	*I C*	445
	19	*Cr L J*	157
650	46	*I C*	301
	19	*Cr L J*	717
651	43	*I C*	449
	1917	*P H C C*	337
	5	*P L W*	309
652	45	*I C*	287
	44	*P L W*	307
	19	*Cr L J*	527
653	43	*I C*	785
	4	*P L W*	39
653	19	*Cr L J*	209
	3	*P L J*	389
	1918	*P H C C*	287
654	44	*I C*	638
	4	*P L W*	247
656	42	*I C*	918
	2	*P L W*	218
	19	*Cr L J*	6
658	46	*I C*	604
	19	*Cr L J*	764
660 (1)	44	*I C*	208
	4	*P L W*	212
	19	*Cr L J*	304
660 (2)	46	*I C*	125
	3	*P L J*	379
663	47	*I C*	65
	3	*P L J*	243
	4	*P L W*	354
	19	*Cr L J*	869
666	45	*I C*	182
667	46	*I C*	409
	5	*P L W*	114
	19	*Cr L J*	729
668	48	*I C*	779
672	47	*I C*	76
	3	*P L J*	287
	4	*P L W*	357
	19	*Cr L J*	880
673	46	*I C*	117
	3	*P L J*	415
	1918	*P H C C*	349
675	43	*I C*	23
	3	*P L J*	145
	4	*P L W*	84
676	45	*I C*	673
	5	*P L W*	40
	19	*Cr L J*	625
678	42	*I C*	397
	2	*P L W*	183
680	2	*P L J*	663
	1917	*P H C C*	342
	41	*I C*	337
	2	*P L W*	71
682	42	*I C*	585
686	3	*P L W*	357
	41	*I C*	68

THE
ALL INDIA REPORTER
1918
PATNA HIGH COURT

* * **A. I. R. 1918 Patna 1**

Full Bench

DAWSON-MILLER, C. J., MULLICK, JWALA PRASAD, ALI IMAM AND THORNHILL, JJ.

Uma Shankar Prasad Parasari — Plaintiff—Appellant.

v.

Mt. Nageswari Koeri and *others* — Defendants—Respondents.

Appeal No. 418 of 1915, Decided on 2nd August 1918, from Original Decree of Addl. Sub-Judge, Gaya, D/- 16th June 1915.

(a) **Hindu Law—Succession—Mitakshara—(Per *Full Bench*)—**Maternal uncle is to be preferred to sister's daughter's son.** (*Dawson-Miller, C. J.* and *Ali Imam, J., dissenting*).

By Full Bench. — In a family governed by the Mitakshara school of Hindu law the maternal uncle of the last male owner is preferred to the sister's daughter's son as next heir to the estate. (*Dawson-Miller, C. J.* and *Ali Imam, J., dissenting*).

Per *Mullick, J.*—Both the Dayabhaga and the Mitakshara recognize the principles of propinquity of blood and religious efficacy. The only difference is that in the Dayabhaga religious merits arising from the celebration of the Parbana Sradh is accorded greater weight and that in the absence of religious merit accruing from Parbana rights, the ability to benefit the deceased by some other religious ceremony is a sufficient foundation of a title to inherit. The Mitakshara, on the other hand, regards oblations presented by cognate kinsmen as secondary and conferring no claim against the whole body of agnates. The Dayabhaga, admitting that the oblations are secondary as compared with agnates of the same line, insists that the Parbana Pindas conferred by cognates should prevail against agnates of a remoter line. The true view is that nearness of blood determines the heritable right while the doctrine of spiritual efficacy determines the preferential right. [P 8 C 1]

The test of religious and spiritual benefit can and should be applied to determine the preferential right, that is to say, where the principle of affinity by blood relationship does not clearly indicate with which claimant the preferance lies. [P 13 C 2]

Per *Jwala Prasad, J.*—The first and foremost rule of preference among several claimants is that the nearest in degree, ascertained by the simple method of counting given in the Mitakshara, excludes those more remote and when the degree is equal only then other considerations might be resorted to for the purpose of preference among the rival claimants. [P 19 C 1]

The rule that the heirs ex parte paterna should be preferred to those ex parte materna is not to be found in the text relating to Bandhus in the Mitakshara and there is no authority for supplying any omission in that text. [P 22 C 2]

Per *Ali Imam, J.*—In the Mitakshara religious efficacy is not the determining guide for the purpose of inheritance. [P 30 C 1]

Per *Thornhill, J.*—As between Bandhus of the same class a rule of preference may be found in the quantity of spiritual benefit which they confer. [P 34 C 1]

(b) Appeal—Evidence—Appellate Court can disregard findings of fact and form its own judgment only when it is satisfied beyond doubt that those findings are erroneous or that reasons given are such as cannot be supported.

By the Division Bench. (*Dawson-Miller, C. J.* and *Ali Imam, J.*)—A Court of appeal should not readily disturb the findings of fact arrived at by the trial Judge even if it might be inclined to take a different view from reading the evidence, but if the appellate Court is satisfied beyond all reasonable doubt on considering the evidence that the findings are erroneous, then it ought to interfere. Or again, if the reasons given by the Judge of the lower Court for arriving at his conclusions are such that they cannot be supported then the Court of appeal is clearly entitled to disregard those findings and form its own independent judgment of the facts from the evidence and probabilities of the case. [P 35 C 2]

Krishna Sahay, Abani Bhusan Mukherjee and *Panchanan Banerjee*—for Appellant.

Kailaspati and *Mrityunjoy Lal*—for Respondents.

Dawson-Miller, C. J.—The question for determination in this reference is, whether in a family governed by the Mitakshara school of law the sister's daughter's son or the maternal uncle of the

last male owner is to be preferred as next heir to his estate. The pedigree set out below shows the relationship between the parties. The last male owner of the property in suit was Chamman Lal Upadhya.

Mandal Missir, Maternal grandfather.

Bechan Lal Upadhya (Father) = Mother — Raghunandan Missir, maternal uncle.

Mt. Channi Bibi (Sister) — Chamman Lal Upadhya (Propositus). — Parmeshri Koer.

Mt. Pun Bibi

Uma Shankar (Plaintiff).

The persons whose claims to succeed to Chamman Lal's estate have to be considered are (1) the plaintiff Uma Shankar, and (2) Raghunandan Missir. The former is Chamman Lal's sister's daughter's son, the latter is his mother's brother. Chamman Lal died childless in the year 1910 and his widow Mt. Parmeshri Koer succeeded to his estate. She died in 1912 and the plaintiff Uma Shankar claimed to succeed to the estate as nearest Bandhu and next heir to Chamman Lal. His claim was opposed by one Ganesh Prasad Panday, a nephew of Parmeshri Koer, Chamman Lal's widow, and by Mt. Nageshari Koer, a sister of the same lady. The nature of this claims is not material to the present issue. They were based on a transfer and an adoption alleged to have been made by the widow. During the course of the trial however it transpired that Raghunandan Missir, the maternal uncle of Chamman Lal, was alive. He had made no claim to the estate, but the learned Additional subordinate Judge at Gaya who tried the case came to the conclusion that even if the plaintiff could succeed in establishing his case in other respects, the maternal uncle of Chamman Lal would succeed to his nephew's property in priority to the plaintiff whose relationship was that of sister's daughter's son. On appeal to this Court, the question, being considered one of importance in which there was some conflict of authority, was referred to a Full Bench.

It is contended on behalf of the respondents (defendants) that although under the Mitakshara consanguinity may determine the right to inherit in the first instance, nevertheless as between rival claimants of the same class the efficacy of religious offerings is the determining factor establishing priority. In the present case both of the plaintiff and Raghunandan Missir are Atma Bandhus of the propositus. Raghunandan Missir could confer some spiritual benefit on the deceased by his offerings. The plaintiff could confer none. The appellant contends that whatever may be the rule prevailing under the Bengal school, the right to inherit under the Mitakshara as well as the order of succession are determined solely by nearness of blood, subject to certain rules founded on the text itself or based by analogy on the principles to be deduced therefrom and that the efficacy of religious oblations forms no part of the scheme of succession prescribed by the Mitakshara. It is true that under the Mitakshara the nearest agnates who succeed are those who confer the greatest spiritual benefit on the deceased proprietor, but when the more distant agnates are considered it is clear that their claims to inherit in priority to near cognate relations, such as the sister's son whose religious offerings rank much higher than those of distant agnates up to the 14th degree to whom he is postponed, cannot be based on any considerations of religious efficacy. Mr. Mayne, in his well-known treatise on Hindu Law and Usage, says:

"The doctrine that heirs are to be placed in the direct order of their spiritual merit was announced for the first time by Jimuta Vahana and has been expanded by his successors," and points out that this necessitated a remodelling of the order of succession in the Bengal system, the cognates being shuffled in amongst the agnates to the exclusion of those mentioned in the Mitakshara and whereas in Bengal the inheritance follows the duty of offering sacrifices, elsewhere the duty follows the inheritance. According to that learned author the cardinal distinction between the two schools of Hindu Law governed by the Dayabhaga and the Dayakrahma Sangraha on the one hand and the Mitakshara on the other is that in the former the order of succession is based on the efficacy of religious offerings and in the latter on consanguinity. Mr. Mayne goes so far as to say that the Mitak-

shara in dealing with succession never once alludes to the test of religious merit. There is a passage in the Mitakshara which might appear to conflict with this dictum where the commentator distinguishes between Sapindas and Samanodakas, stating that the former succeed before the latter and that the former offer funeral cakes and the latter only libations of water. This Mr. Mayne explains as merely a way of indicating different degrees of propinquity and not as evidencing different degrees of religious merit, and there is certainly no room for doubt that under the Mitakshara those who confer high religious benefits on the deceased owner are in many cases postponed to those who confer little or none. Sir Ernest Trevelyan, an authority of weight on this subject, when dealing with the difference between the law of inheritance prescribed by the Mitakshara and that of the Bengal school, also says:

"In the system of inheritance under the Mitakshara school of law propinquity of relationship is the guiding principle for determining the order of succession." (Hindu Law, Edn. 2, p. 377).

Colebrooke's celebrated paraphrase of the word Sapinda in his translation of the Mitakshara as "connected by funeral oblations" no doubt afforded material for the supposition that Vijnaneswara has in mind the effcacy of religious offerings, and not propinquity, as the criterion determining the order of succession. This translation of the word Sapinda made over a century ago would hardly appear to be justified by reference to other passages in the Mitakshara which have more recently been translated, but its effect has undoubtedly been felt in many of the judgments dealing with questions of inheritance under the Mitakshara Law. That part of the Mitakshara known as the Acharakanda which was not translated by Colebroke makes it clear beyond doubt that the meaning attributed to the word Sapinda by Vijnaneswara himself was blood relationship. He says:

"Sapinda relationship arises between two people through their being connected by particles of one body,"
and truely enough observes that
"the word Sapinda on account of its etymological import (connected by having in common particles of one body) would apply to all men,"
and accordingly restricts its signification as shown in the text to relations connected by a common ancestor not more than 6 degrees removed from either. It is true this passage does not occur in that part of the text which deals with inheritance, but there is nothing to suggest that the use of the same word in other portions of the commentary was meant to have a different signification. I have stated that Colebrooke's translation has been accepted by learned Judges when dealing with questions of inheritance under the Mitakshara Law, but in such cases it does not appear to have been questioned. In *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (1) decided in 1868 the question was whether a person could be heir to his maternal uncle as a Bandhu, although not one of those specially named in the text of the Mitakshara. Dwarka Nath Mitter, J., in dealing with Colebrooke's translation of the Mitakshara, Ch. 2, S. 5, verse 3, made some observations which may be urged as showing that that learned Judge accepted Colebrooke's rendering of Sapinda in connection with the definition of Bandhu. He says at p. 81:

"It will be observed that two conditions are necessary to meet the requirements of this definition, namely, first that the claimant should be a kinsman sprung from a different family and second that he should be connected by funeral oblations."

Cloebrooke's translation is as follows:

"For kinsmen sprung from a different family but connected by funeral oblations" (Sapindaship) "are indicated by the term cognate (Bandhu)."

Both these conditions were fulfilled in that case by the claimant, a sister's son of the propositus, and it did not become necessary to discuss the accuracy of Colebrooke's translation nor does it appear to have been questioned. But in a later passage the learned Judge says:

"It is perfectly true that the lawyers of the Benares school sometimes use the word Sapinda in the sense of consanguinity or mere connection through the body,"
and on either view he decides that the sister's son was a Bandhu. The real point decided in that case was that the enumeration of Bandhus in the Mitakshara was illustrative and not exhaustive, which was the view also taken by their Lordships of the Privy Council in *Girdhari Lall Roy* v. *Bengal Government* (2) decided in the same

(1) [1869] 2 B L R 28=10 W R 76 (F B).
(2) [1867-69] 12 M I A 448=2 Suth 159=2 Sar 382 (P C).

year. In the latter case also Colebroke's translation was accepted without comment but it was not necessary to consider the point. In 1880 the case of *Lallubhai Bapubhai* v. *Cassibai* (3) came before their Lordships of the Privy Council. It was a Bombay case and concerned the claim of the widow of a paternal cousin, who was a Gotraja Sapinda of the deceased, to succeed in preference to a more remote male heir, also a Gotraja Sapinda. It was contended *inter alia* that the passages in the Acharakanda of the Mitakshara defining Sapinda relationship as connected by particles of one body should apply also to the same word in the parts of the text which treat of inheritance. The Court below had so decided. Their Lordships in dealing with this proposition said they were "prepared to assent to the conclusion to which the Judges of the High Court upon consideration of the authorities arrived that by the law of the Mitakshara as interpreted and accepted in Western India, the preferential right to inherit in the classes of Sapindas is to be determined by family relationship or the community of corporal particles and not alone by the capacity of performing funeral rites."

In the same year the case of *Umaid Bahadur* v. *Udoi Chand* (4) was decided by a Full Bench of the Calcutta High Court. In that case the rival claimants to the property of the last male owner were the plaintiff whose father had purchased from the widow of the deceased owner and the defendant who was his sister's daughter's son. His relationship to the propositus was identical with that of the plaintiff Uma Shankar in the present case. The question turned upon whether the defendant as sister's daughter's son of the propositus could be an heir. This depended upon the meaning to be attached to the word Sapinda in Chapter 2, section 5, verse 3 of the Mitakshara. The defendant was certainly not connected by funeral oblations with the deceased. The Court consisting of Sir R. Garth, C. J., and four other Judges came to the conclusion that the word Sapinda should be used throughout the Mitakshara in the same sense, *viz.*, connected by particles of one body as explained by the author himself in the Chapter on rituals and that Colebrooke's translation was wrong. They accordingly decided that the defendant was entitled to inherit. In this judgment reference is made to a further passage in the Mitakshara (Acharakanda), where the author cites a text of Vrihat Manu dealing with Sapinda relationship and that of Samanodakas in the case of agnates and says with regard to it:

"Sapinda relationship with the father does not arise by reason of connection through funeral cakes but through the connection of particles of one body."

This is significant, as the Sapinda relationship referred to in the text of Manu was evidently that of Gotraja Sapinda. Reference to other parts of the Mitakshara also supports the view that propinquity and not religious efficacy is the principle on which the selection of heirs is based. In Ch. 2, S. 3, verse 3, the mother is preferred to the father as an heir on the ground that:

"the father is a common parent to other sons (obviously meaning by another wife) but the mother is not so and since her propinquity is consequently greatest, it is fit she should take the estate in the first instance conformably with the 'text to the nearest Sapinda the inheritance belongs.'"

This quaint process of reasoning is based on the doctrine that man and wife are Sapindas to each other as they together beget one body but the privilege of the husband to a plurality of consorts, which is not shared by the wife, is supposed to place him in a category more removed from his children than that of their mother. As the mother presents no oblations to her son whilst the father does, this is not only a striking instance of the meaning of the word Sapinda as used in the text dealing with inheritance, but also indicates the doctrine on which priority of inheritance is based. A consideration of the Bandhus specifically named in the Mitakshara also discloses the fact that 4 out of the 9 mentioned confer no spiritual benefit at all on the manes of the deceased. These are the 5th, 6th, 8th, and 9th in the order given in the text. (Mitakshara, Ch. 2, 6.) Moreover, after enumerating the 3 classes of Bandhus the text continues:

"Here by reason of near affinity cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred; or if there be none, his mother's cognate kindred. This must be understood to be the order of the succession here intended."

(3) [1880] 5 Bom 110=7 I A 212=4 Sar 164 (P C).
(4) [1881] 6 Cal 119.

The Mitakshara also bases the claim of the daughter to inherit upon consanguinity alone and not, as in the Dayabhaga, on the expectation of religious offerings from her son and neither the sonless widows nor the barren are excluded as in the Bengal system (Mitakshara, Ch. 2, S. 2, verses 2—4). The question however appears to have been finally determined in so far as Vijnaneswara's conception of the meaning of Sapinda is concerned, by the decision of their Lordships of the Privy Council in the case of *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (5) in the year 1914, where it is stated: "Mr. Colebrooke in his rendering of the Mitakshara has paraphrased Sapinda as a relation 'connected by funeral oblations', which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognised that his paraphrase was erroneous and that the true theory of Sapinda relationship propounded by Vijnaneswara was based on community of blood."

There are no doubt passages to be found in many of the earlier cases which support the view that the order of succession in the Mitakshara is founded to some extent at least on the doctrine of religious benefits. It is not necessary to refer to those cases in detail. It would appear that in most, if not all of them the translation of Sapinda as "connected by funeral oblations" was the foundation of the opinions therein expressed, and in some instances much ingenuity has been expended in an attempt to reconcile the clear evidence to be found in the text of the Mitakshara itself that consanguinity and not funeral oblations is the guiding principle governing the order of succession with Colebrooke's translation which for many years was accepted without question. Once it is conceded, as it must be, that this translation was erroneous, the authority of the cases which accepted it as accurate is materially diminished.

But our attention has been urgently directed by the learned Vakil for the respondents to certain passages in the case of *Buddha Singh* v. *Lallu Singh* (6). The actual point there decided was that as between agnates the great-grandson of the grand-father was to be preferred to the grandson of the great-grandfather. The nearer stock up to 3 generations from the common paternal ancestor had to be exhausted before the nearer descendants of a more remote stock of descendant could take. The decision depended upon the meaning of the word Putra as used by Vijnaneswara in the Mitakshara, and this was interpreted as including there generations in descent from the common ancestor. There is a passage, however towards the end of their Lordships' judgment which, whilst recognising that the right of inheritance arises from Sapinda relationship or community of blood, points out that in determining propinquity amongst the Gotraja the preferential heir may be discovered by applying the test of the capacity to offer oblations, and a passage in the Viramitrodaya is referred to as supporting this proposition as well as an earlier ruling of the Board in the year 1870 in the case of *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7). The application of this test in the case of near Gotraja Sapindas up to three generations in descent from a common ancestor is no doubt one which can be safely resorted to in the cases named, but it does not determine the vexed question of whether the inheritance follows the duty of offering oblations or the duty follows the inheritance.

The whole question is discussed at length by Mr. Mayne in Chapter XVI of his treatise, where he comes to the conclusion that the Hindu Law of inheritance in its inception is founded on nearness of blood and not on the capacity to offer oblations, and that this is the governing principle regulating the rules of inheritance observed when the Mitakshara was compiled, whereas some three centuries later the effect of Brahminical influence resulted in a remodelling of the basic principle of inheritance in accordance with the religious doctrine as expounded by Jimuta Vahana and his followers. However this may be, it appears to me that when applied to the order of succession amongst Bhinna Gotra Sapindas the religious test fails at nearly every turn, and I am unable to accept the view that it was the intention of their Lordships in the cases last referred to to lay down a rule of universal application which should govern the order of succession in a class of cases not then under consideration. The case of *Adit Narayan Singh* v. *Mahabir Prosad Tewari* (8) decided by a Bench of this Court in 1916 un-

(5) A I R 1914 P C 1=42 Cal 384=41 I A 290 =25 I C 290 (P C).

(6) A I R 1915 P C 70=37 All 604=42 I A 208=20 I C 529 (P C).

(7) [1869-70] 13 M I A 373=2 Suth 330=2 Sar 566 (P C).

(8) [1917] 35 I C 687=1 P L J 324.

doubtedly took a contrary view and decided that superior efficacy of religious oblations should be applied in the case of Bandhus even to the extent of preferring a Matri Bandhu to the son of one of those named in the text as an Atma Bandhu and who, according to a previous decision of the Bombay High Court in *Bai Vilji* v. *Prabhalakshmi* (9), was himself an Atma Bandhu. Assuming that Rajender in that case was an Atma Bandhu, and there is a series of decisions in addition to the Bombay case above cited which support this view [*Krishna Ayyangar* v. *Venkatarama Ayyangar* (10), *Balusami Pandithar* v. *Narayana Rau* (11)], it is difficult to see on what ground the claim of a Matri Bandhu can be preferred to that of an Atma Bandhu in face of the express text of Mitakshara to the contrary. The case, however, is decided on the hypothesis that none of the descendants of the named Atma Bandhus are themselves Atma Bandhus, and the reason given by the learned Chief Justice in that case for arriving at this conclusion is that if the descendants of an Atma Bandhu are entitled to succeed in preference to all the Pitri or Matri Bandhus expressly mentioned, it may easily happen that an obviously remote Sapinda may exclude a nearer Sapinda. I confess that it is with some hesitation that I venture to differ from the view here expressed by the learned Chief Justice for whose attainments and ability I entertain a profound respect, but I am unable to share in the difficulty which weighed with him and assisted to the conclusion to which he came. The number of heritable Bandhus is not indefinite but limited in any one line of descent. [*See Umaid Bahadur* v. *Udoi Chand* (4)].

Within these limits those tracing through a nearer common ancestor may well be regarded as nearer in blood relationship to the propositus than others descended from a more remote ancestor though less removed from the common ancestor. In the present case the plaintiff is more remote from the common ancestor than Raghunandan, but he traces his descent through the father and mother of the propositus whereas Raghunandan traces through the maternal grandfather. This question was considered in *Balusami Pandithar* v. *Narayana Rau* (11), where preference was given to the sister's son, over the mother's brother's son, although the latter was 2 degrees only and the former 3 degrees removed from the common ancestor. Two main principles were relied upon and given effect to in that case. (1) that amongst Bandhus of the same class those ex parte paterna are preferred to those ex parte materna, (2) that the nearer line is preferred to the more remote.

The earlier case of *Sundrammal* v. *Rangasami Mudaliar* (12) is also an authority for the first of the above propositions. In another case, *Subramania Mudeliar* v. *Ranganathan Chettyar* (13), the father's sister's son's son is preferred to the mother's brother on the same principle. The claims of the present plaintiff would appear to be even stronger than those of the successful claimant in the case last cited if it is admitted, as I think it must be, that the intervention of a greater number of females makes no difference except in cases where other tests fail. It has been so decided in Madras [*Krishna Ayyangar* v. *Venkatarama Ayyangar* (10), *Tirumalachariar* v. *Andal Ammal* (14)] and I see no reason to differ from the rule there followed. In Bombay also where women are permitted to inherit as Bandhus, the preferential claim of the father's line over that of the mother has been recognized to the extent of postponing the mother's full brother to the father's half sister [*Saguna* v. *Sadashiv Pandu* (15)] The rule that the nearer line excludes the more remote is accepted by Sir Ernest Trevelyan (Hindu Law, 2nd Edition, p. 401), subject to the rule that in each of the 3 classes of Bandhus preference is given to those related through the father over those connected through the mother. In laying down the order of succession, however, in the case of Atma Bandhus it is obvious that he does not exhaust the nearer line before bringing in the more remote. His reason appears to be that sons of daughters of the family (*i. e.*, daughters who would have inherited if they had been sons) come first, then sons of daughter's sons and lastly son of daughters' daughters. Subject to this the nearer line is preferred to the more remote. But he follows consistently what he regards as the dominant rule that in each of the 3 classes the Bandhus of the deceased connected with him through his father have preference over

(9) [1907] 9 Bom L R 1129.
(10) [1906] 29 Mad 115.
(11) [1897] 20 Mad 342.
(12) [1895] 18 Mad 193.
(13) [1913] 18 I C 506.
(14) [1907] 30 Mad 406.
(15) [1902] 26 Bom 710.

those connected through his mother. In this he is supported by Dr. Rajkumar Sarvadhikari and Dr. Jogendranath Bhattacharya. The authority of the former as an expounder of Hindu Law has been recognized by their Lordships of the Privy Council on more than one occasion and the reputation of the latter is well known. The question for determination is, I feel one of some doubt and difficulty, but I think the principles to be gathered from the text of the Mitakshara and the weight of authority on the subject favour the claim of the plaintiff and, in my opinion, the sister's daughter's son should be preferred to the maternal uncle.

Mullick, J.—I am of opinion that the defendant must succeed. The term Bandhu is said to have been used for the first time in Hindu Law by Yajnavalkya. To him the term was synonymous with Bandhava and applied indiscriminately to relatives in general, both agnates and cognates, and even to friends. In some out of the 17 texts in which he uses the term, he applies it to the kinsmen on the mother's side reserving for other kinsmen related through a female the term "Yonisambandha." He was the first to prescribe obsequial offerings to maternal ancestors and their issue, and it would seem that his object in doing so was to find a reason for giving the heritable right to relations on the mother's side. In truth the concession was made in deference to the continuous disintegration of communistic life. Though economic causes had begun to operate long before Gautama and the sages compromised with individualism by adopting spiritual benefit as a condition of heirship, Yajnavalkya found a further advance necessary and brought widows, daughters and some others within the circle of heirs who were incapable of offering the funeral cake. Not so courageous was his predecessor Manu who, while bowing before the advancing wave and affirming the principle of affinity by blood relationship, seems still to have retained allegiance to the principle of spiritual benefit, rendering himself liable to the charge of indecision and inconsistency by such texts as "the funeral cake follows the family and the estate." "To three ancestors must water be given for three is the funeral cake ordained, but the fourth in descent is the giver of oblations to them and the fifth has no concern with the gift of funeral cakes." (Manu. IX-185, IX-187, IX-186).

The efforts of the law givers, however, were powerless and compromises did not avail. Little use was it for Gautama to seek to stem the tide by ruling that:

"Those who are allied by the funeral cake should take the wealth of the deceased;"

or for Manu to temporize or for Yajnavalkya to extend the heritable right while still clinging to Gautama's rule. The fact remains that by the time of Vijnaneswara, that is within the next 900 years, the doctrine of spiritual benefit had lost further ground. But the vitality of Hindu institutions is proverbial and although that commentator in clear and unequivocal terms declared Sapinda relationship to be dependent on community of blood, nevertheless between the 11th and the 15th centuries spiritual benefit still continued to affect the preferential right. In my opinion this explains why Vijnaneswara did not insist upon the father's line being exhausted before any of the grandfather's line were admitted. The position in the 16th century is further elucidated by the Viramitrodaya, which repeatedly contains passages to the effect that:

"comparative propinquity is evidenced by the amount of spiritual benefit conferred on the deceased proprietor and that spiritual benefit can be conferred by the presentation of Pindas in the Parvana Sradh held in the honour of the deceased and of his ancestors." (Viramitrodaya 3, 1—11; 3, 5—1).

Again in book II, section 1, verse 23 of that work, Mitra Missir, the author, gives the following remarkable opinion:

"Blood relations alone are entitled in the first instance to celebrate Parbana rights of the deceased and their competence to benefit the Bandhus is in proportion to the nearness of their deceased relative. If we know the one, we know the other. Where there are many claimants to the heritage among the Gotrajas and the like, then the fact of conferring spiritual benefits on the deceased merely settles the question of precedence among the heirs."

The next stage in the development of the theory of religious benefit is furnished by the Dayabhaga, which finally and definitely recognised it as a ground of preference in the case of both agnates and cognates. Whereas in the Mitakshara no cognate is allowed to succeed in preference to an agnate, however superior the offerings of the former may be in religious efficacy, the

Dayabhaga adopted the more logical basis and applied the test equally to both. The result was that many cognates, who were excluded by the Mitakshara, took precedence under the Dayabhaga over more distant agnates. It would be wrong, however, to say that the Dayabhaga discorded the principle of propinquity by blood. Equally wrong would it be in my opinion to say that the Mitakshara took no account of the principle of religious merit. In my opinion both systems recognise propinquity of blood and religious efficacy. The only difference is that in the Dayabhaga religious merit arising from the celebration of the Parbana Sradh is accorded greater weight and that in absence of religious merit accruing from Parbana rights, the ability to benefit deceased by some other religious ceremonies is a sufficient foundation of a title to inherit. The Mitakshara, on the other hand, regards oblations presented by cognate kinsman as secondary and conferring no claim against the whole body of agnates. The Dayabhaga, admitting that the oblations are secondary as compared with agnates of the same line, insists that Parbana Pindas conferred by cognates should prevail against agnates of a remoter line. The point of difference between the two systems depends upon the interpretation of the scriptures relating to the efficacy of oblations presented by agnates and cognates. It would be wrong therefore to say that the doctrine of spiritual efficacy was, as has been observed by one learned author, a figment of the Brahminic brain in Bengal and that in the Mitakshara it has no place. The true view appears to be that nearness of blood determines the heritable right, while the doctrine of spiritual efficacy determines the preferential right.

The position of Bandhus could not fail to remain unaffected by the vicissitudes of the doctrine of religious efficacy and we find, therefore, that while Yajnavalkya left the question of their heritable right undetermined in his list of heirs and while he made express mention only of the "maternal uncle and the rest" in regard to their right to succeed a trader dying abroad, Vijnaneswara was the first to extend the list by the inclusion of nine selected cognates. The next development that followed was the addition of the daughter's son as a special heir and for nearly four centuries thereafter the commentators appear to have recognised only ten Bandhus.

Next Mitra Misser added three, namely, of the maternal uncle of the deceased, of his father and of his mother. Since then the number does not appear to have been added to for the next 300 years till the claims of the maternal uncle and of the sister's son came up for consideration in the case of *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (1). In that case Mitter, J., held that the list of Bandhavas given by Vridha Satatappa was not exhaustive and that although a sister's son was according to their Lordships a Pitri Bandhu, he took precedence over other Bandhus on the ground of superior religious efficacy. Following the principles enunciated by their Lordships it seems to me clear that we must look to a large expansion of the list of heritable Bandhus, but at the same time there does not seem to me to be any doubt as to how the present case should be decided.

Now the first point for consideration is whether the plaintiff and Raghunandan have any heritable right at all. They are undoubtedly cognate Sapindas. For the purpose of marriage Sapinda relationship is prescribed by the Mitakshara to extend to seven degrees when relationship is claimed through the father and five degrees when claimed through the mother. There was some divergence of opinion between text-book writers as to whether these limitations applied also for the purpose of determining the heritable right and Professor Golap Chandra Sarkar was of opinion that Sapinda relationship for purposes of inheritance extended to seven degrees both on the father's and the mother's side. Their Lordships of the Privy Council have, however, now ruled that the limits applicable to marriage also apply to inheritance, *Ramchandra Martanda Waikar* v. *Vinayak Venkatesh Kothekar* (5). Professor Golap Chandra Sarkar also doubted the correctness of the dictum of their Lordships of the Calcutta High Court in *Umaid Bahadur* v. *Udoi Chand* (4) to the effect that in order to establish the heritable right Sapinda relationship must be mutual. On this point also their Lordships of the Privy Council in the above mentioned case have pronounced in favour of the view of their Lordships of the Calcutta High Court.

Their Lordships of the Privy Council have not, however, yet pronounced any opinion on the point whether Sapinda relationship through cognates can be claimed through an ancestor more remote than the father's or mother's

grandfather. Professor Raj Kumar Sarbadhikari in his Tagore Law Lectures answers this question in the negative basing his conclusion on the following passage of the Mitakshara where Vijnaneswara quoting the text of Vridha Satatappa observes as follows. I give the translation made by West and Buhler, which is now accepted as more correct than that made by Colebrooke and which differs from the latter on the point whether the term Sapinda means connected by particles of the same body or connected by funeral oblations. The passage runs thus:—

"On failure of agnates, the cognates are heirs. The cognates are of three kinds, related to the person himself, to his father, or to his mother, as is declared by the following text. 'The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his his mother's maternal aunt, and the sons of his father's paternal uncle must be deemed as his father's cognate kindred. The sons of his mother's paternal aunt, sons of his mother's maternal aunt and the sons of his maternal uncle must be reckoned as his mother's cognate kindred.' Here by reason of near affinity the cognate kindreds of the deceased himself are his successors in the first instance. On failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be the order of succession here intended" : Mitakshara (2, section 6.)

This indeed is the only other text besides the text of Yajnavalkya regarding the goods of a trader dying abroad in the whole of Hindu Law as at present known to us which is of any assistance in determining the limits of the heritable right of Bandhus. From this text Professor Sarbadhikari derives the following rules:

"1. A Bandhu is a cognate Sapinda within four degrees counting (1) from the deceased himself, in ascent or descent: (2) from any one of the four immediate ancestors of the deceased. 2. The right of inheritance accrues to a Bandhu if the late owner and the person claiming the heritable right were related as Sapindas to each other. either directly through themselves or through their mothers or fathers. In other words, a heritable Bandhu is a cognate Sapinda within four degrees counting from—1. The deceased in ascent or descent. 2 Deceased's paternal ancestor within four degrees. 3. Deceased's maternal ancestor within four degrees. 4 Deceased's father's maternal ancestor within four decree. 5 Deceased's mother's maternal ancestor within four degrees. N. B.—The word 'five' is to be substituted for 'four' in the case of father's Bandhus. If the deceased or his ancestor be related through father's mother, then five degrees instead of four should be counted in both directions. Thus grandson's daughter's grandson is related to the deceased (or his paternal ancestor) through father's mother. Rule of exclusion:—1. The cognate descendant of each of these classes is excluded from inheritance when (i) the deceased or (ii) the deceased's ancestor does not belong to—(a) His maternal grandfather's line. (b) His father's ditto. (c) His mother's ditto. 2. The cognate ascendant of the deceased is excluded from inheritance when he does not belong to—(a) The deceased's maternal grandfather's line. (b) The deceased's father's ditto. (c) The deceased's mother's ditto."

The learned Professor proceeding upon these rules classifies Atma Bandhus into Atma Bandhus *ex parte paterna*, namely, the sons of the daughter of the family, sons of the daughters' sons of the family, sons of the daughters' daughters of the family; next into Atma Bandhus *ex parte materna* beginning from mother's father; next into Atma Bandhus *ex parte paterna* to whom the deceased was Atma Bandhu ex parte paterna; next into Atma Bandhus ex parte materna to whom the deceased was Atma Bandhu ex parte materna; next into Atma Bandhu ex parte paterna to whom the deceased was Priti Bandhu; and finally into Atma Bandhus ex parte materna to whom the deceased was Matri Bandhu. He adopts the same method for Pitri Bandhus and Matri Bandhus.

Now it is to be observed that the learned Professor's two rules of exclusion are inconsistent with the text which includes within the circle of Bandhu heirs all who claiming through the mother are within five degrees of the common ancestor. Mr. Mayne in his work on Hindu Law would seem to partially accept Professor Sarbadhikari's view, for he does not seem to give the heritable right to the heirs of the maternal grandfather's grandfather though he gives him the 27th place in his chart. In the case of *Ramchandra Martand Waiker* v. *Vi-*

nayak Venkatesh Kothekar (5) to which I have referred above, Mr. Lowndes in his address to their Lordships of the Privy Council noticed this inconsistency between the text on marriage and the rule adopted by Professor Sarbadhikari, but it became unnecessary for their Lordships to decide the point. Following Professor Sarbadhikari, Professor Jogendranath Bhattacharya and Professor Trevelyan would seem to base their conclusion on that part of Vridha Satatappa's text which appears to limit Pitri and Matri Bandhavas to those descended from the mother's or father's grandfather. This conclusion might perhaps be justified if, as was thought by Mitter, J., in *Omrit Kumaree's case* (1), the term Bandhavas in Satatappa's text were synonymous with Bandhava the plural of Bandhu; but Professor Jogendra Nath Bhattacharya has clearly demonstrated that this is not the case and that Bandhavas is not the plural of Bandhu and signifies what is known among Hindus is cognate brother or first cousin. Speaking with the greatest respect I think this is the correct rendering of the term and that Professor Sarbadhikari's rules of exclusion are not warranted by the text.

I think also that I am supported in this view by Professors Golap Chandra Sarkar and Jogendra Nath Ghose, whose works on Hindu Law have often been referred to by their Lordships of the Privy Council.

In my opinion Satatappa in enumerating the 9 Atma, Pitri and Matri Bandhavas did not intend to limit heritable right to the descendants of the mother's and father's grandfather within five degrees. Nor is there anything to show that Vijnaneswara was of a different view to that which I have ventured to take. If this is the correct interpretation of Satatappa's text, then it follows that the classification given in the text into Atma, Pitri and Matri Bandhus applies only to the nine Bandhavas specially enumerated therein. All other Bandhus are subject to one and only one limitation, namely, that given in the text on marriage. In support of the view I take, it is to be noticed that neither Professor Sarbadhikari, nor Professor Bhattacharya, nor Mr. Mayne are agreed as to the classes within which certain heirs should be grouped. Indeed it has been said that Professor Sarbadhikari has been guilty of reading into the text words which do not occur therein, so as to give the status of Atma Bandhus to persons who would otherwise be classed as Pitri Bandhus. Similarly it is to be noticed that their Lordships of the Calcutta High Court in *Omrit Koomaree's* case (1) have classed a sister's son as a Pitri Bandhu, though the learned Vakil of the plaintiff before us relying on Professor Sarbadhikari's view strenuously contends that he is an Atma Bandhu.

In this state of doubt and uncertainty it would, in my opinion, be unsafe to insist on the classification within the group of Atma, Pitri and Matri Bandhu of heirs other than the nine specifically enumerated in the text. In my opinion the son of one of these nine is not entitled to claim membership in the class to which his father belongs and I think the doubt thrown out by Chamier, C. J., in *Adit Narayan Singh* v. *Mahabir Prosad Tewari* (8), which is binding on this Court till overruled, was well grounded. In that case the learned Judges gave effect to their doubt by preferring one who would be a Matri Bandhu according to Professor Sarbadhikari's classification to one who would be a Pitri Bandhu, because he was nearer in degree counting from the common ancestors in their respective lines, and also on the ground of religious merit. It follows from the above view that when there is a contest between Bandhus other than the nine Bandhavas or between one of the former and one of the latter, the principle of numerical propinquity alone will determine the heritable right, supplemented in case of doubt by the rule of religious benefit and such other rules derived from the succession of agnates as may be appropriate. Let us next consider what is the position of the claimants in the case now before us. Both parties seem to be agreed that the plaintiff and Raghunandan are Atma Bandhus. If Atma Bandhu is the same thing as Atma Bandhava and if Bandhava has not the special meaning of cousin brother or first cousin, then if a maternal grandfather's son's son is an Atma Bandhu in the sense of one specially near to the propositus, it would be reasonable to class the grandfather's son also as an Atma Bandhu. But is the sister's daughter's son also an Atma Bandhu? I think not, although he has been classed as such by Professor Sarbadhikari. Their Lordships of the Calcutta High Court observed in *Omrit Koomaree's case* (1) that the sister's son was both an Atma and Pitri Bandhu, but they seems to have classed him as a Pitri Bandhu on the ground that he was

nearer in degree to the father of the propositus than to the propositus.

But as I have already observed, the Mitakshara does not warrant the inference that all Bandhus must be classified into the three classes assigned to the nine enumerated Bandhavas and I respectfully venture to differ from those decisions of the Madras Court which held that every descendant of an Atma Bandhu within the requisite limits is entitled to claim the status of his ancestor. The difficulty in following out this classification logically in the case of the descendants of the daughters of the family compelled Professor Sarbadhikari to alter the text to an extent which has been pronounced unwarrantable by other textbook writers. I think, therefore, that Bandhus other than the nine Bandhavas named in the text connot appropriately be placed in the three groups reserved for the latter. Assuming, however, that the three classes are exhaustive on the point of classification and that there can be no heritable right without membership within one of these three classes, then I think Raghunandan being an Atma Bandhu and the plaintiff a Pitri Bandhu, the former is entitled to preference. Let us assume next that both are Atma Bandhus as has been held by Professor Sarbadhikari. If the principle of nearness by particles of the body is applied, how is the calculation to be made? We have no means of ascertaining how much the plaintiff has in common physiologically with the deceased as compared with the maternal uncle. We can only estimate through the common ancestor through whom they respectively claim and if that test is applied, then obviously the maternal uncle and the deceased have greater community of blood than the plaintiff and the deceased.

Let us take next the mode of counting sanctioned by the Hindu Law. The Indian Succession Act, following the principle of the civil law, precribes that counting is to be made from the propositus upwards to a common ancestor each ancestor representing one degree, and then downwards till the claimant is reached. The Mitakshara prescribes that counting is to be made from the common ancestor, from whom the branch divides beginning with such common ancestor as the first degree. Adopting this mode of counting Raghunandan is two degrees removed while the plaintiff is four degrees removed. In the absence of any detailed order of succession for cognate Sapindas, I think Raghunandan is entitled to priority.

But then it is said that the rule of the Mitakshara is that the nearer line excludes the more remote and therefore the line of the father of which the plaintiff is a member must be exhausted before the line of the maternal grandfather can come in. Now this rule is not based upon any text. It is derived from the order of succession as given in the Mitakshara relating to certain named agnates, but even in that connection the rule is not of general and universal application. In the earlier decisions in upper India the limit was placed on the authority of Colebrooke at the seventh lineal descendant, according to later decisions in Madras it was fixed at the second degree, while their Lordships of the Privy Council have now definitely held that the limit of collateral descent is three degrees in each line. Thus the grandson's grandson, though a lineal and nearer descendant, is excluded by descendants within three degrees in the lines of the father and the grandfather. The Mitakshara in this respect is not singular, for we find that in other systems too the law has recognised the propriety of preferring some collaterals to lineal descendants of the fourth and the fifth degrees. If therefore the rule is limited in application with regard to agnates, I see no reason why it should be applied without restraint and restriction in the case of cognates. Upon the admitted mode of counting, a maternal uncle is nearer in degree than a father's daughter's daughter's son and I cannot find any equity in defeating his rights by a resort of analogy and by the arbitrary extension of a rule applicable to another class.

I am unable, therefore, to exclude Ragunundan on the ground that he claims descent through a more distant line than the plaintiff. If the principle is to apply at all it must apply to cases where the respective candidates are numerically of the same degree. In such an event this test as well as other tests may be taken into account for the purpose of determining the preferential right. Next it is said that the Mitakshara favours the male against the female heir, and therefore, the plaintiff, who is connected through the father is preferable to Raghunandan who is connected through the mother. Here again the rule is derived not from an express text in the Mitakshara but from the order of succession given by the sages as regards agnates. But

even among the latter the preference for males is not rigorously enforced and female relatives, such as a mother, daughter, and sister and a male relative descended through a female, namely, the daughter's son, have been accorded high places within the circle of agnatic heirs, the last named being even preferred to one nearer in degree on the male side, namely, the father's son. Here again the question arises whether the preference for males shown by the Hindu Law in the case of agnates generally, and in particular in Satatappa's text as regards Bandhavas is to be applied regardless of numerical nearness in degree. It may be noticed that Satatappa and Vijnaneswara seem to limit the preference to cases where the degree of relationship is equal, as for instance when they give precedence to Pitri Bandhavas over Matri Bandhavas. Even in Madras where their Lordships of the High Court have applied the rules of agnatic succession to the case of Bandhus more freely than other Courts in favour of claimants who would be otherwise excluded, the decisions have not been uniform and we find that in spite of the superiority ascribed by analogy to males a mother's sister's son has been preferred to a mother's brother's son.

I think, therefore, that the correct rule in regard to these analogies has been laid down by Professor Golap Ch. Sarkar as follows:—(1) The nearer degree on either side must be preferred to one more remote. (2) Of those equal in degree the one related on the father's side is to be preferred to the one related on the mother's side. (3) When the side is the same, the circumstance of one being related through a male and another through a female makes no difference. Applying these rules I do not consider that the fact of plaintiff's being connected through a nearer branch or through a male can operate in his favour. On the other hand if the latter fact operates in this case at all, then the circumstance that he claims through two females must also be taken into account as a counterpoise. At the same time it must in fairness be remembered in this connexion that although their Lordships of the Madras High Court in *Appandai Vathiyar* v. *Ragubali Mudaliar* (16) preferred the mother's sister's son to the mother's brother's son, their Lordships of the Allahabad High Court in *Ram Charan Lal* v. *Rahim Bakhsh* (17) were of a contrary opinion, holding that the mother's sister's son being removed by two females the principle of preference in favour of males rendered the mother's brother's son nearer in affinity. Being, however, clearly of opinion that Raghunandan is nearer in affinity than the plaintiff from every point of view, I do not think the interposition of two females affects the present case.

For the same reason the question of spiritual benefit also does not arise. In this respect the position, as I have already said, appears to be this, that while the Dayabhaga recognizes the principle of affinity as well as the principle of spiritual benefit for the purpose of creating the heritable right and admits into the circle of heirs persons by reason of their capacity to confer spiritual benefit alone, the Mitakshara makes affinity the sole test of the heritable right, leaving the preferential right to be regulated by the doctrine of spiritual benefit. This position has been repeatedly affirmed by their Lordships of Privy Council in a long line of decisions beginning from *Gridhari Lall Roy* v. *Bengal Government* (2) and ending with *Buddha Singh* v. *Lallu Singh* (6), and it could not have been more emphatically recognised by their Lordships of the Calcutta High Court than it was in *Gunesh Chunder Roy* v. *Nil Kamul Roy* (18), where a father's daughter's son was preferred to a mother's sister's son on the ground of spiritual benefit. Applying this principle to the case under consideration, it is immaterial whether the plaintiff and Raghunandan are both ordinary Bandhus or both Atma Bandus; in either event Raghunandan is clearly entitled to preference because he can offer spiritual benefit upon the maternal grandfather of the propositus, while the plaintiff can confer no spiritual benefit upon the propositus of any kind whatsoever.

In the various Courts in India the strongest resistance to the application of the doctrine of spiritual benefit has perhaps come from their Lordships of the Madras High Court and particular reliance has been placed by the plaintiff on *Balusami Pandithar* v. *Narayana Rau* (11), where a maternal uncle was defeated by a sister's son's son on the ground that the nearer line must exclude the more remote, and also on the ground that an Atma Bandhu ex parte paterna excludes an Atma Bandhu ex parte materna. Their Lordships de-

(16) [1910] 33 Mad 439=5 I C 280.
(17) [1916] 38 All 416=34 I C 108.
(18) [1874] 22 W R 264.
(11) [1893] 16 Mad 23.

clined to consider the principle of religious efficacy at all but with great respect, I venture to say that this view is not in accordance with that of other Judges of the same Court and is certainly in direct conflict with the latest pronouncement of the Privy Council.

As an illustration of this divergence of opinion I need only cite the case of *Muttusami* v. *Muttukumarasami* (19) where their Lordships of the Madras decided in favour of the maternal uncle of the half blood against the son of the father's paternal aunt and laid down the rule that as between Bandhus of the same class the spiritual benefit conferred upon the propositus is, as stated in the Viramitrodaya, a ground of preference. That decision was affirmed by their Lordships of the Privy Council in *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (20) and no exception was taken to the above statement of the law. The unsatisfactory condition produced by subsequent conflicting decisions has been somewhat sharply commented upon in a recent judgment by Sadasiva Aiyar, J., in *Subramania Mudaliar* v. *Ranganathan Chettyar* (13). His Lordship there, although approving of the claim of the father's sister's son as against a maternal uncle on the ground that the former is an Atma Bandhu ex parte paterna, characterizes Satatappa's text as illogical, incomplete and inconsistent, but feels himself bound to accept the law as settled by the Courts even though based on less authoritative treatises than the ancient authoritative Shastras. He points out that a mother's sister's son need not necessarily be always a Bhinna Gotra Sapinda, as sometimes the mother of the propositus and her sister might marry husbands of the same Gotra. He is nevertheless of opinion that the rule as to religious benefit laid down in *Muttusami* v. *Muttukumarasami* (19) is not supported by the law and custom within the Presidency of Madras where the question of spiritual benefit or of death pollution or of the right of performance of obsequial ceremonies does not operate in determining the preferential right. He considers that Mr. Mayne's classification is inaccurate and misleading as he gives the maternal uncle the 9th place and the maternal grandfather the 17th place, and does not carry the class of Bandhus to the fifth degree. He agrees with the decision of Aikman, J., sitting as a single Judge in *Ram Bharos* v. *Ram Parshad* (21), where preference is given to a father's brother's daughter's daughter's son as against a mother's brother's son on the ground that the former is an Atma Bandhu ex parte paterna, but he feels that this position is really contrary to the Hindu Shastras and that legislation should intervene to alter the current of judicial decisions. The learned Judge's findings are admittedly limited to the Madras Presidency where the Smriti Chandrika and other later commentaries have acquired special predominance, but his observations are of general application in so far as they indicate the possibility of a different mode of interpretation of the texts.

So far as concerns the Province to which the parties before us belong and the territories which are now subject to the authority of the High Court at Patna, I am quite satisfied that the test of religious and spiritual benefit can and should be applied to determine the preferential right, that is to say, where the principle of affinity by blood relationship does not clearly indicate with which claimant the preference lies. The result is that I would answer the reference in favour of the defendant. This result is in conflict with the lists prepared by Professors Sarbadhikari and Bhattacharya, while Mr. Mayne, who gives precedence to the sister's son as against the maternal uncle, does not consider at all the claim of a sister's daughter's son. On the other hand Professor Golap Chandra Sarkar and Jogendra Nath Ghose would seem to support the claim of the maternal uncle on the rule of nearness laid down by them.

In my opinion as the texts do not expressly declare the order of priority between the rival claimants we are entitled to apply the principles of affinity and spiritual benefit both of which have been pronounced by sages and commentators to be of universal application and here operate to establish Raghunandan's claim. Other principles, inferred from the order of succession for agnates who have been specially mentioned by name in the texts, cannot be invoked in this case as the claimants are not numerically of the same degree of nearness.

Jwala Prasad, J.—The question for determination is whether Uma Shanker or Raghunandan is the preferential heir of one Chaman Lal Upadhaya. Uma Shanker is the sister's daughter's

(20) [1896] 19 Mad 405=23 I A 83=7 Sar 45 (P C).

(21) [1906] 3 A L J 461.

son of Chamman Lal. Raghunandan is the mother's brother, or maternal uncle of Chaman Lal. The competition, therefore is between a maternal uncle and a sister's daughter's son. The former bases his claim for preference over the latter on the following grounds:—

(1). That he is nearer in degree to the propositus than the sister's daughter's son inasmuch as he is 4 degrees removed from the propositus and 2 degrees from the common ancestor of the propositus (the maternal grandfather) and himself, whereas the sister's daughter's son is 5 degrees removed from the propositus and 4 degrees from the common ancestor of the propositus (the father) and himself. (2). That the maternal uncle offers Pindas or funeral oblations to two ancestors of the propositus, namely, the maternal grandfather and the great-grandfather, to whom also the propositus offers Pindas, whereas the sister's daughter's son offers no Pinda to any of the ancestors of the propositus, and thus the maternal uncle confers spiritual benefit to the propositus, whereas the sister's daughter's son confers none. (3). That the maternal uncle is related to the propositus through one female only, namely, the propositus's mother, whereas the sister's daughter's son is related to him through two females, namely, the sister and the daughter. (4). That the texts of the Mitakshara and Viramitrodaya give to the maternal uncle a high position among heirs. Reference has been made to the Mitakshara, Ch. 2, S. 6, Cl. 1, where the maternal uncle's son is enumerated as an Atma Bandhu, to another part of the Mitakshara (p.332, Edn. 3, 1829) where he has been expressly mentioned as a principal heir of a trader dying abroad, to Acharkanda, Ch. 1, verse 52, where the maternal uncle has been mentioned as a prominent Sapinda, and to Viramirodaya, Ch. 3, part 7, S. 5, where the maternal uncle has been mentioned as an heir superior to the three classes of Bandhus. Sister's daughter's son or any of his ancestors, sister or sister's daughter, is not mentioned anywhere. The above facts are not disputed, but it is contended that the sister's daughter's son should be preferred to the maternal uncle on the following grounds: (1) That he is related to the propositus through his father, whereas the maternal uncle is related to the propositus through his mother; and (2) That he traces his descent through a nearer ancestor of the propositus, namely, his father, whereas the maternal uncle traces his descent through a remoter ancestor, namely, the maternal grandfather of the propositus. The parties are governed by the Benares school of the Hindu Law. The remoter sources of the Hindu law are the Institutes of Manu and of Yajnavalkya and other Rishis, who gave different Smritis. These ancient texts are common to all the schools. The authority of a commentator was received in one and rejected in another part of India. Hence schools with conflicting doctrines arose. The Mitakshara, which is a commentary on the Institutes of Yajnavalkya by Vijnaneswara Bhutta, is universally accepted by all the schools except that of Bengal where also it is received as of high authority, yielding only to Dayabhaga in those parts where they differ. In like manner there are glosses and commentaries upon the Mitakshara which are received by some of the schools that acknowledge the supreme authority of that treatise but are not received by all: *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (22). Smriti Chandrika by Deonand Bhutta and Subodhani by Visheshwar Bhutta are generally followed in Southern India (Madras Presidency) and Vyavahar Mayukha by Nil Kantha Bhutta in Western India (Bombay Presidency). They differ in essential rules of law from those followed in the Benares school: *Buddha Singh* v. *Laltu Singh* (6).

In the Benares school which is said by their Lordships in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7) to be the most orthodox of the different schools, Viramitrodaya by Mitter Misser is followed concurrently with the Mitakshara: *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (1). Their Lordships of the Judicial Committee as well as all the Courts in India from the earliest times up to the present moment have recognized Viramitrodaya as an authoritative commentary on the Mitakshara and as governing the Benares school (*vide Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (22), *Gridhari Lall Roy* v. *Bengal Government* (2), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7), *Lallubhai Bapubhai* v. *Cassibai* (3)' *Buddha Singh* v. *Laltu Singh* (6), *Narasimma* v. *Mangammal* (23), *Muttusami* v. *Muttukumarasami* (19), *Appandai Vathiyar* v. *Ragubali Mudaliar* (16), *Janki* v. *Nand Ram* (24).

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(22) [1867-69] 12 M I A 397=2 Suth 135=2 Sar 361 (P C).
(23) [1890] 13 Mad 10.
(24) [1969] 11 All 194 (F B).

Suba Singh v. *Sarafraz Kunwar* (25), *Buddha Singh* v. *Laltu Singh* (26), *Lullubhai* v. *Manukvarbai* (27), and *Mohandas* v. *Krishnabai* (28). In *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (22) their Lordships point out that in administering Hindu Law, the duty is, not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. This has been emphasised in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7) and recently in *Ram-Chandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (5) in the following words:

"Questions arising under the Hindu law cannot be determined by abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers, and recognized expounders."

The question whether a maternal uncle or a sister's daughter's son will have a preferential right to succeed to the properties of the propositus will therefore be determined by the rules laid down in the Mitakshara by Vijnaneswara and in Viramitrodaya by Mitter Missir. The text of Manu upon which all the rules of inheritance in the Hindu law are founded consists of two Slokas 186 and 187, Ch. 4

Translation:—186. "Let a man do the water rite and offer oblations to his three ancestors (*i. e.*, father, grandfather and great-grandfather); no Sapinda relationship exists between the offerer of such oblations and his fifth ancestor (i. e., great great grandfather)."

187. "Of the Sapinda relations one nearest to the deceased shall inherit the property (in exclusion of one more remote); in the absence of one's Sapindas one's Sakulyas shall inherit his property, and in the absence of a Sakulya his preceptor, and in the absence of a preceptor his disciple (shall inherit his property)."

It is clear from the above that Manu, whose antiquity is not unknown, prescribed oblations to the three ancestors and held that no Sapinda relationship exists between the offerer and the fifth ancestor, great great grandfather, the offerer being the 4th. Manu does not mention of any oblation to the maternal ancestors and does not expressly mention Bandhus among the heirs. As held by heir Lordships in *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (5), Yajnyavalkya, who lived in the 2nd century of the Christian era, was the first to introduce Bandhus or distant kinsmen related to the deceased through females, as heirs and he was also the first to mention the offering of a cake to maternal ancestors [Translation:—Thus (he should give rice balls) even to the manes on the maternal side (Ch. 1, S. 10, Sloka 242, Yajnyavalka, Acharkanda), (Mandalik, p. 190)]. Consequently it became necessary to allow those who could offer Pindas to inherit and this let the Bandhus in. The cake offered to maternal ancestors was offered to 3 ascendants of the mother and no *lepa* was offered to higher ascendants and no water offerings. So the right of inheritance was confined to five degrees, counting the offerer, which is the exact limit allowed to persons claiming relations through mother. By the time that Vijnaneswara flourished in the 11th or the 12th century, the right of inheritance came to depend upon blood connexions and not upon the right to offer funeral oblations. But there can be no doubt that the latter had still great influence upon the right of inheritance and the two were still regarded as going together.

In verse 135, Yajnyavalkya has enumerated the heirs of a sonless man and in verse 136 has said that on failure of the first among those enumerated, the next in order is the heir of the deceased and that this rule extends to all persons and classes. Bandhus have been mentioned to succeed after the Gotrajas or gentiles. The Mitakshara commenting upon the aforesaid verses, has defined Gotrajas to mean Sapindas and Samanodakas and has given the rules and the order of their succession in Ch. 2, S. 5. In Cl. 3, S. 5, it says that by the word 'Bandhu' must be understood a Sapinda relation belonging to a different Gotra or family—(connected with the propositus through females). In Mitakshara, S. 6, Ch. 2, the following rules have been laid down regarding the succession of Bandhus:

Clause 1.—"On failure of Gotrajas or gentiles the Bandhus are heirs. The Bandhus are of three kinds—the Bandhus of the man himself, the Bandhus of the father and the Bandhus of the mother, as is declared by the follow-

(25) [1897] 19 All 215.
(26) [1912] 34 All 663=16 I C 529.
(27) [1877] 2 Bom 388.
(28) [1880] 5 Bom 597.

ing text:—The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own Bandhus.

"The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle must be deemed to be his father's Bandhus. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle must be regarded as his mother's cognate kindred."

Clause 2.—"Here by reason of nearness the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here indicated."

Viramitrodaya, Ch. 3, part 7, S. 5, quoting the above passages from the Mitakshara, adds the following:

"In the text of Manu, namely,—'In their default, a Sakulya, or the preceptor, or a pupil (becomes heir),'—the term Sakulya includes the Sagotras (Sapindas) and Samanodakas, *the maternal uncle and the like*, and the three classes of cognates. Also in the text of Yogiswara the term 'cognate' or Bandhu comprises also the *maternal uncle*. Otherwise the exclusion of the maternal uncle and the like would be the result. And it would be extremely improper that their sons are heirs, but they themselves though nearer are not heirs" [quoted in *Gridhari Lall Roy* v. *Bengal Government* (2), *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (1)].

Viramitrodaya therefore recognized that the above quoted text of the Mitakshara is not an exhaustive enumeration of all the Bandhus who are capable of inheriting, but is only an illustration of the proposition that there are three kinds of Bandhus, as is held by their Lordships of the Privy Council in *Gridhari Lall Roy* v. *Bengal Government* (2). This is now a settled proposition of Hindu law. In addition to the 9 persons mentioned in the Mitakshara, many other persons have been let as heritable Bandhus and their place in the order of succession has to be determined. According to the definition of Bandhu as Bhinna Gotra Sapinda given in the Mitakshara, it is obvious that a heritable Bandhu must be a Sapinda of the propositus, and according to the text of Manu (Ch. 9, S. 187) "The property of a near Sapinda shall be that of a near Sapinda," the Sapinda relationship must be mutual. Among agnates the Sapinda relationship is always mutual but amongst cognates it is not in a few cases. In order therefore to determine whether any persons are heritable Bandhus, it is necessary to see whether they are Sapindas to each other: *Ramchandra Martand Waikar* v. *Venayak Venkatesh Kothekar* (5).

Chapter 2, S. 6, Cl. 2, no doubt clearly lays down the order of priority among Bandhus of each of the three classes. But no special rule has been laid down by the Mitakshara, or Sanskrit text writers and commentators as to the other in which the heritable Bandhus of each class should take preference amongst themselves, as pointed out in *Ram Charan Lal* v. *Rahim Bakhsh* (17) and *Gridhari Lall Roy* v. *Bengal Government* (2). According to the Mitakshara the rule given for the preference of Atma Bandhus to those of Pitri Bandhus and so on is said to be "by reason of nearness;" (Ch. 2, verse 6, Cl. 2). The Sanskrit words used are * * * literally meaning "by reason of nearness or proximity" (vide Monier William's Sanskrit English Dictionary). The reason "of nearness" assigned by the Mitakshara for the preference of one class of Bandhus to the other class is in accordance with the text of Manu itself "to the nearest Sapinda the inheritance belongs." This, therefore, is the only rule prescribed by Manu and the Mitakshara for determining the claims of rival Bandhus—the nearest of the Bhinna Gotra Sapindas or Bandhus will exclude the others. The question then is now to determine the nearness or proximity among the Bhinna Gotra Sapindas of a propositus. Manu in Chapter 3, verse 5, recommends for marriage a girl not related to one's mother by the tie of Sapinda relationship nor to one's father as Sagotra and has limited the Sapinda relationship to seven degrees on the paternal side, Chapter 5, Sloka 60. Yajnavalkya in Chapter 1, verse 52 (Acharkanda), says, "a Sapinda should not be married." Commenting upon this verse Vijnaneswara in Mitakshara defined a Sapinda relationship and declared that definition to apply to the word 'Sapanda' used elsewhere in the Mitakshara, namely, in Chapters on Sradha and Inheritance.

Verse 52, Chapter I, runs as follows:

"He should marry a girl who is a non-Sapinda (with himself). She is

called his Sapinda who has particles of the body (of some ancestor, etc.) in common (with him). Non-Sapinda means not his Sapinda. Such a one he should marry. Sapinda relationship arises between two people through their being connected by particles of one body. * * * *
Thus the son stands in Sapinda relationship to his father because of particles of his father's body having entered (his). In like (manner stands the grandson in Sapinda relationship) to his paternal grandfather and the rest, because through his father particles of his grandfather's body have entered into (his own). Just so is (the son) a Sapinda relation of his mother, because particles of the mother's body have entered into (his). Likewise (the grandson stands in Sapinda relationship) to his maternal grandfather and the rest through his mother. *So also is (the nephew) a* Sapinda *relation of his maternal aunts and uncles and the rest,* because particles of the same body, the paternal grandfather, have entered into (his) and (theirs). Likewise does he stand in Sapinda relationship with paternal uncles and aunts and the rest, so also the wife and the husband are Sapinda relations to each other, because they beget one body. Likewise brothers' wives are in Sapinda relationship to each other. They produce one body, the son, with those (severally) who have sprung from one body (that is, because they bring forth sons by their union with the offspring of one person and thus their husbands' father is the common bond which connects them). *Therefore, one ought to know that whenever the word Sapinda is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent.*"

The Sapinda relationship is limited in verse 53 as follows:

"After the fifth anscestor on the mother's side," and "after the seventh on the father's side"—"on the mother's side in the mother's line after the fifth, on the father's side in the father's line after the 7th (ancestor) the Sapinda relationship ceases; these latter two words must be understood, and, therefore, the word Sapinda, which on account of its etymological import (connected by having in common) particles (of the body) would apply to all men, is restricted in its signification, just as the word Pankaja (which etymologically means growing in the mud, and, therefore, would apply to all plants growing in the mud) designates the lotus only, and the like: and thus the 6th descendant beginning with the son and one's self counted as the 7th in each case are Sapinda relations. *In the case of a division of a line also the enumeration should be until the 7th degree commencing from whence the direction of the line changes. This rule should be applied in every case.*"

The above translation is to be found in the Digest of Hindu Law of West and Buhler, page 120, and also in the judgment of the Bombay High Court in *Lallubhai* v. *Mankuvarbai* (27) and in *Lallubhai Bapubhai* v. *Cassibai* (3) and recently in the case of *Ramchandra Martand Waiker* v. *Vinayak Venkatesh Kothekar* (5). The rest of the verse 53 runs as follows:

It has thus been translated by Pandit Rajkumar Sarvadhikari, pages 604 and 605 (Tagore Law Lectures, 1880):

"A girl is said to be related to a given person through his mother if in reckoning upwards from the mother to the common stock (e. g., the maternal grandfather, the great- grandfather and the rest), she is found to stand in the 5th degree of the kindred in the mother's line. Similarly, a girl is said to be related to a given person in the 7th degree through his father if in reckoning upwards from the father of the common stock (e. g., the paternal grandfather and the rest) she is found to stand in the 7th degree of kindred to the common ancestor in the fathers' line."

In *Ramchandra Martand Waiker* v. *Vinayak Venkatesh Kothekar* (5) their Lorships held that the limitation prescribed in verse 53 regarding Sapindas connected through females, applies only to Bhinna Gotra Sapindas and that the right of a Bhinna Gotra Sapinda or a Bandhu ceases with the 5th degree from the propositus not merely for the purpose of marriage but generally, and, therefore for the purposes of inheritance also.

The limits of Sapinda relationship prescribed by Manu in Chapter V, Sloka 60, and those prescribed by Yajnavalkya and Mitakshara on marriage apply to Sradha, impurity and inheritance (vide Mitakshara, Chapter I, verse 253, Ch. 2, verses 135 to 137, and Ch. 3, verse 18). In *Soorendronath Roy* v. *Mt. Heeramonee* (29) their Lordships observe: "Still there is in the Hindu law so close a connection between their

(29) [1867-69] 12 M I A 81=2 Suth 147=2 Sar 372 (P C).

religion and their succession to property that the preferable right to perform the Sradha is commonly viewed as governing also the question of the preferable right to succession of property and as a general rule they would be expected to be found in union." According to Manu the near Sapinda is enjoined to perform the funeral rites and he is also entitled to inheirt the property of the deceased. For the purpose of inheritance and Sradha, the Mitakshara, therefore, in the aforesaid verses 52 and 53, Ch. 1, lays down the rule for ascertaining in what degree of kindred a Bandhu or Sapinda belonging to a different Gotra stands to the deceased both in the direct line as well as when the line or lineage diverges. This rule of counting the number of degrees that a person is removed from the propositus is for the purpose of determining his nearness or propinquity with the propositus, and is, therefore, also the rule for the order of preference among several Bandhus for the purposes of inheritance and Sradha. Referring to the aforesaid verses 52 and 53 the learned Judges of the Sadr Dewani Adaulat, Agra, in their judgment quoted in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7), hold "We have thus furnished to us a rule for computing the order of succession in regard not only to Sapindas but to Samanodakas." That was a case of Gotrajas, but the above remarks would apply to the case of Bandhus as well. It must therefore be held the Mitakshara in the said verse has laid down the rule that the nearest in the degree ascertained by the mode of calculation indicated there exclude those more remote. The mode of calculating in what degree a person stands to the propositus has been clearly laid down in the said verse both when the line is direct as well as when the lineage diverges. For the latter it is said:—

"Should the line diverge the enumeration should be made until the 5th degree commencing from whence the line varies. This should be applied in every case," that is, among collateral Bandhus the degrees of propinquity are counted from the ancestor from whence the line diverges (*vide* Mayne's Hindu law, 8th Edition, p. 712 and illustration, and *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (5), where the collateral Bandhus, per genealogy given therein, beyond 5 degrees from the propositus were held not to be heritable). According to Sarvadhikari's Tagore Law Lectures, 1880, pp. 633, 635, the degree in which a Bandhu stands to the deceased is ascertained by counting from the deceased himself to the Bandhu in question allowing a degree for each person, and among collaterals the counting commences from the common ancestor from whence the line diverges. At page 728, the same author says: "Within a well-defined range the degrees of Sapinda relationship are allowed to be heritable and the distance from the common ancestor is the test of propinquity." This is also the method of determining nearness or propinquity adopted in the Indian Succession Act, part 3, S. 22, where it is laid down that—"for the purpose of ascertaining in what degree any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased to the common stock and then downwards to the collateral relative allowing a degree for each person both ascending and descending."

The table annexed to that section illustrates the method of determining the nearness of degree. The nearest in degree of kindred to the propositus thus ascertained excludes remoter degrees: (vide S. 44). Adopting the method of computation laid down in the Mitakshara, the sister's daughter's son is 5 degrees removed from the propositus, whereas the maternal uncle is only 4 degrees removed from the propositus. Again the former is 4th in descent from the common ancestor of himself and the propositus, whereas the latter is only 2nd in descent from the common ancestor of himself and the propositus. According to the English method of counting (*vide* Table to the Succession Act, S. 22, *mutatis mutandis*) the former is 4 degrees removed and the latter 3 degrees removed from the propositus. Thus if the nearness or propinquity of Sapinda relationship depended upon the number of degrees removed either from the propositus or the common ancestor, there can hardly be any doubt that the maternal uncle is nearer than the sister's daughter's son, whatever mode of counting be adopted. In Sradha also where preference is given to the Sapindas on the ground of nearness, the method of determining the nearness is by counting the number of degrees removed from the common ancestor of the propositus. There is no reason, therefore, why this should not be the mode for determining the nearness or propinquity for the purpose of succession, particularly where there

is no other rule mentioned expressly in the text or in the commentaries.

Brahaspati—"Where there are many jnati, Sakulyas and Bandhavas, among them whoever is the nearest he shall take the property of the childless" [quoted in *Lallubhai* v. *Mankuvarbai* (27) and also in *Ram Charan Lal* v. *Rahim Bakhsh* (17)]. This is strictly in accordance with the text of Manu "to the nearest Sapinda the inheritance shall belong," and the Mitakshara, verses 52 and 53, Ch. 1, as well as the Chapter on Bandhu where the only test is that of nearness. This again is the test applied in the Succession Act. Sarvadhikari has clearly laid down at p. 728 that among the heritable Bandhus "the distance from the common ancestor is the test of propinquity": and at p.711 that the "nearer excludes the more remote." So does Golap Chandra Sastri in his Hindu Law, Edn. 4, at p. 294, lay down—"the nearer in degree on whichever side is to be preferred to one more remote", as the foremost principle for determining the rival claims of Bandhus. Both of them have laid down other rules for selection among those equal in degree. It is thus clear that the first and foremost rule of preference among several claimants is that the nearest in degree ascertained by the simple method of counting given in the Mitakshara, exclude those more remote and when the degree is equal only then other considerations might be resorted to for the purpose of preference among the other rival claimants. In the present case the maternal uncle and the sister's daughter's son are not equal in degree. The former is nearer in degree than the latter and must on this ground alone be preferred. There is therefore no occasion for applying any other test to the present case and it would have been unnecessary to discuss the other tests for determining the preferential claims of Bandhus but for the great stress laid on them at the Bar during the hearing of this case.

It is said that although a sister's daughter's son is remoter in degree than the maternal uncle, yet the common particles of the body of the propositus in the former are greater than those in the latter. It is difficult to weigh with exactitude the common particles of body or blood, and an attempt to do that would perhaps be futile. The following illustration, suggested during the hearing of this case, by one of my learned colleagues in this Full Bench (which I quote here with his kind permission) will however show that the maternal uncle and the propositus have more particles of body and blood of their common ancestor (the maternal grandfather and the maternal grandmother of the propositus) than the sister's daughter's son and the propositus have of their common ancestor (the father and the mother of the propositus). The propositus's mother and the maternal uncle had each 16 annas of the common particles of body and blood of the maternal grandfather and the maternal grandmother. The propositus had 8 annas of his mother in common with the maternal uncle. Now the propositus and his sister had 16 annas of the common blood of the father and the mother. The sister's daughter inherited 8 annas and the sister's daughter's son only 4 annas of that common blood. The sister's son or the sister's daughter may be said to have equal quantity of common blood or particles of body of the father and the mother as the maternal uncle and the propositus had of the maternal grandfather and the maternal grandmother, but in a descendant further removed, namely, the sister's daughter's son, the common particles of body and blood became less. Thus the descendant of a remoter ancestor as the maternal uncle will have more common particles of body and blood than one descended from a nearer ancestor but several generations down. The uncertainty of this test is obvious and cannot be the basis of a general rule.

It is then contended that the sister's daughter's son, being descended from the father or mother, should be preferred to the maternal uncle who traces his descent from a more remote ancestor, namely, the maternal grandfather: in other words, the line of the father must be exhausted before that of the grandfather is resorted to. This contention is supported by the view expressed in *Balusami Pandithar* v. *Narayana Rau* (11), where a sister's son's son was preferred to a maternal uncle's son [followed in *Krishna Ayyangar* v. *Venkatarama Ayyangar* (10)]. No text or authority was cited in support of the view taken by their Lordships. As an illustration the case of a nephew excluding his uncle was quoted. The analogy does not afford any principle, for the priority of the nephew (brother's son) over the uncle (paternal grandfather's son) is by virtue of a special text in the Mitakshara. In

Ch. 2, placita 135 and 136, Yajnavalkya, the order of succession of (an Aputra) a sonless propositus is as follows:— "The wife, the daughter, both parents, brother likewise, and their sons, gentiles: cognates, a pupil and a fellow-student. On failure of the first among these the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue."

In accordance with this text of Yajnavalkya, in Ch. 2, S. 5, the Mitakshara gives the rules and the order of succession of Gotrajas (Sapindas and Samanodakas) and in clause 1 declares that brother's sons succeed before the paternal grandfather and his sons. In placitum 4, it is expressly laid down "on failure of the father's descendants (Santan) the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

Placitum 5. "On failure of the paternal grandfather's descendants (Santan) the paternal great-grandmother, the great-grandfather, his sons and their sons inherit. In this manner must be understood the succession of kindred belonging to the same Gotra or family till the 7th degree among the Sapindas." "Suta" in verse 136 of Yajnavalkya, "Santan" and "Putra" in placita 4 and 5 of the Mitakshara cited above do not mean only son or descendant in the restricted sense, for in Yajnavalkya the word "Putra" in the verse stands for son, son's son and son's son's son, as defined by Manu, Vishnu, Harita, Yajnavalkya, Sankha and Lakhita (Mitakshara, Ch. 1, S. 11, Sloka 3; Viramitrodaya, Ch. 3, part 1, S. 11, p. 198). Upon the aforesaid special meaning of the word "Putra" and Santan" the texts enjoin that the three immediate descendants of an ancestor would succeed before the next ancestor and his 3 descendants can come in. This rule applies only in the case of 3 immediate ancestors of the deceased upon the text of Manu, Ch. 9, verse 187, and is also based upon the theory of religious benefit: "To three ancestors water must be offered, to three funeral cakes must be given, the forth descendant is the giver of oblations, the fifth has no connection."

The Smriti Chandrika, an authority in Madras, has restricted the meaning of son to include only son's son and has further laid down that the son and grandson of an ancestor succeed even before the ancestor (*vide* Smriti Chandrika, Ch. 9, S. 5). This view has been adopted by the Madras Court in *Suraya Bhukta* v. *Lakshminarasamma* (30) and *Chinnaswami Pillai* v. *Kunju Pillai* (31). This would show that in Madras, either on the text or on the authority there is no general rule even in the case of Gotraja Sapindas of exhausting all the heirs in the nearer line before going up to a higher one. Far less this can be a rule in the case of Bandhus. There is no such rule in the Benares school either. Their Lordships of the Judicial Committee in the case of *Buddha Singh* v. *Laltu Singh* (6) affirming the decision of the Allahabad Court, laid down the order of succession among Gotrajas by working it up from the express texts, and not upon the general principle that 'the nearer line excludes the more remote.' Indeed if this were the rule, then the descendants up to the 7th degree of each immediate ancestor would have been exhausted before going up to a higher ancestor and the nephew's great-grandson would have excluded the grandfather and the great-grandfather and their three respective immediate descendants.

It is noticeable that among Gotrajas the heirs succeed in the order in which they have been named in verses 135 and 136, Yajanavalkya, but the Bandhus do not succeed in the order in which they have been enumerated in Ch. 2, verse 6, as held in *Ram Charan Lal* v. *Rahim Bakhsh* (17), dissenting from *Appandai Vathiyar* v. *Ragubali Mudaliar* (16). Thus the analogy of the principal rule of succession among the Gotrajas is not extended in the Benares school to Bandhus. Why then should the analogy of an uncle succeeding before the nephew apply to the case of Bandhus? As to the contention that, as in the case of Gotrajas so in the case of Bandhus three descendants of nearer line should be exhausted before going to a higher line, or his descendants, it is enough to say that the words "and their sons" have not been used against the Bandhus named in Ch. 2, S. 6, Sloka 2, as in the case of Gotraja Sapindas. Besides, it would hardly help the sister's daughter's son, for Putra means son's son's son, and a daughter does not come in. In the recent case of *Adit Narayan Singh* v. *Mahabir Prosad Tewari* (8) this Court declined to adopt the rule that a descendant of a nearer ancestor must be preferred to that

(30) [1882] 5 Mad 291.
(31) [1911] 35 Mad 152=11 I C 885.

of a remoter one, and held that a mother's paternal aunt's son, who although traced his descent through the mother's father's father, was preferable to mothers' sister's son's son who traced his descent through the mother's father, on the ground that the former was nearer in degree than the latter. Another ground for preference mentioned in that case was that the former offered religious oblations to two ancestors of the deceased, whereas the latter offered to none.

This principle will be referred to later, but at present the decision of this Court is referred to for the purpose of showing that among Bandhus there is no such rule that the descendant of a nearer ancestor excludes that of a remoter one. Sir Edward Chamier, C. J., observed that the effect be given to this rule, "it may easily happen that an obviously more remote heir will exclude a nearer Sapinda" and will therefore override the cardinal principle of Hindu law that "the inheritance belongs to the next Sapinda." Sir Edward Chamier was a party to the decision in *Kalian Rai* v. *Ram Chandra* (32), where it was held that the grandson of a brother is preferable to a son of a paternal uncle, and that among the Gotrajas "the father's line as far as the grandson must be exhausted before the grandfather or his line can come in" and was therefore fully alive to the texts regulating the rule of succession among the Gotrajas; still he would not lay down a general rule that a nearer line excludes the one more remote and would not extend the rule by analogy to apply to the case of Bandhus. His long experience at the Bar and on the Bench in the United Provinces and lately on the Bench of this Court, where the Mitakshara Law of the Benares school prevails, is entitled to great weight, as showing that the Hindu law, as administered in the United Provinces and here, does not admit of the rule that "the nearer line excludes the one more remote."

In the Madras cases *Balusami Pandithar* v. *Narayana Rau* (11) and *Krishna Ayyangar* v. *Venkatarama Ayyangar* (10), relied upon, no text or authority has been quoted. Besides, the rival claimants were equal in degree, and that also makes the ruling inapplicable to the present case, where the one claimant is nearer than the other. Sarvadhikari, at p. 712 says, "all other things being equal, the nearer line excludes the one more remote."

(32) [1901] 24 All 128.

It is then contended that the sister's daughter's son is a descendant from the father of the propositus, whereas the maternal uncle is connected on the mother's side of the propositus, and hence the former would exclude the latter on the principle that the heirs ex parte paterna exclude those ex parte materna. In the earlier decisions of the Madras Court the principle does not appear to have been recognised. In *Narasimma* v. *Mangammal* (23) a maternal uncle was preferred to a father's sister and thus the above principle relied upon was not followed although in Madras females were heritable Bandhus, vide *Nallanna* v. *Ponnal* (33), *Ramappa Udayan* v. *Arumugath Udayan* (34). In *Muttusami* v. *Muttukumarasami* (19) maternal uncle was preferred to father's father's sister's son, although the former was connected through the mother and the latter through the father and grandfather. This decision was affirmed by the Privy Council in *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami* (20), which is an indication that their Lordships did not give effect to or recognise the principle of preferring ex parte paterna to ex parte materna.

For the first time in *Sundrammal* v. *Rangasami Mudaliar* (12) it was simply stated, without deciding, that as between the plaintiffs, the daughter's son of the paternal uncle and defendant 3 who was mother's sister's son, the latter is ex parte materna while the former is ex parte paterna. The point could not be decided as there was no dispute in that case between defendant 3 and the plaintiffs; they compromised the case in the Court below. The appeal was by defendants 4 and 5 who were the sister's daughters of the propositus, against the plaintiffs. That ruling, therefore, cannot be any authority for the proposition that a Bandhu ex parte paterna is to be preferred to one ex parte materna. Yet this was relied on in the case of *Balusami Pandithar* v. *Narayana Rau* (11) for the proposition that the ex parte paterna excludes the ex parte materna and on that ground a sister's son's son was preferred to a maternal uncle's son. Here also no text of the Hindu law was quoted in support of the general proposition. The later decision in the Madras Court in *Subramania Mudaliar* v. *Ranganathan Chettyar* (13) shows that the Judges felt themselves bound to follow the decisions of that Court

(33) [1891] 14 Mad 149.
(34) [1894] 17 Mad 182.

in *Sundrammal* v. *Rangasami Mudaliar* (12) and *Balusami Pandithar* v. *Narayana Rau* (11). Miller, J., in answer to the argument that the rule is not based on any Smriti or accepted commentary, said that: "It is not a sufficient reason why we should refuse to follow the course of decisions in this Court." Sadasiva Aiyar, J., went further and said that "It is not the Shastra according to my views." The learned Judge however recognized that the Benares branch of the Hindu law was different from that administered in that Presidency, as is expressly said by him within brackets "(and ignoring the Benares Branch of the school)." His Lordship further said that the father's sister's son would include father's sister's son's son, as son means son's son. I have already shown that the Mitakshara in enumerating the Bandhus does not add the words "and sons" as in the case of Gotrajas, and there is therefore no justification for including sons and grandsons of the persons named. Even if it be so, it would not apply to the present case. In the first place, sister or sister's daughter is not mentioned. In the second place, we are concerned here not with the sister's son's son, but with the sister's daughter's son, and the word "son," although it includes son and grandson, does not mean daughter and daughter's son. These Madras cases seem to accept the notion, as expressly held in *Appandai Vathiyar* v. *Ragubali Mudaliyar* (16), that amongst the persons inter se named in the text of Mitakshara they succeed in the order in which they have been named. This view was dissented from recently in an elaborate judgment of Banerji and Piggott, JJ., in *Ram Charan Lal* v. *Rahim Bakhsh* (17), where the mother's brother's son was preferred to mother's sister's son and it was conclusively shown that the Madras authorities were wrong in holding that the order of priority among cognate Bandhus of each of the three classes is not the order in which those persons have been named in the text. In *Madho* v. *Janki* (35), relied upon, it is expressly mentioned that the decision is based upon the law and usage prevalent in the Bombay Presidency, where Mayukha and Smriti Chandrika are the authorities and have been given precedence over the Mitakshara. Mitter, J., said that "unless there were clear and cogent reasons for dissenting from the earlier decisions in Nagpur and in Bombay, where by custom the females are heirs, it would be my duty to follow them." The case of *Ram Bharos* v. *Ram Parshad* (21), where father's brother's daughter's son was preferred to mother's brother's son, was decided by Aikman, J., sitting singly. The learned Judge did not discuss the point or cite any text. The decision, therefore, is not of any assistance in the case. The rule that the heirs ex parte paterna should be preferred to those ex parte materna is not to be found in the text relating to Bandhus in the Mitakshara and there is no authority for supplying any omission in that text. It was well observed by Holloway, J., in *Chelikani Tirupati Rayaningaru* v. *Rajah Suraneni Vencata Gopala Narasimha Rau Bahadur* (36): "It is satisfactory to find it at least recognized that the rule of law is not to be derived from the positive words of a commentator and still less from his omissions."

According to Mayne, those on the father's side take precedence over those on the mother's side "as regards two sets of persons equally near," and hence the nearer in degree on whichever side will exclude the one more remote (Mayne's Hindu Law, Edn. 8, p. 812, para. 579). Similarly Golap Chandra Sastri lays down among the governing principles of competition among Bandhus first rule—"the nearer in degree on whichever side is to be preferred to one more remote" and the second rule "of those equal in degree one related on the father's side is to be preferred to one related on the mother's side." In the Madras cases the claimants were equal in degree. Thus the rule that ex parte paterna is to be preferred to ex parte materna becomes inapplicable to the present case where the claimants are not equal in degree, but the maternal uncle is nearer in degree than the sister's daughter's son. I do not see how the fathers' line should be preferred to the mother's on the text of the Mitakshara, for the Mitakshara as distinguished from Dayabhaga prefers mother and grandmother to father and grandfather respectively, on the ground that their propinquity is greater than the father and grandfather (vide Mayne, para. 512, p. 714; also Mitakshara Ch. 2, placita 3, 4 and 5). According to Smriti Chandrika which governs the Madras Presidency, the father succeeds before the mother and this might be the reason for the decisions in that Province that persons connected

(35) [1916] 36 I C 514.

(36) [1870] 6 M H C R 278.

through the father are to be preferred to those connected through the mother. There is an absence of direct authority of the Privy Council on the point but as already shown, the principle was not given effect to in *Muthusami Mudaliyar* v. *Simambedu Muthukumarswami Mudaliyar* (20).

The reason urged for preferring persons related through males to those related through mothers or other females is possibly that in the case of the latter the Gotra becomes different by marriage, and where two females intervene the family becomes much more remote and is disconnected by two different Gotras or families. On this ground also the maternal uncle should be preferred because only one female intervenes between him and the propositus, whereas in the case of the sister's daughter's son two famales intervene. There is apparently a conflict of decisions in the Madras Court on this point. In *Krishna Ayyangar* v. *Venkatarama Ayyangar* (10) father's sisters' daughter's son was preferred to patertnal grandfathers' sisters' daughter. As regards the intervention of two females in the case of the former, it is said as follows: "Whether having regard to the preponderating influence in the Hindu system of law of relationship through males with reference to the devolution of the heritage of a man, such circumstance (intervention of females) as that relied on may or may not avail when the competition is between Bandhus of the same category and of the same degree, it is unnecessary to consider."

The question therefore was left undecided. The question was however expressly decided in the case of *Tirumalachariar* v. *Andal Ammal* (14), where a daughter's son's son was preferred to a daughter's daughter's son on the grounds stated that "it is legitimate to prefer that claimant between whom and the stem there intervenes one female link to that claimant who is separated from the stem by two such links." It may be noted that in Madras a daughters' daughter is an heir and Bandhu [*Ramappa Udayan* v. *Arumugath Udayan* (34), *Nallanna* v. *Ponnal* (33)]. With regard to the decision in *Tirumalachariar* v. *Andal Ammal* (14), it was said in the case of *Appandai Vathiyar* v. *Ragubjali Mudaliar* (16) that the principle of two females intervening would not apply to the case, because of the important qualification "of all other considerations being equal," and the mother's sisters' son was preferred to the maternal uncle's son on the ground that he was mentioned before the latter in the list of Bandhus given by the Mitakshara, in the text, S. 6, Ch. 2. This view has been dissented from recently in the case of *Ram Charan Lal* v. *Rahim Bakhsh* (17), where it is held that the mother's sister's son, though named before the maternal uncle's son in the enumeration of Bandhus in the Mitakshara, cannot still be preferred to the latter inasmuch as he is separated from the propositus by two females, whereas in the case of the maternal uncle's son only one female intervenes. So far as the present case is concerned, the Allahabad decision must be preferred to those of Madras and Bombay Courts. Apart from the aforesaid decision of Allahabad Court, I think that the intervention of two females would more diverge the Gotra and family of the person so related from that of the propositus than where only one female intervenes and that there would be less or no possibility of the former classes of relations conferring any spiritual benefit to the propositus or his ancestors. This might possibly be the reason for the rule, if any, of postponing females or relations through females to males and those connected through males. The reason will apply with greater force to exclude persons connected through two females in preference to those connected through one female. This was the reason adopted in *Tirumalachariar* v. *Andal Ammal* (14) and *Ram Charan Lal* v. *Rahim Bakhsh* (17).

I have discussed all the tests for determining the rival claims of Bandhus and I would conclude by saying that none of those tests are mentioned in the text either of the Rishis or by Vijnaneswara in the Mitakshara, or in the authoritative commentary of Mitakshara, namely, Viramitrodaya, received as a treatise of high authority and as exposition of what may have been left doubtful by the Mitakshara. I have also shown that there is no authority for resorting to any of those tests where the claimants are not equal in degree. The claim of the maternal uncle rests upon the firmer ground, namely, that he offers oblations to the two common ancestors of the propositus and thereby confers spiritual benefit to him, whereas the sister's daughter's son offers oblations to none of the ancestors of the propositus and confers therefore no spiritual benefit at all. It is said that some of the persons named in the Mitakshara as heritable

Bandhus do not confer spiritual benefit and in particular one of the Matri Bandhus, who confers spiritual benefit is postponed till some of the Pitri Bandhus who confer none, and hence the Mitakshara abandoned the doctrine of spiritual benefit to be applied to the case of Bandhus.

We are dealing here with the case of claimants who are not expressly mentioned in the Mitakshara as Bandhus and there is no reason why their nearness or propinquity to the propositus should not be determined by the religious benefit they confer upon the deceased in order to give preference among rival claimants. In the case of *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7) the Board affirmed this ruling in the following words: "When the question of preference arises, as preference is founded on the superior efficacy of oblations, the principle must be applied to the solution of the difficulty. It obtains properly when the succession opens to the deceased, when the question mooted is a real one (at least in contemplation of pious Hindus), viz., who best can confer on the deceased and his ancestors not fully benefited the benefits which the grades of oblations offer in differing degrees."

In the recent case of *Buddha Singh* v. *Laltu Singh* (6) their Lordships, relying upon the text of Viramitrodaya, Ch. 2, Part 1, S.23 (A), observed—"Now it is absolutely clear that under the Mitakshara whilst the right of inheritance arises from Sapinda relationship or community of blood, in judging of the nearness of blood relationship or propinquity among the Gotraja the test to be applied to discover the preferential heir is the capacity to offer oblations."

Similar was their Lordships' observation in the case of *Soorendronath Roy* v. *Mt. Heeramonee* (29), already referred to in the earlier part of this judgment. It is contended that the rule laid down by their Lordships of the Privy Council applies only to the case of Gotraja Sapindas and not to the Bhinna Gotra Sapindas or Bandhus. There does not appear to be any substance in this contention. Their Lordships do not restrict the application, and the authorities that will be presently quoted will show that the rule applies also to the case of Bandhus. Besides, if the rule applies to the Sagotra Sapindas, there is no reason why it should not apply to the Bhinna Gotra Sapindas. The passage in Viramitrodaya relied on by their Lordships occurs in Ch. 2, part 1, S. 23 (A), relating to the Partition of Heritage: "But when there are many claimants to the heritage among the gentiles and the other class, then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like, only excludes those that do not confer such benefits though this is not the criterion here." The Sanskrit words are: (vide p.39, Sanskrit Text, and p. 91, Translation by Golap Chandra Sastri). The expression means "Gotrajas and other (class)" as rendered by Dr. Sarvadhikari. It clearly lays down the general rule applicable not only to Gotrajas but to all classes of heirs including Bandhus. This is by using the word "Gotraja," and the other classes. Devala says, "Sages declare partition of heritable to be coordinate with gifts of funeral cakes." Vishnu and Gautama support the theory of religious oblations as a determining factor in inheritance.

Mitter Missir has conclusively shown that according to Manu, Yajnavalkya and other Rishis as well as the Mitakshara, inheritance is intervoven with capacity to offer funeral oblations. It is needless to quote these passages. They have been referred to in Viramitrodaya, Ch. 3, part 1, S. 11, pp. 134, 155, 157, 186 and 200. Relying upon those texts, Viramitrodaya says: "the three descendants beginning with the son confer the greatest amount of spiritual benefit on the three ancestors beginning with the father, consequently the estate, conducing as it does to the benefit of the owner himself when taken by the sons, etc., continues as it were the owner's own by reason of the proximity of benefit. And the nearness on account of the spritual benefit is consistent with reason; thus it is ordained. Since, in the chapter on partition of Heritage, the conferring of spiritual benefit is by the term "therefore" set out as the reason; hence it is indicated that he alone is entitled to get the estate, on whom the estate being devolved conduces to the greatest amount of spiritual benefit of the deceased owner, and that proximity in this way is to be accepted as a general rule and reasonable." Indeed Mitter Missir has considered the religious efficacy in discussing the claim of every heir separately and has throughout his work maintained that the degrees of propinquity are determined by religious merit. West and Buhler accept the principle of religious efficacy as propounded in Viramitrodaya. Apararka, another

commentator of great repute, who flourished a century before Mitter Missir, has also upheld the same principle of preference among several claimants. There are passages in the Smriti Chandrika supporting the same view in Chapters on Inheritance of Gotrajas and the last para. (15) in Ch. 11 regarding the succession of Bandhus.

I next deal with the principle of religious efficacy as accepted in the judicial decisions. The Calcutta High Court in the Full Bench case of *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (1), per Mitter, J., applied the doctrine of spiritual benefit for holding that sister's son and maternal uncle, though not specifically mentioned in the list given by Mitakshara are heritable Bandhus, and affirmed the views of Sir William Jones that "the doctrine of funeral cakes is the key to the whole Hindu law of inheritance. All the schools of Hindu law that are current in the country are agreed in accepting this principle as their guide however much they might differ from one another with reference to particular points connected with its application." In *Gunesh Chunder Roy* v. *Nil Kamul Roy* (18) the principle of spiritual benefit was accepted to be the general priciple of Hindu law and as a general guide in determining the preferential claims of the parties where their respective position is not settled in the Mitakshara itself or by any decided case, the principle was applied and a sister's son was preferred to a mother's sister's son of the deceased on the ground that the former "confers greater spiritual benefit upon the soul of the deceased than the latter." Similarly the Allahabad High Court in the Full Bench case of *Janki* v. *Nand Ram* (24), upon the authority of Viramitrodaya and the Mitakshara, held that although propinquity is the rule of inheritance and the spiritual benefit cannot create the heritable right, yet it determines with precision the preferable right of Gotrajas and other heirs, where there is more than one claimant to the heritage. Mahmood, J., agreed with the above and went the length of saying: "The Hindu system went further and laid it down as an imperative rule, that the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. The devolution of property depends upon the competence to perform the obsequial rites of the deceased."

In the Full Bench case of *Suba Singh* v. *Sarafraz Kunwar* (25) with regard to the passage in Viramitrodaya already referred to Banerji, J., observed that "It may be that, where two Sapindas stand, with reference to propinquity, in the same degree of nearness to the propositus, the capacity to confer the highest amount of spiritual benefit should be applied as a test to determine the order of priority. But, where the degrees of propinquity are different, the rule of religious efficacy has, according to the Mitakshara, no application." According to Banerji, J., therefore, even if the maternal uncle and the sister's daughter's son were equal in degree, the former would have been preferred and being nearer in degree, his claim is much more preferable. The Bombay Court in *Lallubhai* v. *Mankuvarbai* (27) held that the Mitakshara adopted, in view of religious efficacy, the theory that Sapindaship is based upon community of corporal particles, or in other words, upon consanguinity. This was affirmed by their Lordships of the Privy Council in *Lallubhai Bapubhai* v. *Cassibai* (3). Neither the Bombay Court nor their Lordships of the Judicial Committee held that spiritual benefit could not be taken into consideration in determining the preferential right of rival claimants. Their Lordships say that by the law of Mitakshara as interpreted in Western India, the preferential right to inherit in the classes of Sapindas is to be determined by family relationship or community of corporal particles and not alone by the capacity to perform the funeral rights. Moreover in that case the right of the widow of a first cousin was upheld upon the local law and usage and upon the Mayukha which has precedence over the Mitakshara in Gujerat and Bombay Presidency. Except for the principle referred to above the authority is not applicable to the Benares school as females, unless specially mentioned, do not succeed in Northern India to the exclusion of male heirs [*Gauri Sahai* v. *Rukko* (37)].

Later on in *Mohandas* v. *Krishnabai* (28) the Bombay Court applied the principle of religious efficacy and preferred the maternal uncle to mother's sister's son. It was observed—"When it is once admitted that the list of Bandhus given in the text is not exhaustive and that other relatives take before some of those specified in the list, there is no other logical conclusion except that the relative who as the nearest of kin is capable of conferring the

(37) [1881] 3 All 45.

greatest spiritual benefit on the soul of the deceased, must in all cases be preferred to more remote Bandhus."

This Bombay case [*Mohandas* v. *Krishnabai* (28)] has been referred to in the later decisions of the same Court in *Gojabai* v. *Shrimant Shahajirao Maloji Raje* (38) and the Privy Council case of *Bai Kesserbai* v. *Hunsraj Morarji* (39). But the principle laid down there has not been at all dissented from or adversely commented upon. The case of *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (40) has also been referred to, but in that case there were no rival claimants and no question arose as to preference by religious efficacy. The views of the Madras Court have been conflicting. In *Chelikani Tirupati Rayaningaru* v. *Rajah Suraneni Vencata Gopala Narasimha* (36), Innes, J., observed as follows:—

"Putting the Mitakshara aside for the present, all the treatises on Hindu law just referred to seem to disclose the intention of including as heirs in the order of propinquity all kindred however remote, except when propinquity requires to be postponed to the superior benefits which another relationship is capable of conferring in funeral oblations."

In *Lakshmanammal* v. *Tiruvengada Mudali* (41) Turner, C. J., referring to *Chelikani Tirupati Rayaningaru* v. *Rajah Suraneni Vencata Gopala Narasimha* (36), said that"that ruling has the support of at least one text, although the right to perform funeral rites is a sequence and not a cause of inheritance and the recognition of the right in a person may fairly be regarded as recognition of the claim of inheritance in the same person." In *Muttusami* v. *Muttukumarsami* (19) a maternal uncle of the half blood was preferred to father's paternal aunt's son, the Court, relying and quoting a passage from the Viramitrodaya, Ch. 3, part 1. S. 2, p. 158, observed:—"This passage indicates that as between Bandhus of the same class, a rule of preference may be found in the quantity of spiritual benefit which they confer. As between Bandhus of the same class the spiritual benefit they confer upon the propositus is, as stated in Viramitrodaya, a ground of preference."

On appeal to the Privy Council *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (20) their Lordships affirmed this decision but did not take exception to the observation of the Madras High Court. On the other hand, their Lordships expressly recognized the authority of Viramitrodaya. In *Sundrammal* v. *Rangasami Mudaliar* (12) relied upon by the appellant, the decision in *Muttusami* v. *Muttukumarasami* (19) was referred to, but the doctrine laid down there regarding the preference to be given by reason of spiritual benefit was not dissented from. On the other hand, the analogy of the sister's son excluding the sister was quoted with the remark that the sister is the mere relative and being a female, "can offer no funeral oblations."

In *Balusami Pandithar* v. *Narayana Rau* (11) and *Appandai Vathiyar* v. *Raghubali Mudaliar* (16) the doctrine of religious efficacy was not acted upon. In the latter case their Lordships felt themselves more at liberty not to follow the doctrine "by the fact that the parties were Jains and that though the Hindu law is prima facie held applicable to them, its religious developments should not have unrestricted operations." The actual decision in the case, that the mother's sister's son is preferable to the maternal uncle's son, has been dissented from recently by the Allahabad Court in *Ram Charan Lal* v. *Rahim Bakhsh* (17). In the former Madras case [*Balusami Pandithar* v. *Narayana Rau*(11)] it was held that the doctrine ought not to be resorted to in derogation of the principles (1) the nearer line excluding the more remote, and (2) that persons ex parte materna should be preferred to those ex parte paterna on the ground that these principles are the cardinal principles of the Hindu law and pervade the law of inheritance under the Mitakshara system. But no text or authority was quoted in support of the aforesaid view, or that these principles should override the rule of religious efficacy for the purpose of giving preference in the case of rival claimants as laid down in the earlier decisions of the same Court. But both the aforesaid Madras decisions in *Balusami Pandithar* v. *Narayana Rau* (11) and *Appandai Vathiyar* v. *Ragubali Mudaliar* (16) have admitted that "the Privy Council and the Madras Court have adverted to considerations of religious efficacy of oblations as a factor in determining the relative priority of competing claimants," particularly "as between Ban-

(38) [1893] 17 Bom 114.
(9) [1906] 30 Bom 431=33 I A 176 (P C).
(0) [1895] 19 Bom 631.
(11) [1882] 5 Mad 241.

dhus of the same class." The doctrine therefore has not been wholly abandoned by the Madras Court. Indeed a reference to the Smriti Chandrika itself will show that the doctrine has been referred to in more places than one in chapters relating to succession of Gotrajas. In Ch. 11, S. 5, para. 14, Smriti Chandrika has quoted from the Mitakshara the enumeration of Bandhus. In para. 15, it says "of the kinsmen, distant kinsmen, and cognate kindred, in default of one that stands nearest in the order expressly given, he that may be somehow viewed to stand on a par with him, may be selected, it being generally declared by Goutama "let those take the inheritance who give the funeral cake (Pinda), who are the descendants from the same Gotra, or who are sprung from the same Rishi." I do not know how in face of the above, it can be said that the Smriti Chandrika did not lay down that (1) the nearest in degree should be preferred to those more remote, and (2) that religious efficacy may be resorted to for the purpose of preference of the rival claimants. This exactly agrees with the view in Viramitrodaya and as stated in the rules given in Dr. Sarvadhikari's Tagore Law Lectures and Golap Chandra Sastri's Hindu Law already referred to. Whatever may have been the view in the other Presidencies, the proposition has been stoutly affirmed and followed in Northern India, where the Mitakshara as interpreted by Viramitrodaya governs the rule of succession.

The Privy Council as early as 1868, in *Gridhari Lal Roy* v. *Bengal Government* (2), observed, after quoting the text of the Mitakshara re the enumeration of Bandhus: "This sub-division of Bandhus into 3 classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations." As observed by their Lordships of the Privy Council in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7): "The compiler of the Mitakshara is said to have been an ascetic or a devotee and from that source nothing at variance with the religion of the Hindus is likely to have flowed." Yajnavalkya was the first to mention the offering of a cake to the maternal ancestors in Ch. 1, Sloka 242, and to introduce Bandhus as heritable heirs and could not ignore the religious considerations from inheritance, much less his commentator, Vijnaneswara, the author of the Mitakshara, could do. Mayne on Hindu Law, Edn. 8, S. 516, p. 723, dealing with the succession of Bandhus, says: "The Mitakshara recognized the difference between the offerings which *A* and *B* were bound to make to *X*, but it used the difference in order to ascertain which of the two was nearer to *X* in a direct line." Coming to this Court, in the recent case of *Adit Narayan Singh* v. *Mahabir Prosad Tewari* (8) Sir Edward Chamier, C. J., referred to Viramitrodaya and to the Privy Council authorities and gave effect to the religious benefit in determining the claims of the mother's paternal aunt's son to that of a mother's sister's son's son, although the latter was the son of an Atma Bandhu expressly named in the Mitakshara. Sir Edward Chamier in *Kalian Rai* v. *Ram Chandar* (32) had also referred to Viramitrodaya for the proposition that religious considerations should be resorted to in order to prefer the claims of competitors.

In another case, *Harihar Charan* v. *Jang Bahadur* (42), a Division Bench of this Court, per Roe, J., held that although the succession of a Bandhu is based on consanguinity, it must still be supported by the right to offer oblations to a common ancestor. There is no reason why the two decisions of this very Court should not be followed in this case. It appears to me clear that the maternal uncle must exclude the sister's daughter's son on the ground that he confers spiritual benefit on the propositus, whereas the latter confers none. There is a difference of opinion among the recent commentators as to the rights of the present claimants. Those who have placed the sister's daughter's son above the maternal uncle have apparently done so on the authority of the Madras cases which, as has already been shown, do not apply to the Benares school. They have not supported their views by any text of the Mitakshara or the Hindu Law. The claims of the parties must be determined in accordance with the text. According to Sarvadhikari's Tagore Law Lectures, p. 728, father's paternal aunt's son should take precedence over mother's brother or mother's sister's son, but this is obviously contrary to what has been held in *Muthusami Mudaliyar* v. *Muthukumarswami Mudaliyar* (20). We cannot therefore depend upon a commentator's views but upon the text. The claim of the maternal uncle to succeed ranks high after the Gotrajas under the Mitakshara. In verses 52 and 53,

(42) [1916] 34 I C 183.

the Mitakshara itself, while enumerating the Sapindas, mentions maternal uncle as occupying a high position.

Viramitrodaya, Ch. 3, Part 7, S. 5, at p. 200 of Golap Chandra Sastri's Translation, after quoting from the Mitakshara the list of Bandhus, adds—"In the text of Manu, namely—'In their default, a Sakulya or the preceptor or a pupil (becomes heir)'—the term Sakulya includes the Sagotras (Sapindas) and Samanodakas, the maternal uncle and the like, and the three classes of cognates. Also in the text of Yogisvara the term 'cognate'or Bandhu comprises also the maternal uncle. Otherwise, the exclusion of the maternal uncle and the like would be the result. And it would be extremely improper that their sons are heirs but they themselves though nearer are not heirs."

Dr. Jolly in the Tagore Law Lectures for 1883 at p. 215 is of the same view. According to Viramitrodaya, the maternal uncle would even have precedence over the 3 classes of Bandhus. There is no reason why the authority of Viramitrodaya, right or wrong, which has been accepted for centuries in the Benares school, should be discarded on any strained analogies or on account of its being either unreasonable or even repugnant to the text of Mitakshara, for the Benares school is governed not by the Mitakshara alone, but by the Mitakshara as interpreted by Mitter Missir in Viramitrodaya. There is another passage in the Mitakshara itself, p. 322, Edn. 3, 1829, quoted in *Gridhari Lall Roy* v. *Bengal Government* (2), *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (1): "When one having gone to a foreign country dies, let the descendants, cognates (Bandhus), gentiles, or his companions take the goods. In their default, the King. When of those who are associated in trade, any one having gone to a foreign country dies, then his share shall be taken by his heirs, i. e., the son and other descendants, cognates, Bandhavas."

This passage was relied on by their Lordships of the Privy Council in the aforesaid case at p. 466, (of 12 *M. I. A.*) in the following words: "Here then is a passage written by the author of the Mitakshara himself, which treats the maternal uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal uncle, as well as that of the co-trader, may be exceptional and confined to the case of the trader dying abroad. Their Lordships however cannot admit the reasonableness of this hypothesis." Therefore the maternal uncle occupies the foremost position among the Bandhus and according to Viramitrodaya is superior to the Bandhus. Sister's daughter's son is nowhere mentioned. Besides, it is doubtful whether the sister's daughter's son is an Atma Bandhu or a Pitri Bandhu. If he is a Pitri Bandhu, he will clearly be excluded by the maternal uncle. The doubt was also expressed in the case of *Umaid Bahadur* v. *Udoi Chand* (4), and in fact I am not satisfied that the persons not named in the Mitakshara should necessarily be classed in one of the three classes mentioned there. In the already cited Patna case, *Adit Narayan Singh* v. *Mahabir Prasad Tewari* (8), it was not accepted that the descendant of an Atma Bandhu is necessarily an Atma Bandhu, for the reason that then "it may easily happen that an obviously more remote Sapinda will exclude a nearer Sapinda."

I have refrained from quoting any translation from Colebrooke for the reason that the accuracy of his translation has been doubted. On a consideration of the original texts and of such translations as have been accepted by the authorities, particularly of the Privy Council, I have come to the conclusion that the theory of religious efficacy is based upon the original text of the Smritis, the Mitakshara and the Viramitrodaya, the authoritative commentary thereof. The rule has been accepted by all the authorities on the Hindu law and has been affirmed by judicial decisions, both in this country and of the Judicial Committee of the Privy Council prior to and after Colebrooke's translation of the word Sapinda was doubted. The rule has nothing to do with the meaning of the word "Sapinda," whether it means a connexion through the particles of one body or a connexion by balls of rice, but is founded upon the fact that the rules of succession and religion are indissolubly blended in the Hindu law and cannot, by any process of reasoning or analogies, be separated. This has been affirmed recently by the Privy Council, as already adverted to, in *Buddha Singh* v. *Laltu Singh* (6) (a case of the Benares school and applicable to the parties in the present case). To conclude, the maternal uncle must be preferred to the sister's daughter's son for the reason that (1) he is nearer in degree than the latter, (2) he confers spiritual benefit on the pro-

positus, whereas the latter confers none, (3) he is mentioned in certain texts of the Mitakshara as occupying a high position among heirs, whereas the sister's daughter's son is not mentioned anywhere, and (4) he is connected with the deceased through one female, whereas the latter is connected with the deceased through two females and is thus much more remote.

I do not think that the fact that the sister's daughter's son is related to the deceased through his father whereas the maternal uncle is related through his mother, or that he is descended from a nearer ancestor, namely, the father, whereas the maternal uncle is descended from a more remote ancestor, namely, the maternal grandfather, does in any way give him any preferential right, for the simple reason that these are not the tests mentioned in the Smritis, the Mitakshara, or any authoritative commentary. I, therefore, hold that the maternal uncle should be preferred to the sister's daughter's son and would answer the reference accordingly.

Ali Imam, J.—The question referred to us for determination by this Full Bench is whether in a family governed by the Mitakshara school of law a sister's daughter's son is to be preferred to the maternal uncle of the last male owner as his heir. The answer to this question depends upon the order of succession among the Bhinna Gotra Sapinda under the Mitakshara as expounded in the Benares school. The Mitakshara has placed Bhinna Gotra Sapindas that is Bandhus into three classes in the order in which they stand to the deceased for the purposes of inheritance. These are Atma Bandhus, who are cognate kindreds of the deceased; Pitri Bandhus, who are cognate kindreds of the father of the deceased, and Matri Bandhus, who are cognate kindreds of the mother of the deceased. This is evident from the following passage in Ch. 2, S. 6, para. 1, of the Mitakshara:—"On failure of gentiles cognates are heirs. Cognates are of three kinds, related to the person himself, to his father or to his mother as is declared by the following text,—'the sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred.'"

The passage was relied upon in *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (1). It will be observed that the text of the Mitakshara does not mention sister's daughter's son or maternal uncle as heirs, but it has been repeatedly held that the enumeration in the text is only illustrative and not exhaustive [vide *Gridhari Lall Roy* v. *Bengal Government* (2), *Muthuswami Mudaliyar* v. *Simambedu Muthukumara swami Mudaliyar* (20), *Umaid Bahadur* v. *Udoi Chand* (4), *Babu Lal* v. *Nanku Ram* (43)]. Taking the text as only illustrative it is clear that sister's daughter's son and maternal uncle are Atma Bandhus of the deceased. This is admitted in the argument addressed to us by both sides at the Bar. The question then is, which of these two Atma Bandhus has preference for the purposes of inheritance. They both have a place in the first group of heritable Bandhus. Paragraph 2, S. 6, Ch. 2, of the Mitakshara runs as follows:—

"Here by reason of more affinity the cognate kindreds of the deceased himself are his successors in the first instance: on failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

The text lays down the order of precedence among the three main classes of Bandhus known as Atma Bandhus, Pitri Bandhus and Matri Bandhus. This is not questioned by the parties before us and is supported by judicial pronouncements [vide *Muthuswami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (20), *Appandai Vathiyar* v. *Ragubali Mudaliar* (16)]. There is no tevt of the Mitakshara which definitely lays down any rule of precedent when the competition is between Bandhus of the 1st class inter se. That a sister's daughter's son is a heritable Bandhu received the sanction of judicial authority in the decision of the Calcutta High Court in *Umaid Bahadur's case* (4). The learned vakil appearing on behalf of the appellant does not dispute that the mother's brother is also a heritable Bandhu, nor could this be doubted once the illustrations given in the Mitakshara are accepted to be not exhaustive. We have, therefore, to decide between the rival claims of two cognates who are

(43) [1895] 22 Cal 339.

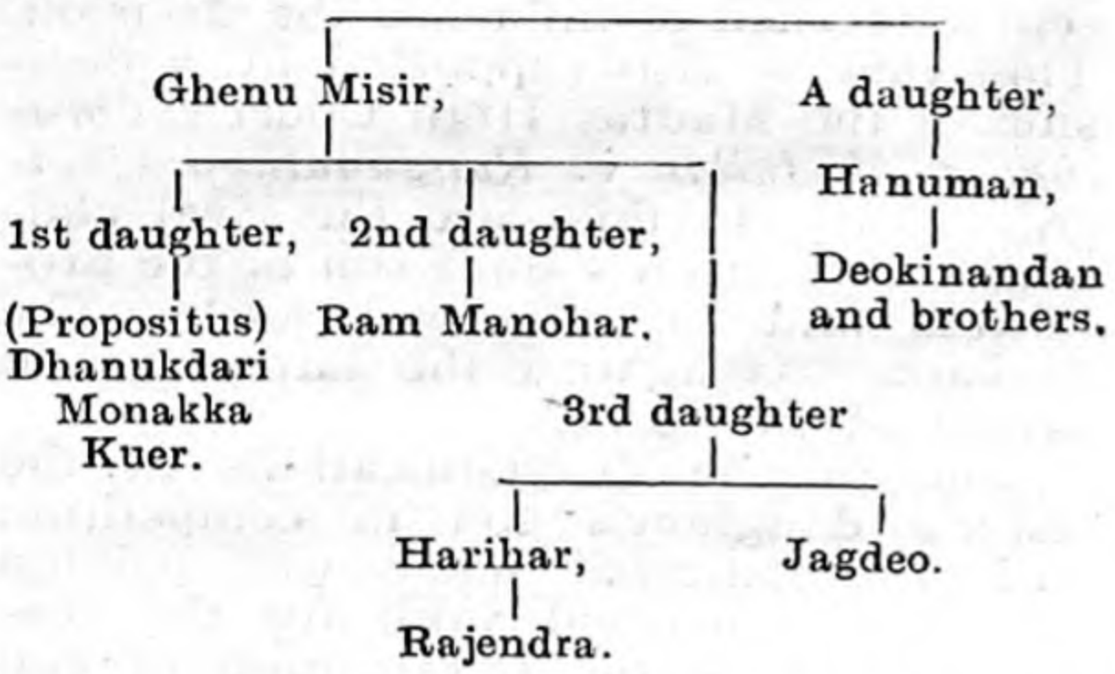
both admittedly heritable Bandhus. If the test as a determining factor were the efficacy of religious benefit, there is little doubt that the mother's brother would have preference over a sister's daughter's son, for the former admittedly would offer Pindas to the maternal grandfather of the propositus; whereas the latter suffers from complete incapacity to render any religious service whatever to the propositus or his ancestors. One of the cardinal differences between the Dayabhaga of the Bengal school and the Mitakshara of the Benares school is that inheritance under the latter law is regulated by propinquity of relationship as the guiding principle of determining the order of succession [vide *Suba Singh* v. *Sarafraz Kunwar* (25), *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (40), *Balusami Pandithar* v. *Narayana Rau* (11)]. Indeed the mistake by Colebrooke in translating the word "Sapinda" in the Mitakshara by the phrase "connected by funeral oblations" has become a matter of history in the case-law of India and was discovered so long ago as 1876, when their Lordships of the Bombay High Court gave their decision in the well-known case of *Lallubhai* v. *Mankuvarbai* (27). That religious efficacy is not the determining guide for the purpose of inheritance in the Mitakshara is also evident from the fact that no less than 4 heritable Bandhus out of the 9 specifically mentioned in the text (Ch. 2, S. 6, para. 1) can confer no religious benefit whatsoever. The proposition that Vijnaneswara, the author of the Mitakshara, construes Sapinda relationship to arise from community of blood is supported by judicial decisions [vide *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (5), *Appandai Vathiyar* v. *Raghubali Mudaliar* (16), *Parot Bapalal Sevakram v. Metha Harilal Surajram* (40)].

I do not therefore think that the mother's brother's capacity to render religious service can be relied upon in a case governed by the Mitakshara as a ground of preference over a sister's daughter's son. It was contended by the learned vakil for the respondent that though propinquity of blood determines the preferable right to succeed, the test to determine propinquity is closeness in religious benefits and not blood particles. No text has been placed before us that the principle enunciated by the learned vakil is one that has application to succession by Bandhus under the Mitakshara. It has however been argued that where the Mitakshara is silent, the authority of Viramitrodaya must be received as an exposition of what has been left in doubt by Vijnaneswara. That Mittra Missir, the author of Viramitrodaya, has a high place in the Benares school is not denied [vide *Gridhari Lall Roy* v. *Government of Bengal* (2)]. But no text from Viramitrodaya has been placed before us to establish the proposition that among Bandhus preference must be given to one that renders religious service over another who does not, or that among Bandhus the capacity to offer such service is the text of propinquity of blood. Reliance has been placed upon a passage of Viramitrodaya quoted by their Lordships of the Judicial Committee in *Buddha Singh* v. *Laltu Singh* (6). The passage in question is as follows: "When there are many claimants to the heritage among Gotrajas and the like, then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like only excludes those that do not confer such benefits."

The rival claimants before their Lordships of the Judicial Committee were agnates of the propositus and in dealing with the case their Lordships were pleased to observe as follows: "Now it is absolutely clear that under the Mitakshara whilst the right of inheritance arises from Sapinda relationship, the community of blood, in judging of the nearness of blood relationship or propinquity among the Gotraja the test to be applied to discover the preferential heir is the capacity to offer oblations." So also in the case of *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7), where the claimant was a Gotraja, the Board made the following observation: "When a question of preference arises, as preference is founded on superior efficacy of oblations that principle must be applied to the solution of the difficulty."

The learned vakil for the respondent has failed to produce any authority except a decision of a Divisional Bench of this Court in support of his contention that the passage of the Viramitrodaya is applicable to a case in which the claimants are not Gotrajas of the propositus but Bhinna Gotrajas. To my mind there is a material difference between the two classes of cases. The Gotrajas are agnates and descendants in the male line from a common ancestor or ancestors of the propositus. In their case the male line of descent is not broken or disturbed by a Gotra springing from a different family as in the case of Bandhus. It is quite evi-

dent that in cases where the rival claimants are Gotrajas, greater propinquity of blood is identifiable by greater capacity to render religious rights. But this is not necessarily the case when the rival claimants are Bhinna Gotrajas. The point may be illustrated by a reference to the case of *Adit Narayan Singh* v. *Mahabir Prosad Tewari* (8) their by a Divisional Bench of this Court and relied upon by the learned vakil for the respondent. In that case the rival Bandhus were an Atma Bandhus and a Matri Bandhu as will appear from the genealogical table given below:



The question of preference in this case was between Hanuman and Rajendra. Their Lordships who decided the case applied to the issue before them the test of finding out the nearest Sapinda by the capacity to offer oblation. As I have said before, that principle will apply to the case of preference among Gotrajas without doing any violence to the Mitakshara rule, which basaes succession on community of blood. The same rule, when applied to the case of rival Bandhus, will produce a result which does not seem to me to be in agreement with the text of the Mitakshara itself. In deciding the case reported as *Adit Narayan Singh* v. *Mahabir Prosad Tewari* (8) decided Lordships recognized the fact that the test of religious efficacy to determine nearness of blood was a test that had been applied in reported cases with reference to disputes between agnates. With profound respect to their Lordships who decided that case, I have not been able to discover the ground upon which the test was applied for deciding the issue between Bhinna Gotras. There can be no question that Hanuman, a Matri Bandhu, could offer oblation to the great-great-grandfather of the propositus. On the other hand Rajender was incapable of offering such religious service. The application of the principle held to be the test among the Gotrajas to a case among Bhinna Gotrajas resulted in the exclusion of an Atma Bandhu by a Matri Bandhu. It appears to me that this is inconsistent with the clear and explicit text of the Mitakshara already quoted (Ch. 2, S. 6, para. 2). Fully recognizing the high authority of the Viramitrodaya in the Benares school in matters left doubtful by the Mitakshara, I am unable to ascept a view which subordinates the Mitakshara to a merely possible interpretation of the text of the Viramitrodaya.

I am not unmindful of the dictum laid down by the Calcutta High Court in the case of *Gunesh Chunder Roy* v. *Nil Kamul Roy* (18). In that case the contest was between a sister's son ans the mother's siste's son. Preference was given to the sister's son as he cenferred greater spiritual benefits upon the soul of the deceased than a mother's sister's son. In that case the test of spiritual benefits was applied, as it was held that in the Mitakshara itself the respective positions of the parties were not definitely settled and the general principle of the Hindu law was therefore applied to determine the issue. The decision in that case is nonetheless consistent with the general principle of the Mitakshara based upon affinity of blood. It is also quite evident that the Mitakshara gives preference to the male line over the female line. The Mitakshara kinsmen ex parte paterna have preference over kinsmen ex parte meterna. The text of the Mitakshara already quoted clearly indicates that Bandhus ex parte paterna should be preferred to Bandhus ex parte materna. This is a view that is supported by the order of succession of Atma Bandhus laid down by Dr. Jogendra Nath Bhattacharya and Pandit Raj Kumar Sarvadhikari. According to these learned authors the first group in order of merit is made up of Bandhus who are sons of the daughters of the family of the propositus.

The second group in made up of sons of daughter's son of the family. The third group is composed of sons of daughter's daughters of the family, and it is in this group that father's daughter's daughter's son has been placed and is the seventeenth in the list given in Trevelyan's Hindu Law. On the other hand, mother's brother's son is outside these three groups and has the 23rd place in order of merit as an Atma Bandhu. This is evidently due to the Mitakshara preference of the Bandhus of the deceased connected with him through his father over those connected through his mother. The principle of

the Mitakshara has been the guide in the decisions given in *Saguna* v. *Sadashiv* (15) and *Ram Bharos* v. *Ram Parshad* (21). This is also the view taken in *Sundrammal* v. *Rangasami Mudaliar* (12) and was followed in *Balusami Pandithar* v. *Narayana Rau* (11). In the last case the doctrine of religious efficacy based upon the authority of the Viramitrodaya was dealt with. Their Lordships who decided this case, while unwilling to hold that the doctrine in question could never be resorted to in dealing with difficult questions arising under the Mitakshara and for which no rule was expressly or impliedly stated in the treatise of the Benares school, did nevertheless emphatically lay down the rule that the doctrine of the Viramitrodaya was not to be resorted to in derogation of the great principles governing the law of inheritance under the Mitakshara. The competition in that case was between a sister's son's son of the deceased and his maternal uncle's son. Their Lordships held that the latter had no preference, inasmuch as one of the pervading principles of the Mitakshara law of inheritance was that the nearer line excluded the more remote. The sister's son's son, tracing his descent from the father of the propositus, was given preference over the maternal uncle's son who traced his descent from a more remote ancestor, namely, maternal grandfather. It is quite evident that the decision in the case turned on the nearness or propinquity of blood, and not religious service. The principle has been applied by the Allahabad and Calcutta Courts to a reversionor of the full blood excluding one of half blood [vide *Suba Singh* v. *Sarafraz Kunwar* (25) and *Sham Singh* v. *Kishun Sahai* (44)]. It seems to me that these principles governing inheritance under the Mitakshara are clearly deducible from the well-known text of Manu "to the nearest Sapinda the inheritance next belongs."

In the case before us the sister's daughter's son seems to have two distinct advantages over the maternal uncle. Firstly, he descends from the father of the propositus, while the other from the maternal grandfather. Descendants of the nearer ancestor exclude those of the more remote. Secondly, though both are Atma Bandhus, the sister's daughter's son is ex parte paterna unlike the mother's brother who is ex parte materna. These advantages are based upon the broad principles of the law of inheritance laid down in the Mitakshara. Can it therefore be said that the authority of the Viramitrodaya is sufficient to outweigh the principles of the Mitakshara? I think not. There is no authority for such a proposition. I am unable to accept the view that on any point on which the principles of the Mitakshara are clear the authority of the Viramitrodaya can have any place [vide *Appandai Vathiyar* v. *Ragubali Mudaliar* (16), and *Ram Charan Lal* v. *Rahim Bakhsh* (17)]. I do not therefore think that the capacity to offer oblation can be permitted in the present reference to influence the decision. This view is also supported by a decision of the Madras High Court [*Subramania Mudaliar* v. *Ranganathan Chettyar* (13)]. In this case the rival claimants were sister's son's son of the propositus and his maternal uncle. The decision was against the latter and in favour of the former.

One of the disqualifications of the sister's daughter's son in competition with the maternal uncle was pointed out by the learned vakil for the respondent to be the intervention of two females in the case of the former. I do not think there is any substance in this contention. The rival claimants are no doubt both Atma Bandhus, but as has already been pointed out, the sister's daughter's son is of a nearer line and is also ex parte peterna. The rule based on the intervention of two females is therefore inapplicable to the present case, where the claimants do not stand on the same place [vide *Krishna Ayyangar* v. *Venkatarama Ayyangar* (10)]. It is only when all considerations are equal that the rule applies [vide *Tirumalachariar* v. *Andal Ammal* (14)]. It was suggested in the course of his address by the learned vakil for the respondent that the decisions of the Madras Court on the points arising in the present case were in the light of the Mitakshara law as understood in the Madras Presidency and probably influenced by the text of the Smriti Chandrika and the Saraswati Vilas, which are high authorities in that province but not here. It is worthy of note that neither of these authorities contains any text laying down any order of precedence among Bandhus of each of the three classes inter se. All that they contain is reproduction of what is laid down in the Mitakshara. This feature of these two books was noticed in *Ram Charan Lal* v. *Rahim Bakhsh* (17). Nothing has been placed before us to establish the proposition that the decisions of the Madras Court on the

(44) [1907] 6 C L J 190.

issues raised in this case are inconsistent with the principles of the Mitakshara as expounded by such authorities as Mayne, Trevelyan, Golap Chandra Sarkar Sastri, Bhattacharji and Sarvadhikari. Nor has any case-law been relied upon to show that the cardinal principles of the Mitakshara have received a provincial interpretation in the Madras decisions. Having given my most careful consideration to the reference my opinion is that the sister's daughter's son has preference over the maternal uncle under the law of inheritance as laid down in the Mitakshara.

Thornhill, J.—The appellant, Uma Shankar Prasad, claims to succeed to the estate of Chuman Lall, deceased on the ground that he, as sister's daughter's son of the said deceased, must, under the Mitakshara Law of Inheritance, be preferred to the maternal uncle of the said deceased. Both are Bhinna Gotra Sapindas or Bandhus. It is admitted the sister's daughter's son confers no spiritual benefits on the deceased whereas the maternal uncle does. It was on this account the learned vakil for the appellant devoted a considerable time to the meaning of "Sapinda" relationship. He has authoritatively shown that the word "Pinda" as used in the Mitakshara is used in the sense of "body" and not in the sense of "funeral cakes" and that Sapindaship is based upon community of corporeal particles, or, in other words, upon consanguinity. The Mitakshara, after enumerating the three classes of Bandhus, that is to say, those related to the person himself, those related to his father and those related to his mother, declares that "by reason of mere affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended.

Thus it would appear that the order of priority of the three classes of Bandhus is established, but the Mitakshara lays down no rules for our guidance as to the order of succession inter se of the Bandhus comprised in each class, but case-law has made it clear that in the system of inheritance under the Mitakshara school propinquity or nearness of relationship is the guiding principle of determining the inheritance. The Viramitrodaya by Mitra Missir, which is an authority to be looked to of what may have been left doubtful by the Mitakshara [*Gridhari Lall* v. *Government of Bengal* (2)] says at p. 194: "Greatness of propinquity is alone the criterion of succession."

The method of counting Sapinda relationship according to the Mitakshara is referred to in Mayne, Edn. 8, p. 707, but no matter what method of counting is adopted, the maternal uncle in the present case would be nearer in decree of relationship. It is, however, argued that the appellant's claim must be postponed in conformity with the two rules which are to be found in Trevelyan's Hindu Law, Edn. 2, p. 401:—(1) In each of these classes as between cognates related through the father of the deceased and those connected through his mother, preference is given to those related through his father. (2) Subject to the above, the nearer line excludes the more remote.

The former of these rules appears to be founded on *Sundrammal* v. *Rangaswami Mudaliar* (12). There the plaintiffs compromised with a number of the defendants and the competition for the decision by the Court rested between the males and females. The case does not appear to me to satisfactorily lay down any cardinal rule. In *Tirumalachariar* v. *Andal Ammal* (14) the competition was between Bandhus of equal degree in nearness to the propositus. The learned Judges in their judgment stated: "We base our decision on the general preference exhibited by the Mitakshara for the male over the female line. We think that that preference, of which it is unnecessary to give instances, may legitimately be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes only one female link, to that claimant who is separated from the stem by two such links."

This seems to indicate that preference of a male line over female was resorted to because the competition was between Bandhus of the same class and in the same degree of propinquity. There has been one case, however, which has been referred to, *Madho* v. *Janki* (35), decided in the Nagpur Judicial Commissioner's Court, where a competitor connected through the father, though further removed from the propositus by one degree, was preferred to a competitor connected through the mother. There seemed to be a doubt in the mind of the Court as to whether the successful competitor was a Gotraja Sapinda or a Bandhu,

and admittedly the law applied was the Mitakshara as interpreted and followed in Western India. It cannot, therefore, be taken as laying down a principle to be followed in the present case.

The second rule appears to be based upon the decision in *Balusami Pandithar* v. *Narayana Rau* (11), where it is said that "the doctrine of religious benefit ought not to be resorted to in derogation of the great principles pervading the law of inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote." In this case also the competition was between persons who were removed from the propositus, or deceased owner, by an equal number of degrees of relationship. This was followed in *Krishna Ayyangar* v. *Venkatarama* (10), where the competitors were also removed from the propositus in an equal number of degrees and where the Court decided that an Atma Bandhu had preference to a Pitri Bandhu. Such rules, if applied in the present case, would seem to me to be completely inconsistent with the principle, "Greatness of propinquity is alone the criterion of succession." It is pointed out in *Mohandas* v. *Krishnabai* (28) that the maternal uncle occupied amongst Bandhus an important status. The passages from the Mitakshara, quoted at pp. 40 and 41 of the judgment in the Calcutta Full Bench case, *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty* (1), tend to show that the maternal uncle was regarded by Yajnavalkya as the principal representative Bandhu, while the passage from the Viramitrodaya cited at p. 42 is still more clear upon the point.

In Upper India however where the Viramitrodaya is taken as the greatest authority, Ch.3, Part 1, S. 2, pp. 157, 158, there is a distinct indication that as between Bandhus of the same class a rule of preference may be found in the quantity of spiritual benefit which they confer. In *Buddha Singh* v. *Laltu Singh* (6), where the dispute was between agnates, the Privy Council made it clear that while under the Mitakshara the Sapinda relationship arises from community of blood and the right to offer oblations, still it does not exclude the right to offer oblations from consideration as a test of propinquity or nearness of blood. No case has been cited showing that the right to offer oblations may not be taken into consideration as a test of propinquity when dealing with the claims of Bandhus of the same class. I would, therefore, hold on the ground of propinquity the maternal uncle has preference over the sister's daughter's son.

By the Court.—The order of the Full Court is that in a family governed by the Mitakshara school of law the maternal uncle of the last male owner is preferred to the sister's daughter's son as next heir to the estate. The case will be returned to the Division Bench for disposal.

Final Judgment.

Dawson-Miller, C. J. and Ali Imam, J. (*August* 6, 1918).—This is an appeal from a judgment of the Additional Subordinate Judge of Gaya, dated 16th June 1915. The suit was instituted on 3rd March 1913. The plaintiff seeks a declaration that he is the nearest Bandhu and legal heiir of the property of Babu Chaman Lal Upadhya and entitled to succeed to his estate after the death of his widow, who died on 30th August 1912. He further claims a declaration that neither of the defendants, whose claims to the estate are based upon a deed of sale and a deed of adoption executed by the widow a few months before her death, has any lawful title to the property and that the said deed of sale and deed of adoption may be declared void and that possession of the property may be given to the plaintiff. Chaman Lal died on 23rd November 1910, leaving a widow, Mt. Parmeshwari Koer but no issue. Under the Mitakshara law which governs the family, his wife Parmeshwari succeeded as his next heir taking a life-interest, and on her death on 30th August 1912 the succession to Chaman Lal's estate reopened. The plaintiff Uma Shankar Prasad Prasari claims to be the nearest Bandhu, there being no son or agnatic relation of Chaman Lal alive. He traces his relationship through his mother Poon Bibi, who is the daughter of Chaman Lal's sister Mt. Chuni Bibi. Defendant 1, Mt. Nageshwari Koer, was a sister of Mt. Parmeshwari and she claims an 8 annas share in the property, alleging that she acquired it by purchase from her sister during the latters' lifetime by a Kabala, dated 28th April 1912, the sale being for valuable consideration and justified by legal necessity. Defendant 2, Ganesh Prasad Pandey, is a nephew of Nageshwari, being the son of her deceased brother Ram Prasad Pandey, and he claims the remaining half of the estate which was not acquired by his aunt

Nageshwari under the kabala referred to, alleging that he is the adopted son of Chaman Lal, the ceremony having been performed by Chaman Lal's widow Parmeshwari after her husband's death with his verbal permission and under his instructions, and in support of this he relies upon a deed of adoption executed by Parmeshwari on the same day as the kabala just mentioned in favour of Nageshwari.

It is clear that if the defendants' case can be made out, they would defeat the title of the plaintiff even if the proved his relationship to Chaman Lal. The defendants however by their written statements set up a second line of defence. They say that the plaintiff is not the son of Poon Bibi and they go further and say that Poon Bibi never had a child at all and, therefore, the plaintiff cannot be her son. The written statement on behalf of defendant 1 states iin para. 3 as follows:— "That the plaintiff is not the son of Poon Bibi and is not the grandson of *Musammat* Chuni Bibi. As a matter of fact no child has been born to Poon Bibi."

The written statement on behalf of defendant 2 also says in para. 4: "That the plaintiff's allegation in para. 1 of his plaint that he is the son of Poon Bibi the daughter of Chuni Bibi, who is the sister of the late Babu Chaman Lal Upadhya, is entirely false, and the genealogical table therein referred to is also untrue and false and incomplete and has been fabricated to support a false case, and as a matter of fact no child has been born to the said Poon Bibi and the plaintiff cannot be and is not either the son of Poon Bibi or grandson of Chuni Bibi." It would have been sufficient for the defendants simply to deny the parentage of the plaintiff, but they have by their written statements set up a case which they called evidence to support that it was entirely untrue to say that Poon Bibi had ever borne a child. At the trial the learned Subordinate Judge arrived at the conclusion that the plaintiff was not the son of Poon Bibi on the ground that she had not in fact given birth to any child. He however decided that assuming the plaintiff to be the son of Poon Bibi he was not the nearest heir to Chaman Lal, but that the latter's maternal uncle who was alive had a prior claim to inherit his nephew's property. Having come to this conclusion, he thought it was not necessary to decide the other issues which were raised by the defendants as to the Kabala and the deed of adoption upon which they relied. We should like to say here that in our opinion it is desirable when issues of fact are raised before the Court of first instance that those issues about which evidence has been adduced should be considered and determined by the trial Judge notwithstanding that the determination of one issue only may decide the case in favour of one or other of the parties. In the event of the judgment being overruled on appeal upon the issues in fact decided, it becomes necessary to send back the case on remand to the Court of first instance to have the other issues determined, and this must necessarily involve additional expense to the parties which might have been avoided had those issues been determined in the first instance.

From this judgment the plaintiff has appealed and asks this Court to overrule the findings of fact as well as the conclusions of law arrived at by the learned Subordinate Judge. There are certain general principles which ought to guide the Court of appeal in dealing with questions of fact which have been decided by the trial Court. The Court which tries the case has a great advantage over the Appellate Court in that the Judge of first instance has an opportunity which is denied to the Appellate Court of observing the demeanour and behaviour of the witnesses when giving their evidence before him and has special facilities for judging of their credibility, and therefore as a general rule the Court of appeal should not readily disturb the findings of fact arrived at by the trial Judge, even if it might be inclined to take a different view from reading the evidence, but if the appellate Court is satisfied beyond all reasonable doubt on considering the evidence that the findings are erroneous, then it ought to interfere. Or again if the reasons given by the Judge of the lower Court for arriving at his conclusions are such that they cannot be supported, then the Court of appeal is clearly entitled to disregard those findings and form its own independent judgment of the facts from the evidence and probabilities of the case. As already mentioned, the case made by the defendants both in their written statements and by their evidence is that Poon Bibi never had a child at all. Both Poon Bibi and her husband have given evidence to the effect that the plaintiff is their son. This is supported by a considerable volume of evidence

of relations and neighbours who support the plaintiff's case.

It is inconceivable that Poon Bibi and her husband could possibly be mistaken as to the fact of her having had a child or children, and it is highly improbable that the neighbours and relations who speak to the circumstances surrounding the birth of this child could have been deceived as to the fact that Poona Bibi had given birth to a child. The nature of the defence therefore involves a charge of wilful conspiracy to defraud, certainly on the part of Poon Bibi and her husband, and almost as certainly involves in that conspiracy the others who were near neighbours at the time and who speak to the events connected with the birth of a child by Poon Bibi. Moreover, the fact that a woman has borne a child is one which can be established without any reasonable doubt by proper medical examination by qualified doctors, and in the present case evidence of this nature has been adduced by the plaintiff in the form of certificates given by two lady doctors holding a distinguished position in charge of the Dufferin Hospital at Lucknow, and one of these ladies has also given oral evidence to the effect that Poon Bibi has at some previous time borne a child.

Altogether apart from Poon Bibi and her husband Kalika Prasad, some 7 witnesses gave evidence to the effect that the plaintiff was Poon Bibi's son and in addition two medicial certificates were put in, one dated 9th September 1913 signed by Mrs. Huffton, the Lady Superintendent of the Dufferin Hospital at Lucknow who was temporarily in charge during the absence of Miss O'Brien, the permanent doctor in charge, and another dated 4th February 1914 signed by Miss O'Brien who had then resumed her duties and who was subsequently examined as a witness. These documents certify that Poon Bibi had been examined by the ladies in question and that she had at some period borne a child, and Miss O'Brien's evidence is to the same effect. There is therefore a large volume of positive evidence in support of this part of the plaintiff's case.

The evidence of the defendants on this issue is of a negative character only and is to the effect that Poon Bibi never had a child. The defendant's main witnesses consisted of the defendant Nageshwari Koer herself who is a sister-in-law of Poon Bibi, Lalita Bibi a sister of Poon Bibi, and Chandrika Koer the wife of the distant relation. In addition Ram Lal and Ram Saran Ram, old servants of Chaman Lal and now in the service of one or other of the defendants, were called and stated that Poon Bibi never had a son. The other witnesses who were called spoke to the other issues in the suit but added nothing materal to the question now under consideration. Poon Bibi and her husband Kalika Prasad as well as the principal witnesses called for the plaintiff resided at Badaun near Lucknow, whereas the defendants and their witnesses resided in the District of Gaya some hundreds of miles distant. The plaintiff's witnesses therefore would obviously be in a better position to speak to the truth of the plaintiff's parentage than those of the defendants, but at the same time one would hardly expect that the sister and sister-in-law of Poon Bibi could have remained in ignorance of the fact that that lady had borne a son. Although there was nothing in the nature of a quarrel between them, Poon Bibi does not appear to have had any close association with her relations at Gaya since her marriage, which took some 20 years or more before the date of the suit. During that time, so far as the evidence goes, she visited Gaya very seldom and only on ceremonial occasions, one being when Chaman Lal died and another on the death of his widow. It appears from the evidence of Lalita Bibi that she was anxious that the defendants should succeed and would be very grieved if they should fail, and the three ladies who supported the defendants' case, including Nageshwari herself, were undoubtedly on very intimate terms with each other. Both Lalita Bibi and Chandrika affirmed that they had not been informed by anybody as to the nature of the evidence that would be required of them and that until the moment they were examined they had no idea as to the facts they would be asked to depose to. Such a state of things is so improbable that it casts considerable suspicion upon the ingenuousness of their evidence.

Looking at the case broadly, the first outstanding feature is that the existence of the plaintiff as the reputed son of Poon Bibi and her husband cannot be disputed. The defendants, beyond denying his parentage, do not attempt in their written statement to set up any affirmative case alleging who his parents were. It was suggested, however, in the course of the trial that he was probably the son of Kalika Prasad by his first wife, it being admitted that Poon Bibi was the second wife.

The evidence on this point, which is not contradicted, appears to make it quite clear that although Kalika Prasad had been married some years before he married Poon Bibi, his first wife died before the Gaona ceremony was performed, and therefore the marriage was never consummated. On reading the whole of the evidence we should have no hesitation in coming to the conclusion that the plaintiff has established satisfactorily that he was the son of Poon Bibi and Kalika Prasad, but as the learned Subordinate Judge has arrived at a different conclusion it becomes necessary to examine his judgment with care to see how he arrives at that conclusion. The learned Judge in the earlier part of the judgment has made a calculation, based upon the evidence of Poon Bibi herself and the evidence contained in one of the medical certificates, from which he arrived at the conclusion that the plaintiff, being admittedly 18 years of age or over at the time when the judgment was delivered, could not possibly have been the son of Poon Bibi. With respect to the learned Judge we cannot help feeling that he has misinterpreted the effect of Poon Bibi's evidence, where she states that she was married 20 or 23 years ago. He has assumed that the effect of this evidence is that Poon Bibi's marriage according to her own statement took place either exactly 20 years ago or exactly 23 years ago, and that in either case the age of the plaintiff coupled with the other evidence in the case does not fit in with that statement. If however the marriage took place somewhere between 20 and 23 years previously to the date when her evidence was given, which was in March 1914, the difficulty which weighed on the mind of the learned Judge at once disappears.

It is a well-known fact that Pardanashin ladies frequently have no very definite and precise ideas of time or dates and are not accustomed to calculate the number of years that have passed since a given event with any great nicety, and it may safely be assumed that when Poon Bibi in answer to questions put to her in cross-examination stated that she was married "about 20 or 23 years ago", she was allowing a margin to cover an event about the exact date of which she was not absolutely positive. The certificate (Exhibit 1) relied upon by the learned Judge as his starting point was that granted by Miss O'Brien, in which she says that she is of opinion that Poon Bibi is about 39 years of age on the date when she examined her, which was on 4th February 1914. This agrees with Poon Bibi's own evidence given in the following month, when she deposed that she was 39 years of age and that her son was then 18. She further says that she was married at the age of 17 and that her son was born 4 years later. Taking the time when her evidence was given, if she was then 39 years of age and was married at the age of 17, that would mean that she had been married 22 years and if her son was born 4 years after her marriage that would make him exactly 18, which appears to have been in fact his age at that time and unless it is to be taken that her statement that she was married about 20 or 23 years ago is inconsistent with her having been married in fact 22 years ago, the conclusion arrived at by the learned Judge does not appear to be well founded. It is only necessary to read that portion of his judgment in which he deals with this matter to see how he has been misled. After stating that the onus of proof is on the plaintiff he refers to Poon Bibi's evidence and continues:

"Her deposition was begun to be recorded on 28th March 1914. The lady doctor's certificate Ex. 1 shows her age on 4th February 1914 to be about 39 years only. She also gives her age in the deposition to be 39 years. She says that she was married at the age of 17 and she was married 20 or 23 years ago from the time of her deposition. She could not have been married 23 years ago, as in that case her age at the time of her deposition would be 40 years, which neither she nor the doctor says. I therefore have no alternative but to take the other figure, namely, 20 years from March 1914, as the probable time of her marriage from her own words. She then says that 4 years after her marriage she gave birth to a male child, meaning apparently the plaintiff. Therefore the plaintiff was born to her 16 years ago from 1914. Now therefore the plaintiff would be 17 years of age or more properly speaking 17 years and a few months old, i. e., not even a major. The plaintiff however says that he is a major now. From these it follows that Poon Bibi's first child, if there was one, is not the plaintiff who is now over 18 years of age, though she apparently means him as her first child." It seems to us with great respect to the learned Judge that having rejected 23 years ago as the

date of Poon Bibi's marriage he was not justified in saying that he had no other alternative but to take the other figure, namely, 20 years ago, as the probable time of her marriage from her own words. An obvious alternative was to take a period somewhere between 20 and 23 years, which would make the whole of the evidence consistent. Another reason why the Judge rejected the evidence on behalf of the plaintiff on this issue was because from the appearance of the plaintiff whom he saw in Court, it seemed to him that he was in fact over 21 years of age. There are few things more difficult than to guess the age of a person by his appearance within 2 or 3 years, and we do not think that the learned Judge was entitled to rely upon his own judgment based on the appearance of the plaintiff in coming to the conclusion that he was in fact 21 years of age and not, as he would have been in June 1915 when the judgment was delivered, something over 19 years if the evidence of his mother is accepted.

The only other reason which influenced the learned Judge in rejecting the evidence as to the plaintiff's age was a statement made by the witness Raghunandan Missir, who stated that on the birth of the plaintiff he was sent by Chaman Lal with clothes, dolls, etc., to Budaun and that that was 17 or 18 years ago. That evidence was given in June 1915 when the plaintiff would be about 19 years of age, but the fact that this witness may have been a year or even two years out in his calculation appears to be such a trivial matter that it ought not to have weighed with the learned Judge as against the great bulk of positive evidence given by the witnesses who were called on behalf of the plaintiff. It is quite true that the evidence of this witness was somewhat discounted by the fact that he had on a previous occasion in an affidavit sworn that the age of Nageshwari Koer, the defendant, was about 25 years, whereas she was obviously older than that. But assuming, as the Judge was quite entitled to do, that this witness was unreliable, that was not sufficient reason for discarding the whole of the other evidence given by the plaintiff's witnesses.

Turning to the evidence of the lady doctors it seems to us that the learned Judge has given no sort of reasons which can be accepted for refusing to believe this evidence. The first certificate was granted on 9th September 1913, when Poon Bibi was examined by Mrs. Huffton. On applying later to endeavour to get this lady to attend as a witness on behalf of the plaintiff it was discovered that she had left the Dufferin Hospital and had gone to England. The plaintiff thereupon applied for a further examination by Miss O'Brien, who had resumed the duties of doctor in charge when Mrs. Huffton went away, and a second examination was accordingly made, this time by Miss O'Brien, on 4th February 1914, when that lady granted the certificate already referred to, and on 21st January 1915 Miss O'Brien was examined on commission on behalf of the plaintiff. It appears that Poon Bibi gave evidence on commission on 28th March 1914, that is, something less than two months after Miss O'Brien's certificate had been granted. Nothing was said by Poon Bibi in her evidence either about the certificate or about the fact that she had been medically examined shortly before by Miss O'Brien and previously by Mrs. Huffton and these certificates had not at that time apparently been filed in the case. This fact appears to have weighed very much with the learned Judge, and from that he argues that the certificates could not really have been obtained on the dates alleged but must have been obtained at a much later period and after Poon Bibi gave her evidence, because she did not mention them and they were not filed until 2nd January 1915. He then goes on and says that it is doubtful whether the real Poon Bibi was produced before the lady doctors at all and arrives at the conclusion that the certificates are so suspicious that he cannot act upon them.

The suspicious nature of these certificates, he says, is corrobrated by the persistent refusal of Poon Bibi to be examined by any Gaya lady doctor, and then the learned Judge continues as follows: "She had experience of lady doctors of Lucknow and she suspected that the Gaya lady doctors could be purchased with money and thus I think her refusal so persistent. Had she really given birth to a child and had she any reason to think that the lady doctors would do their work honestly, then I think she would not have refused in the way she had done in this case. I cannot from these certificates hold that Poon Bibi, the sister's daughter of Chaman Lal and the wife of Kalika Prasad, gave birth to any child. Even if these certificates be considered reliable about which I have already said that they are not, I cannot think

that they would go to show that the plaintiff is the son of Poon Bibi." Now it will be seen from the reference which I have made to the learned Judge's judgment that he first of all doubts the genuineness of the certificate of 4th February 1914 granted by Miss O'Brien, and, secondly, he doubts whether Poon Bibi was in fact the lady who was examined by Miss O'Brien, and, thirdly, he hints pretty clearly that the evidence of these two ladies had been deliberately bought by those acting on behalf of the plaintiff. Not only is there no evidence to justify these conclusions but it seems to us that the slighest consideration of the circumstances of the case must lead to the conclusion that these findings of the learned Judge are wholly unwarranted and cast an unmerited slur upon the character of two ladies who have been devoting their lives to a most laudable object.

First of all turning to the evidence of Poon Bibi, it is obvious that at the time when she gave her evidence, which was rather less than two months after the date of Miss O'Brien's certificate, she at all events was acquainted with Miss O'Brien's because when asked in cross-examination whether she was willing to be examined by a lady doctor, she stated that she had no objection to being examined but would not be examined by any lady doctor from Gaya where the defendants live, and she then stated after her examination was completed that she would keep a lady doctor of her own, Miss O'Brien of Lucknow, who treated her by her side if she were to be examined by a lady doctor of any other place. Poon Bibi could obviously not have made a statement of this sort unless at that time she had at least been acquainted with Miss O'Brien, and from the evidence of Miss O'Brien herself it appears that the first occasion upon which she saw Poon Bibi at all was on 4th February 1914 and that although she was not her family doctor, she had seen her 3 or 4 times since and had treated her. It is therefore quite impossible to believe that this certificate, dated 4th February 1914, was not obtained until many months later, as found by the learned Judge. Again it seems to us that the learned Judge's suspicions that the lady produced for examination by the doctors was not Poon Bibi is totally refuted by the evidence of Poon Bibi herself, who at that time stated in the passage of her evidence already referred to that she would like Miss O'Brien to be present if any examination were made by the defendants' doctor. If in fact those conducting the case on behalf of the plaintiff, including Poon Bibi herself, which is the suggestion, had been guilty of the fraud of obtaining some other lady to impersonate Poon Bibi for the purpose of medical examination and had in this manner imposed upon Miss O'Brien, it is inconceivable that Poon Bibi should insist upon Miss O'Brien being present when a further examination was made, which would inevitably result in the fraud being discovered by Miss O'Brien.

Again if these certificates were concocted and were not obtained until sometime after Poon Bibi had given evidence in March 1914, there would appear to be possible reason for dating them at a much earlier period. Or if again the lady doctors were themselves involved in this conspiracy, which is suggested by the learned Subordinate Judge, it would seem to follow that the certificate from Mrs. Huffton was obtained from her at a time when she had left India and gone to England and that those conducting the case on behalf of the plaintiff had gone to the trouble of writing to England to a lady doctor whom they did not know, offering her a bribe to forge a certificate on behalf of an Indian lady who was nothing to her, and that the lady doctor in question had consented to making herself a party to this conspiracy. For these reasons it seems to us that the grounds upon which the learned Judge based his decision in rejecting the plaintiff's evidence cannot be supported, and once it is admitted that Mt. Poona Bibi had at some time or other borne a child, the evidence of the defendant's witnesses who pledged their word to the fact, which they positively swear to, that she never had a child at all, is entirely unreliable and cannot be accepted. In these circumstances having from a perusal of the evidence come to the conclusion that the preponderating weight of evidence is in favour of the plaintiff, it follows that in our opinion that part of the learned Judge's judgment which finds that the plaintiff is not the son of a daughter of a sister of Chaman Lal Upadhya must be set aside and the plaintiff must be held to have established the fact that he is the son of Kalika Prasad and Poon Bibi.

This however is not sufficient to entitle him to the declaration No. 1 prayed for in the plaint to the effect that he is the next reversioner as nearest Bandhu and legal heir of Chaman Lal

Upadhya, seeing that Raghunandan Missir, the maternal uncle of Chaman Lal, was alive at the date of the latter's death. When this appeal originally came before this Bench, the question of whether the plaintiff, assuming him to be the son of Poon Bibi, was entitled to succeed to Chaman Lal's property in priority to Raghunandan was considered and as the question appeared to be one of some doubt and difficulty, it was referred to a Full Bench of five Judges, who after considering the matter found by a majority that Chaman Lal's maternal uncle Raghunandan was under the Mitakshara law entitled to succeed in priority to the plaintiff. The result is that the plaintiff in this case fails to establish his claim to the property in question and this appeal must be dismissed, but having regard to the fact that the greater part of the argument before us was directed to the question of fact which has been decided in favour of the appellant, each party will bear their own costs of the hearing before this Division Bench. The costs of the reference to the Full Bench have already been dealt with in the judgment on that reference.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 40

CHAMIER, C. J. AND ROE, J.

Mt. Naina Koer and *others*—Defendants—Appellants.

v.

Gobardhan Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 221 of 1916, Decided on 27th November 1916, from decision of Dist. Judge, Mozaffurpur, D/- 13th December 1916.

Evidence Act (1872), Ss. 32 (2), 157 and 159—Entries of births and deaths in chaukidar's diary made by third person at his request—Chaukidar dead—Entries are not admissible under S. 32 (2) but under S. 157 and possibly also under S. 159.

A chaukidar who was an illiterate person got other people to make entries in his diary for him relating to the birth and date of a certain person. The persons who made these entries were called at the trial and deposed that they had made the entries at the request of the chaukidar. The chaukidar was dead at the time of the trial:

Held: that the entries were not admissible in evidence under S. 32 (2): but were admissible under S. 157 and possibly also under S. 159, Evidence Act: 1 *I. C.* 376, *Dist.* [P 40 C 2]

Ali Imam—for Appellants.

Pugh—for Respondents.

Chamier, C. J.—This is a second appeal in a suit brought by the respondents for possession of certain property which at one time belonged to one Ramudar Singh. In order to succeed in their suit the respondents had to prove that Ramudar Singh had a son, Ram Prasad Singh, who survived his father. The first Court (the Subordinate Judge of Mozaffurpur) held that the respondents had failed to prove that Ramudar Singh had a son at all. But on appeal the learned District Judge held otherwise; in his opinion the evidence adduced by the respondents proved that Ramudar Singh had a son, Ram Prasad, and that Ram Prasad survived his father.

Various questions have been mooted by counsel for the appellants. The only question which we can consider in second appeal is the question whether the District Judge was right in admitting in evidence certain entries in the diary of a deceased chaukidar. Before the Subordinate Judge it seems to have been contended that the entries were admissible under S. 35, Evidence Act. The Subordinate Judge held that they were not. On appeal the District Judge agreed with the Subordinate Judge that the entries were not admissible under S. 35 but he held that they were admissible under S. 32, sub-S. (2), Evidence Act. He considered that they were statements made by the chaukidar in the ordinary course of business and in support of that view he referred to the case of *Sheonandan Singh* v. *Jeonandan Dusadh* (1). That case is by no means on all fours with the present case and I do not consider it necessary to express any opinion as to the correctness of the decision in it. In my opinion the entries in the diary in question are not admissible under S. 32, sub-S. (2) for according to the evidence, those entries were not made by the chaukidar at all. According to the evidence the chaukidar who was an illiterate person got other people to make entries in his diary for him. The persons who made the entries relating to the birth and death of Ram Prasad Singh were called at the trial and they both deposed that they made the entries at the request of the chaukidar. It is therefore unnecessary to consider the question which has been argued before us, namely, whether or not the entries in the diaries were made in the ordinary course of business within the meaning of S. 32, sub-S. (2). But, in my opinion, the entries are admissible in evidence under either S. 157 or S. 159, Evidence Act or possibly under both those sections. As already explained, the writers of the entries in

(1) [1909] 1 I C 376.

question were produced as witnesses at the trial; the diary was put into the hands of each of these witnesses and each of them attested the entry made by him in the diary. It is quite clear that the entries are admissible under S. 157 and if the witnesses had been more carefully examined, it would perhaps have been possible to hold that the entries were admissible under S. 159 also. The evidence of one of the witnesses leaves it very doubtful whether he was using the diary for the purpose of refreshing his memory. The evidence of the other witness leaves very little doubt on the subject.

It was contended by counsel for the appellants that even if this Court held that the entries were admissible under S. 157 or under S. 159, Evidence Act it should not accept the findings of fact arrived at by the learned District Judge. Counsel for the respondents, on the other hand, urged that even if we hold that the entries were not admissible we should accept the findings of fact recorded by the learned District Judge because his findings rest not only on the entries in the chaukidar's diary but also upon oral and other documentary evidence. I think there can be no doubt that the learned Judge attached considerable importance to the entries in the diary. But, in my opinion, we ought to accept the learned Judge's findings though I cannot agree with him that the entries in the diary are admissible under S. 32, sub-S. (2), Evidence Act. The learned Judge accepts the evidence of the persons who were called to attest the entries in the diary. He also definitely accepts the evidence of the police constable who was called to prove the initials of a constable which appear in the diary. It is therefore quite clear that the learned Judge was satisfied that the diary was not a recent fabrication and that it was in existence at the time that the entries were made. The importance of the entries lies in the fact that they are contemporaneous records of the birth and death of Ram Prasad Singh. I feel no doubt that if the learned District Judge had admitted the entries under S. 157 or under S. 159, Evidence Act he would have accepted the respondent's case as true. In these circumstances I think that we ought to accept the findings of the learned District Judge, and, accepting them, I would dismiss the appeal with costs.

Roe, J. — I agree. I am strongly impressed by the fact that if the objection now raised had been taken before the learned Sub-ordinate Judge and had been pressed at the time the witness Sunder Lal was giving his testimony in regard to the birth of a son to Ramudar Singh, it would have been brought out in such a form that there could have been no room for doubt, that he was himself cognizant of the birth of that son, and had at or about the tiime of that birth made a statement in writing regarding it. I therefore concur in the order proposed and would dismiss the appeal with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 41

JWALA PRASAD AND COUTTS, JJ.

B. Keshawesarindra Sahi — Appellant.

v.

Debendra Bala Dassi—Respondent.

Appeal No. 10 of 1917, Decided on 9th August 1918, from Original Order of Sub-Judge, Chapra.

(a) Transfer of Property Act, Ss. 88 and 89 —Before coming into force of Civil P. C. of 1908 preliminary decree obtained under S. 88 —Judgment-debtor making default—Application made for order absolute—Proceedings held not affected by repeal of S. 89—No final decree is necessary— General Clauses Act (1897), S. 6.

Where before the coming into force of the Civil Procedure Code of 1908, a preliminary decree in a mortgage suit had been obtained under S. 88, T. P. Act, and the judgment-debtor having made default in payment of the decretal amount, an application for an order absolute under S. 89 of the Act had been made, and notice served on the judgment-debtor:

Held: (1) that the proceedings for order absolute were pending proceedings and were not therefore under S. 6, General Clauses Act, affected by the repeal of S. 89, T. P. Act; [P 45 C 1]

(2) that therefore the decree to be executed was the preliminary decree made absolute by the order of the Court, and that the proceedings being under S. 89, T. P. Act, no final decree was necessary. [P 45 C 2]

(b) Transfer of Property Act (1882), S. 89 —Order absolute during lifetime of judgment-debtor with notice and without objection by judgment-debtor—His legal representative cannot question validity of order.

Where an order absolute for the sale of mortgaged properties was made under S. 89, T. P. Act, during the lifetime of the mortgagor judgment-debtor and with notice to him and no objection was taken by him, it is not open to his legal representative to question the validity of the order made in execution proceedings. [P 46 C 1]

(c) Decree — Execution — Objection not taken in previous proceedings regarding validity of decree cannot be taken in subsequent proceedings.

Where several successive applications for execution of a decree are admitted and orders are passed thereon by a competent Court, without any objection being taken by the judgment-debtor re-

garding the validity of the decree, it is not open to him in a subsequent execution proceeding in respect of the same decree to contend that there is in fact no decree which can be executed. [P 46 C 2]

(d) Civil P. C. (1908), O. 32, R. 3—Sanction given to appear as guardian of minor judgment-debtor—Guardian duly acting—Absence of formal order of appointment is not fatal.

Where in an execution proceeding the Court by its action has given a sanction to the appearance of a person as guardian of a minor judgment-debtor and that person has so appeared and acted on behalf of the minor, the absence of a formal order of appointment under O. 32, R. 3, Civil P. C., is not fatal to the proceedings and the minor is bound by them. [P 48 C 2]

(e) Limitation Act (1908), Art. 182—Application asking for sale of different properties can be in continuance of previous application.

A decree-holder is entitled to treat an application for execution of a decree as in continuation of a previous application even when he wants to proceed to sell different properties. [P 51 C 1]

(f) Civil P. C. (1908), O. 21, R. 11 (2)—Material defect—Mistake in entering date of decree is not material defect.

An execution proceeding can only be vitiated by material defects. [P 51 C 2]

A mistake in entering the date of the decree in an application for execution is not a material defect so as to vitiate the proceedings. [P 51 C 2]

(g) Limitation Act (1908), Art. 181—Fraud of judgment-debtor in collusion with auction-purchaser—Sale set aside—Decree can be executed within three years from date of setting aside sale.

Where an execution sale is set aside on account of the fraud of one of the judgment-debtors in collusion with the auction-purchaser, the decree-holder has, under Art. 181, three years from the date of the setting aside of the sale within which to execute the decree. [P 52 C 2]

Hasan Imam, Rajendra Prasad and *Ambica Prasad Upadhaya*—for Appellant.

Rash Bekari Ghose, Purnendu Narayan Sinha, Shorashi Charan Mitter and *Naresh Chandra Singh*—for Respondent.

Judgment.—This is an appeal against an order of the Subordinate Judge of Chapra rejecting a petition of objection filed under S. 47, Civil P. C., in an execution case. The following are shortly the facts of the case:

On 29th August 1902 one Ramsunder Sahi, who was commonly known as the Lal Saheb of Manjha, borrowed Rs. 3,40,000 from the estate of Kumar Sirish Chandra Sinha of Paikpara near Calcutta by mortgaging his estate. At that time the Paikpara estate was in the hands of a Receiver, Mr. Miitter On 6th November 1902 Kumar Sirish Chandra Sinha died leaving a Will, which had been executed by him on 18th June 1902. By this Will his mother, Rani Devendra Balla Dassi and Kumar Satish Chanwra Sinha were appointed executors. On 24th July 1903 the executors applied for probate of the Will but the Receiver continued in possession. On 7th April 1904 Mr. Mitter was discharged from the receivership and one Mr. Halder was appointed. On 13th September 1907 Mr. Halder sued on the mortgage. On 26th May 1908 he obtained a preliminary decree. On 1st December 1908 he applied, under S. 89, T. P. Act, for an order absolute for sale of the mortgaged property. The order absolute was passed on 2nd January 1909 and on 27th January 1909 the first application for execution was filed. This was registered as Case No. 14 of 1909. On 18th February 1909 a notice under O. 21, R. 66, Civil P. C., was served and received by the Am-Mukhtear of the judgment debtor. Subsequently on 22nd February 1909 the decree-holder asked for time to make substitution in place of Lal Saheb, the judgment-debtor who had died. Time was allowed and on 5th March 1909 the decree-holder applied to substitute Hira Saheb, the brother of Lal Saheb deceased. The order of substitution was made on 13th March 1909 and on the same date a notice was ordered to be issued to Hira Saheb under O.21, R.66. It was then discovered that Lal Saheb had left two Wills, one in favour of Pertap Sahi, minor son of Sheo Pertap Sahi, and another in favour of Keshwa Sevendra Sahi, minor son of Hira Saheb, and that probate of both Wills had been applied for. The decree-holder therefore asked for substitution of both these minors and their fathers. Substitution was made but no guardian was appointed for the minors, and again notices under O. 21, r. 22, were ordered to issue. These notices were served and subsequently notices were issued under O. 21, r. 66. Hira Saheb and his son did not appear. On 6th August 1909 the Receiver of the judgment-debtor's estate made a payment of Rs. 6,039 to the decree-holder and on 21st August 1909 Sheo Pertap Sahi objected to the valuation. A miscellaneous case was started and the proceedings in the execution case were stayed until the hearing of this objection. On 9th October 1909 the objection petition was dismissed and the execution case was also disposed of, another petition being ordered to be filed. The matter of the Will was amicably settled and probate was ordered by the District Judge to be granted to Hira Saheb as guardian of the minor

appellant on 28th September 1909, but it was never taken out.

On 15th November 1909 a second application for execution was made by the Receiver of the decree-holder's estate. The application was made against Hira Saheb for himself and as guardian of his minor son, but no guardian was actually appointed by the Court. On 20th November 1909 there was an order for issue of notices under O. 21, r. 66, and on 1st December 1909 an application was made by the decree-holder that Rs. 2,000 had been paid by the receiver of the judgment-dobtor's estate. The sale proclamation was then issued and 7th February 1910 was fixed for the sale. Meanwhile Mr. Halder died and an application was made on behalf of the decree-holder for time to make substitution. Hira Saheb objected to time being granted, and eventually the following order was passed by the Court: "The present case should be disposed of, leaving it to the legal representative to make another application for execution." By this time another receiver Mr. Mozumdar had been appointed and on 18th March 1910 he made another, the third application for execution against Hira Saheb for self and as guardian of the minor, which was registered as Case No. 44 of 1910. Again no guardian was appointed. The usual notices were served and 2nd May 1910 was fixed as the date for the sale. Before the date fixed for the sale the decree-holder asked for permission to bid. This was granted, but at the same time Hira Saheb who had appeared on his own behalf filed a petition of objection to the execution proceedings on the ground that there was a mistake in the list of properties. The decree-holder asked to be allowed to amend the execution petition, but this was refused and on 28th May 1910 the execution application was dismissed, the decree-holder being directed to make a fresh application.

On 6th August 1910 Mr. Mozumdar made the fourth application for execution, which was registered as Case No. 107 of 1910. Again no application was made for the appointment of a guardian and no guardian was appointed by the Court. 17th November 1910 was fixed for the sale, but on that date Hira Saheb filed an objection under S. 47, Civil P. C., and the execution case was adjourned sine die. The decree-holder then made an application, stating that the receiver of Lal Saheb's estate had paid in Rupees 5,000 on 22nd November 1910 on account of the decree, and on 7th January 1910 the execution case was disposed of. The miscellaneous case was taken up and disposed of on 29th May 1911, On 14th June 1911 Mt. Mozumdar made the fifth application for execution, which was registered as No. 118 of 1911 and a date was fixed for the return of the notices under O. 21, R. 66, but on that date the minor filed an objection under S. 47, Civil P. C., through Hira Saheb his father and his guardian objected to himself (Hira Saheb) being made a party. This application was allowed and on the same date the execution case was dismissed. An appeal was filed to the High Court against the order dismissing the execution case and it was ordered to be revived and proceeded with. The record was received back in the lower Court on 16th January 1912 and 9th March 1912 was fixed for hearing the objection. The objection was disallowed and 3rd June 1912 was fixed for the sale. Subsequently the decree-holder certified payment of Rs. 4,485. The execution case was then taken up and the sale took place on 11th June 1912, the properties being purchased by the Maharaja of Hathwa. There was an application to set aside the sale, which was rejected. An appeal was preferred to the High Court and the order of rejection was set aside. The case was then reheard by the Subordinate Judge, who set aside the sale on 31st May 1916.

On 11th July 1916 the sixth application for execution was presented. This application was presented by Rani Devendra Balla Dasi, who is the executrix of the estate of Kumar Sirish Chandra Sinha. She stated that the persons against whom the decree was sought to be executed were "Babu Keshavendra Sahi, minor son of Babu Hari Harendra Sahi alias Hira Saheb deceased, as the sole legatee under the will of the original mortgagor judgment-debtor, Babu Shaym Sevendra Sahi alias Lal Saheb deceased (of which will probate was ordered to issue to the said Hira Saheb but not actually issued or taken out) and also as one of the heirs of his father, the said Babu Harendra Sahi alias Hira Saheb deceased, through his said minor's mother and guardian Mt. Dulhin Birja Koer, who was appointed guardian by order of the High Court in Miscellaneous Appeal No. 311 of 1913." There are also two others against whom the application is directed, namely, the sons of

Hira Saheb. An objection to this execution was made on behalf of Keshavendra Sahi under S. 47, Civil P. C., in which the points urged before the Subordinate Judge were. "(1) That there is no final mortgage decree and the decree stated in column 3 cannot be legally put into execution. (2) That the execution petition is not according to law. (3) That Rani Devendra Bala Dassi is not competent to file the application for execution, as she has not disclosed the right by which she makes the application and she has not taken any step to get herself substituted in place of the previous decree-holder. (4) That the present execution is barred by limitation as against the petitioner, he not having been made a party in the previous execution so that he is not bound by anything done or any order passed in those cases. (5) That Babu Chander Sekhar Prasad Singh, the Receiver of the mortgaged property, not being made a party to the execution case, cannot proceed. (6) That the decree-holder is not entitled to get the costs of the previous execution cases."

The learned Subordinate Judge by his judgment of 9th December 1916 has overruled all the objections and directed the execution to proceed. The minor judgment-debtor has appealed to this Court. The first point taken in appeal is that the execution proceedings are illegal, inasmuch as there is no final decree for the sale of the mortgaged properties as required by O. 34, r. 5, Civil P. C., and hence there is no decree to be executed. The mortgage-decree was passed on 25th May 1908 under S. 88, T. P. Act, (4 of 1882) directing the amount due on the mortgage bond with costs and interest to be paid within 6 months and "on default the mortgaged properties to be sold for the realization of the sum." The sum specified in the decree was not paid within the time fixed for payment and on 1st December 1908 the decree-holder filed an application, praying that under the provisions of S. 89, T. P. Act, an order absolute for the sale of the mortgaged properties might be made. On the same date the Court directed notice to issue on the judgment-debtor to show cause why the decree nisi should not be made absolute and fixed 2nd January 1909 for disposal. This notice was served upon the judgment-debtor and on 10th December 1908 the Court accepted the service as sufficient. On 2nd January 1909 the following order was passed on the order sheet in Mortgage Suit No. 235 of 1907: "Defendant is absent though served with a notice, which seems to have been received by his Mookhtear. The decree nisi will now be made absolute with costs." (p. 195). The Court at the same date made the following endorsement in its own hand on the certified copy of the decree filed by the judgment-debtor. "Decree nisi made absolute, vide order dated 2nd January 1909, with costs, Rs. 2-8-9." This order was copied by a clerk of the Subordinate Judge's office on the original decree and signed by him; this copy does not bear the signature of the Court.

Mr. Hasan Imam on behalf of the judgment-debtor contends that as the present Code of Civil Procedure had come into force on 1st January 1909 and as amongst other sections of the Transfer of Property Act, Ss. 88 and 89 were repealed (Sch.5, Civil P. C.,) and in lieu of them O. 34, Rr. 3 to 5, Civil P. C., were substituted, a decree absolute as required by O. 34, r. 5, should have been prepared, and that without such a decree the property could not be sold. He urges that the amendment prescribed a new rule of procedure, and that therefore the Court had no jurisdiction to make an order under S. 89 which had been repealed by the Code of Civil Procedure. Cl. 2, R. 5 requires that when the payment mentioned in a preliminary mortgage-decree under rule 4 is not made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale be dealt with as mentioned in r. 4 of the same order. This rule of the Code of Civil Procedure then made this change, that while under S. 89, T.P. Act, the Court was only required to pass an order absolute for sale of the mortgaged property, rule 5 requires the Court to make a "decree" for sale of the mortgaged property. This amendment was due to a conflict of decisions in the different High Courts as to whether the right of the decree-holder to execute the decree accrued after the passing of the preliminary decree under S. 88, T. P. Act, or after an order absolute under S. 89 of the Act and also as to whether the period of three years' limitation for the execution of the decree should run from the date of the preliminary decree or from the date of the order absolute. In support of his contention that a final decree is necessary in this case, Mr. Hasan Imam has relied on the case of *Mahant Krishna Dayal* v. *Sakina Bibi* (1). In

(1) [1916] 34 I C 27.

that case the decree absolute under S. 89, T. P .Act, was made long before the new Civil Procedure Code came into force; the application for execution of the decree was made 12 years after the date of the decree, and it was held that the case was governed by the new Code of Civil Procedure under S. 48 of which the execution was barred. This case had no application to the present case.

It has not yet been definitely settled whether in cases in which the preliminary decree has been passed under S. 88, T. P. Act, an application made for a decree absolute is governed by the Civil Procedure Code or not. In the case of *Madhab Moni Dasi* v. *Pamela Lambert* (2) Mukherji, J., was of opinion that no final decree need be prepared under the new Code of Civil Procedure in order to enforce the preliminary decree passed under S. 88, T. P. Act. In *Amolak Chand* v. *Sharat Chandra* (3) Sir Lawrence Jenkins considered this case, but thought that the point did not directly arise, and as there was no necessity to decide the point in the case before him the question was left open. It is also unnecessary for us in this case to consider the point, because the proceeding to make the decree absolute was pending at the time when the Code of Civil Procedure came into force, and the contention of Sir Rashbehari Ghose on behalf of the decree-holder respondent is that this being so and a notice of the application for an order under S. 89 having been served on the original mortgagor, the repeal of S. 89 does not affect the proceedings pending under that section. This contention is based on S. 6, General Clauses Act, and it appears to us that it must prevail.

In the case of *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (4) their Lordships of the Judicial Committee held that an application for execution for a decree is an application in the suit in which the decree has been obtained, and that nothing contained in S. 2 or in part 2, Act 9 of 1871 shall apply to suits instituted before 1st April 1873, and hence nothing contained in Sch. 2 of that Act extended to an application for execution of a decree in a suit instituted before that date. In *Umesh Chunder Das* v. *Chunchun Ojha* (5) it was held that the mortgage was executed before the Transfer of Property Act came into force and when Regn. 17 of 1806 was in force and notice for foreclosure had been served in a proceeding under that regulation, the proceeding already commenced was saved by S. 6, General Clauses Consolidation Act 1 of 1868, and the new procedure would not apply. Mitter, J., further held that the mortgagee had obtained not only an inchoate right, that is, a mere chance which might be developed into a substantive right, but had acquired a vested right as a mortgagee, and therefore the new Transfer of Property Act would not destroy that right. This was also the view taken in the case of *Baij Nath Pershad Narain Singh* v. *Moheswari Pershad Narain Singh* (6) and in *Mohabir Pershad Narain Singh* v. *Gungadhur Pershad Narain Singh* (7) and also in the case of *Madhab Moni Dasi* v. *Pamela Lambert* (2), where an application for an order absolute under S. 89, T. P. Act, was made on 9th September 1908 and was pending at the time when the new Code of Civil Procedure came into force.

In the present case the application to make the decree absolute was made before the new Civil Procedure Code came nito force, and the right of the decree-holder to sell had already accrued by the default of the judgment-debtor to pay the decretal amount within the time fixed in the preliminary decree of 26th May 1908. The right to apply for the sale of the property had become vested in the decree-holder and notice of the application had been served. The order absolute was an order made in continuation of the mortgage suit which had been instituted before Civil Procedure Code came into force and of the preliminary decree which had been made prior to the passing of that Act. The proceeding for order absolute was therefore a pending proceeding and was governed by the Transfer of Property Act. This being so the decree which was to be executed was the preliminary decree of 26th May 1908, which the order in the Court dated 2nd January 1909 made absolute and the proceedings being under S. 89, T. P. Act, no final decree was necessary.

The learned Subordinate Judge in his judgment on the application made to set aside the sale, has said that the order absolute passed in this case was in accordance with the usual practice in cases under S. 89, T. P. Act. There

(2) [1910] 37 Cal 796=6 I C 537.
(3) [1911] 38 Cal 913=11 I C 943.
(4) [1882] 8 Cal 51=8 I A 123=4 Sar 249 (P C).
(5) [1888] 15 Cal 357.
(6) [1887] 14 Cal 451.
(7) [1887] 14 Cal 599.

nor was properly described to be under the guardianship of his father and she admitted that the father acted as guardian throughout. Her only charge against Hira Saheb was that he was not protecting the interest of the minor by applyiing for setting aside the sale.

The reason suggested in her application was that the eldest son of Hira Saheb was married to the daughter of the Maharani of Huthwa, the auction-purchaser, but the marriage is said to have taken place in May 1910, long after several executions of the decree. This application by the minor's mother was refused but on appeal to the High Court the order was set aside and the matter was referred to the Subordinate Judge for rehearing. For reasons given in his judgment, the learned Subordinate Judge found that there had been irregularity in the matter of sale which had caused great loss to the minor, and, as has already been said, he set aside the sale. In his judgment he found that Hira Saheb acted against the interest of the minor in making the petitions of 4th and 11th June 1912.

We are not satisfied that the learned Subordinate Judge has taken a correct view of this case and Hira Saheb's conduct is capable of an entirely different construction. A very simple explanation of Hira Saheb making the applications on 4th and 11th June 1912 in his own name and not on behalf of the minor is that he did not wish to bind the minor. After the sale when Hira Saheb found that the property was purchased by the Huthwa Raj at 13 times the net income, which was a breach of the arrangement that the purchase should have been 25 times the net income, Hira Saheb negotiated with the Huthwa Raj to give up the purchase and with the decree-holder to take a usufructuary mortgage of the entire property by advancing Rupees 44,000 over and above the amount of the decree. The Maharani of Huthwa, by a petition to the Court, agreed to give up her purchase. From this it would appear that Hira Saheb was really not acting against the interests of the minor. It is also significant that during the hearing of the application for setting aside the sale the allegation of fraud against Hira Saheb was admitted to be not proved, and the learned Subordinate Judge accepted this. We ourselves are of opinion that all that can be urged against Hira Saheb in regard to the sale matter is that he committed an error of judgment in making the applications of 4th and 11th June 1912.

Even however if we accept that in regard to the sale Hira Saheb acted contrary to the interest of the minor, it has nowhere been suggested that before 4th June 1912 he acted contrary to his interest, nor can it be suggested that he had any interest adverse to him. He applied for and obtained an order for probate of the will of Lal Saheb for the minor. It is true that he did not actually take out the probate, probably because he did not wish to pay the fees which were heavy. By getting the grant of probate he renounced whatever interest he may have had as brother of Lal Saheb in the property, and throughout the execution proceedings he, as has been found by the learned Subordinate Judge, "fought tooth and nail to thwart the decree-holder." There can be no doubt on this point. Hira Saheb from time to time made various objections to the execution of the decree, all in the interest of the minor. In the fifth application he filed a petition on behalf of the minor dated 8th July 1911, expressly stating that he had no interest in the estate of Lal Saheb, that the entire estate belonged to his minor son, and that he himself ought not to be made a party to the execution proceedings. The Court allowed the petition and on appeal being made to the High Court by the decree-holder Hira Saheb appeared on behalf of the minor and contested that appeal. Taking the worst view of the case therefore up to 4th June 1912 Hira Saheb not only had no adverse interest to the minor but he was doing everything in his power to assist the minor in resisting the claims of the decree-holder. Moreover, Hira Saheb was the obvious guardian of the minor, being not only his father but his executor by implication under the will.

It is true that Hira Saheb was never appointed guardian ad litem by the Court and that under the Civil Procedure Code the Court is bound to appoint a proper person to act on behalf of a minor, but it has been held in a large number of cases that, although no formal appointment has been made, where the Court by its action has given its sanction to the appearance of a person as a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings. This was the view taken in the following cases: *Midnapore Zamindari Co.* v. *Gobinda Mahto* (15), *Krishna Per-*

(15) [1908] 8 C L J 31.

S. N. DAR, B. A. LL. B.,
Vakil, High Court,
SRINAGAR (Kashmir).

shad Singh v. *Gosta Behari Kundu* (16) and by their Lordships of the Privy Council in the cases of *Hari Saran Moitra* v. *Bhubaneswari Debi* (17) and *Walian* v. *Banke Behari Pershad Singh* (18). In this last case in which the law has been very fully discussed, their Lordships of the Privy Council set aside a decree of the Full Bench of the Calcutta High Court reported as *Suresh Chander Wum Chowdhury* v. *Jagut Chunder Deb Chowdhrani* (19) Mr. Hasan Imam for the respondent has in his argument referred to the judgment of the Calcutta High Court at pp. 4, 5 and 6 of the paper-book, by which the matter of setting aside the sale of 11th April 1916 was remanded to the learned Subordinate Judge for further hearing. In that judgment the learned Judges said that the minor was not represented in the petition of 4th and 11th June 1912, and they made some further remarks which might suggest that they held that the minor had not been represented in the execution proceedings at all. This cannot be so however because if they had intended to hold that the minor was not represented in the execution proceedings at all, the sale would have been void so far as the minor was concerned and they would not have remanded the case for rehearing. It is therefore clear that there is no finding of the learned Judges in that case that the minor was not represented in the execution proceedings. All that they intended to hold was that he was not represented in the applications of the 4th and 11th June 1912. Further, Mr. Hasan Imam has relied in support of his proposition that the minor was not represented on the cases reported as *Rashid-un-nisa* v. *Muhammad Ismail Khan* (20), *Hanuman Prasad* v. *Muhammad Ishaq* (21), *Partab Singh* v. *Bhabuti Singh* (22), *Singaravelu Pillai* v. *Murugesa Pillai* (23) and *Purna Chandra Kumar* v. *Bejoy Chand* (24). In the case reported as *Rashid-un-nisa* v. *Muhammad Ismail Khan* (20), above referred to, a married woman was appointed guardian without the appointment of the Court. As a married woman was at that time incompetent to represent a minor, the case has no bearing on the present case.

In the cases of *Hanuman Prasad* v. *Muhammad Ishaq* (21), *Partab Singh* v. *Bhabuti Singh* (22) and *Singaravelu Pillai* v. *Murugesa Pillay* (23), above referred to, the guardian who acted had an adverse interest to the minor and acted adversely to the interest of the minor. In the case of *Purna Chandra Kumar* v. *Bejoy Chand* (24) their Lordships held that the minor plaintiff, who was not properly represented in the suit, would be bound by the decree if he had any interest in the patni during the period for which the rent decree was obtained and in order to ascertain that, their Lordships remanded the case to the Court below. These cases are clearly distinguishable from this case and from the case reported as *Walian* v. *Banke Behari Pershad Singh* (18), in which the principles which must govern the present case are laid down. The minor was therefore properly represented by his father certainly up till the date of the application made on 4th June 1912 and in our opinion throughout the proceedings, and the omission of a formal order to appoint him as such under O. 32, Civil P. C., will not vitiate these execution proceedings by which the minor is, therefore, bound, particularly as it is not disputed that the minor appellant, as the representative of the mortgagor, is liable for the mortgage-decree.

Apart from this however on 8th February 1915 during the pendency of the 5th execution case the High Court directed that the mother should be appointed guardian of the minor and she was allowed to prosecute the application to set aside the sale on his behalf. Subsequently a formal application was made to the Court and she was formally appointed guardian in August 1916 in the present execution. If then there was any defect in the representation of the minor, it was made good as soon as his mother was appointed guardian, and this appointment must be held to relate back to the date of the 5th application for execution made in June 1912. That application itself was within three years of the date of the decree. The minor was, therefore, properly represented and the execution was taken out within time. This was the view taken in *Khem Karan* v. *Hardayal* (25), *Rup Chand* v.

(16) [1907] 5 Cal L J 434.
(17) [1889] 16 Cal 40=15 I A 195=5 Sar 198 (P C).
(18) [1903] 30 Cal 1021=30 I A 182=8 Sar 512 (P C).
(19) [1887] 14 Cal 204.
(20) [1909] 31 All 572=36 I A 168=3 I C 864 (P C).
(21) [1906] 28 All 137.
(22) [1913] 35 All 487=40 I A 182=16 O C 247=21 I C 288 (P C).
(23) [1911] 12 I C 69.
(24) [1913] 18 I C 859.
(25) [1882] 4 All 37.

Dasodha (26), *Peary Mohan* v. *Narendra Nath* (27), *Jiwat Dube* v. *Kali Charan Ram* (28) and *Chhayunnessa Bibi* v. *Kazi Basirar Rahman* (29). There are numerous other cases on this point to which it is unnecessary to refer. The next point urged is that the applications for execution are not made in accordance with law and that the last application is not made in continuation of the previous applications. In support of the contention that the applications are not in accordance with law, Mr. Hasan Imam points to certain defects in drawing up the various applications for execution. The defects to which he refers are: (1) that the correct date of the decree has not been entered; (2) that all payments which were made under the decree have not been mentioned in the applications; (3) that the properties mentioned in the different applications are not the same; and (4) that the parties are not the same. We are of opinion that there are no material defects in any of the execution applications and we are prepared to agree with the learned Subordinate Judge that the proceedings were all one continuous proceeding, but it is unnecessary to go into this question in detail because the fifth application for execution made on 14th June 1911 was made within three years of the date of the decree, so that if there are no material defects in the 5th application or the last application and this last application is made in continuation of the 5th application, it is not barred by limitation. It is therefore only necessary to deal specifically with defects in so far as they relate to the application for execution and the present application.

The first defect referred to is in regard to the date of the decree. The 5th application gives the date of the decree as 26th May 1908, that is to say, the date of the preliminary decree. The argument that this date was incorrect has no force because, as we have already held, what was to be executed was the preliminary decree and there was no necessity for any final decree. Apart from this however even if there were a mistake in the date of the decree, it cannot be considered to be a material defect because there could be no doubt in the mind of the judgment-debtor as to the intention of the decree-holder or as to what decree it was intended to execute. That a mistake in the date of the decree is not a material defect was held in *Jiwat Dube* v. *Kali Charan Ram* (28).

The next defect pointed out is in regard to non-entry of payments. The payments which had been made towards the decree are not entered at all in the 5th application, but the entry in column 7 is as follows: "Rs. 4,65,535-5-9 besides interest which may be found due up to the date of sale according to the calculation of the office at the rate of six per cent. per annum."

The various payments were all noted in the registers and, as the learned Subordinate Judge has held, in preparing the account the office would certainly consider them in making the calculation and processes would issue for the amount arrived at on such calculation. The fact therefore that these payments were not mentioned in the application for execution was not a material point and could not possibly prejudicially affect anyone. We therefore agree with the learned Subordinate Judge that the non-entry of previous payments was not a material irregularity which would be fatal to the application. The third defect urged is that some of the properties mentioned in the former execution application are not identical with those in the present application. In the body of each of the execution petitions the decree-holder has expressly stated that the properties to be proceeded against are the mortgaged properties, and the schedules refer to these mortgaged properties. It is true that there are some apparent differences in the description of the properties as mentioned in the 5th application and the present application, but they are not material differences. Some of the villages mortgaged are not traceable and in respect of one of the properties the judgment-debtor had only a limited interest which on his death reverted to the Bettiah Raj. In respect of these properties the decree-holder has made an application, dated 22nd July 1917, that she does not want to proceed against them. As regards one property, Godna Masehri, is is described as Masehri only. This is a trivial mistake. The Court below has overruled the objection in regard to the slight difference in the description of properties, on the ground that the mortgaged properties consist of 150 villages scattered over a large part of the District which bear many Touzi numbers and the trivial mistakes referred to above have been rectified in the last application. The Subordinate Judge has held that the property as a whole sought to

(26) [1908] 30 All 55.
(27) [1910] 37 Cal 229=37 I A 27=5 I C 404 (P C).
(28) [1898] 20 All 478.
(29) [1910] 37 Cal 399=5 I C 532.

be sold is not different from the property mentioned in the previous applications. With this view we agree. Further, we may add that no objection on the ground of difference of properties was taken in the petition of 2nd September 1916, either generally or specifically. The objection was taken for the first time on 21st December 1916 and on the authority of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (4), to which we have already referred, we are of opinion that the appellant was precluded from taking this objection. The case of *Bihari Lal Misr* v. *Jagarnath Prasad* (30) also supports this view.

The last defect urged is that the names of the parties are not the same. The difference is that in the 5th execution, Hira Saheb being dead, his two sons, in addition to the minor appellant have been made parties. The minor appellant has been described as a legatee and as heir of Hira Saheb. The other two sons are described as his heirs. It has already been pointed out that probate of the Will of Lal Saheb has not yet been taken out. The decree-holder therefore made Hira Saheb as well as his minor son who was mentioned as a legatee in the Will parties to the execution proceedings and when Hira Saheb died, his sons were substituted in his place. It appears to us that this course adopted by the decree-holder was justified. He did not know who the heirs were, and in order to make himself secure he brought all the sons of Hira Saheb on to the record. We are supported in this view by the case of *Akikunnissa Bibee* v. *Roop Lal Das* (31).

Lastly, it has been contended that the relief sought in the present application is different from the reliefs sought in the previous applications. There is no force in this contention. The decree-holder has throughout prayed for the sale of the mortgaged properties as required by O. 21, R. 1-J—(2). If was held in the case of *Bihari Lal Misr* v. *Jagarnath Prasad* (30) that the decree-holder was entitled to treat the application in continuation of a former one, even when he wanted to proceed to sell different properties. Mr. Hasan Imam has relied upon the case of *Virasami* v. *Athi* (32), where the relief sought in the first application was for sale and in the subsequent application for the arrest of the judgment-debtor. The reliefs therefore were obviously different under O. 21, R. 1-J, sub-Cls. (2) and (3), and this case has no application to the present case. None of the defects then pointed out to us either singly or taken as a whole is a material detect, and without material detects the execution proceedings could not be vitiated. It is hardly necessary to refer to authorities on this point, but a reference may be made to the Full Bench case of *Gopal Chunder Manna* v. *Gasain Das Kalay* (33), *Ramayyan* v. *Kadir Bacha Sahib* (34), *Mathura Prosad* v. *Anurago Koer* (35) and *Kalka Dube* v. *Bisheshar Patak* (36).

The applications for execution then are not vitiated by any material defect; they must therefore be held to have been made in accordance with law. The 6th application is, in our opinion, an application made in continuation of the 5th, and unless the execution applications previous to the 5th application were properly determined and legally disposed of, the present application for execution will also be in continuation of those former applications. A reference to the orders disposing of the several applications will show that none of these applications were disposed of in accordance with law. The decree-holder was not guilty of any fault or laches in the prosecution of the executions. She is therefore entitled to treat the present application in continuation of the former ones in spite of the order of the Court dismissing them. That the last application is in continuation of the 5th application is in accordance with the decision of Chamier, C. J., in a similar case, *Kaniz Zohra* v. *Syam Kisen* (37). In that case it was contended that the application was neither in form nor in fact an application made in continuation of the 2nd application and that it could not be held that the application was one made in continuation of the previous application, because that had in fact been dismissed. The learned Chief Justice in that case remarked as follows: "It seems certain that the legislature could not have intended that further execution of a decree should be prevented by the fact that execution proceedings remained pending in the Courts for many years. In the present case as the 3rd application was one asking the Court to sell the identical property which had been sold before, I think that we should hold that the ap-

(30) [1906] 28 All 651.
(31) [1898] 25 Cal 133.
(32) [1884] 7 Mad 595.
(33) [1898] 25 Cal 594.
(34) [1908] 31 Mad 68.
(35) [1910] 5 I C 579.
(36) [1901] 23 All 162.
(37) [1917] 39 I C 89.

plication was one made in continuation of the previous application."

That case, in so far as this point is concerned, is indistinguishable from the present case and the view taken appears to us to represent the true intention of the legislature. The same view was also taken in *Rameshwar Singh* v. *Rateshwar Singh* (38), *Qamaruddin Ahmad* v. *Jawahir Lal* (39). Mr. Hasan Imam has relied on the ruling reported as *Mahant Krishna Dayal* v. *Sakina Bibi* (1). In that case a decree was obtained in 1896 and was several times put in execution by the decree-holders. Several applications for execution were made, the last but one being made on 6th September 1912. It was dismissed for want of prosecution on 5th December 1912 and the last application, which was the one being dealt with, was made on 18th July 1913. It was held that the Civil Procedure Code of 1908 did not give a fresh starting point for limitation, and that the execution application was barred as being made more than 12 years from the date of the decree sought to be executed. It was further held that the application was not one made in continuation of the previous application, because the relief asked for was different from the relief claimed in the previous application and was directed against property which was not touched by the former application. It is also to be noted that the application of 6th September 1912 was dismissed for want of prosecution and hence the subsequent application could not be in continuation of it; *Dhukiram Srimani* v. *Jogendra Chandra Sen* (40). The aforesaid case in the Patna Law Journal has obviously no bearing on the present case.

In the present case the last application is clearly an application made in continuation of the 5th application, it is by the same parties for the sale of the same properties, and apart from the fact that it is also in continuation of the earlier applications for execution, both this and the 5th application having been made in accordance with law, the 6th application is not barred by limitation. Even however if the 6th application were not in continuation of the 5th application it would not, in our opinion, be barred by limitation. The sale held in the course of the 5th application was set aside on 30th May 1916 and the present application was made on 11th July 1916. The right to execute the decree against the minor accrued to the decree-holder after the sale was set aside and the limitation would be three years from the date of the order setting aside the sale under Art. 181, Limitation Act, as held in the case of *Raghunath Sahay Singh* v. *Lalji Singh* (41). It would therefore not matter whether the previous execution was defective or not, or whether the present application is in continuation of the 5th execution application or is a fresh application. In either case it would not be barred by limitation. In the case of *Abdul Khayar* v. *Reazuddin* (42) it was held that even when the sale was set aside in consequence of the decree-holder's fraud and where the fraud was practised by the decree-holder after his first application for execution, the time would run from the date of the setting aside of the sale. The present case is stronger, inasmuch as the sale was set aside not on account of any fraud committed by the decree-holder but on account of the fraud of one of the judgment-debtors in collusion with the auction-purchaser. The Court on 31st May 1916 set aside the sale and on that very day it dismissed the execution case.

It is hardly necessary to notice another argument which has been placed before us in the case, that probate of the Will of Lal Saheb not having been taken out, the minor was not the legal representative of Lal Saheb under S. 187, Succession Act; and Hira Saheb fully represented the estate throughout the execution proceedings. In this view of the case also the whole of the execution proceeding has been regular and the decree-holder can proceed against the present appellant after the death of Hira Saheb, which occurred less than three years before the date of the last application for execution. In the result we dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

(38) [1913] 18 I C 841.
(39) [1905] 27 All 334=32 I A 102=8 Sar 810 (P C).
(40) [1901] 5 C W N 347.
(41) [1896] 23 Cal 397.
(42) [1909] 1 I C 341.

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CHAPMAN AND ROE, JJ.

Jagdip Narain Singh—Appellant.

v.

F. H. Holloway—Respondent.

Appeal No. 295 of 1916, Decided on on 13th February 1917, from appellate order of Dist. Judge, Monghyr, D/- 1st July 1916.

Civil P. C. (1908), Ss. 144 and 151 and O. 21, R. 92—Sale set aside and judgment-debtors restored to possession—Application for compensation does not fall within S. 144, but is covered by S. 151 and is governed by Limitation Act (1908), Art. 181.

In execution of a decree the shares of the judgment-debtors in certain properties were sold and purchased by the respondent. The sale was subsequently set aside upon the application of the judgment-debtors and they were restored to possession. More than three years after they applied for compensation for the period for which they were kept out of possession:

Held: that the application was governed by Art. 181, Sch. 1, Limitation Act, and was therefore barred by time. [P 53 C 2]

Per *Chapman, J.*—Art. 181, Sch. 1, Limitation Act, applies only to applications made under the Civil Procedure Code.

An application for compensation does not fall within S. 144, Civil P. C., but would be covered by S. 151 of the Code. [P 53 C 2]

Obiter dictum.—An appeal lies from an order dismissing such an application, inasmuch as it is an adjudication between the parties and is not an order from which an appeal lies as from an order. [P 53 C 2]

Per *Roe, J.*—Such an application does not fall within S. 144, Civil P. C., as that section only applies to cases in which a decree is varied or set aside. [P 53 C 2]

Abani Bhusan Mukerji—for Appellant.

Muhammad Tahir—for Respondent.

Chapman, J.—In execution of a decree the shares of the judgment-debtors in certain properties were sold and purchased by the respondent. The sale was subsequently set aside upon the application of the judgment-debtors. The order of setting aside the sale was upheld by the High Court on the 3rd of August 1908. The judgment-debtors applied for restoration to possession and possession was restored on the 18th December 1910. The appellants before us, some of whom are the judgment-debtors and others are persons who have purchased the rights of the judgment-debtors, made an application on the 15th June 1914 for compensation for the period for which they were kept out of possession. The application was objected to in the first Court upon the ground that the Court had no jurisdiction to grant compensation and upon the ground that the application was barred by limitation.

A preliminary objection has been made that no appeal lies and that an ad valorem Court-fee should have been paid. We have however heard the argument upon the ground of limitation and we are of opinion that the learned Court below rightly dismissed the application upon the ground of limitation: that being so, in my opinion, it would be better for us not to expressly decide whether a 2nd appeal does lie in such a case or not. My personal inclination would be to hold that an appeal does lie, inasmuch as it was an adjudication between the parties and it was not an order against which an appeal lies as an appeal from an order [S. 2, sub-section (2), Civil P. C.].The learned District Judge has held that the application was barred by limitation under Art.181, Sch.1, Limitation Act. That article provides that applications for which no period of limitation is provided elsewhere in the schedule or by S. 48, Civil P. C. 1908, shall be barred by limitation on the expiry of three years from the date on which the right to apply accrues. The present application, though it purported to be under S. 144, Civil P. C., was not strictly within the terms of that section. The other section under which the Court could have been asked to interfere would be S. 151. Though it may be argued that S. 151 does not in terms confer any jurisdiction upon the Court, yet the result of the enactment of S. 151 has been to widen the exercise of the powers of the civil Courts. It has been held in a series of decisions, from which it would not be well at this late stage to resile, that Art. 181 applies only to applications made under the Civil Procedure Code and that it does not apply to applications made under other Statutes. This was not an application made under another Statute and, in my opinion, it would be reasonable to hold that it was an application under the Code of Civil Procedure or at least contemplated by the Code of Civil Procedure and therefore Art.181 would apply. That being so, the right to apply would expire after three years from the date of restoration to possession. The previous infructuous applications which are said to have been made would not help the appellants. I am also disposed to take the view that assuming that an application is addressed entirely to the discretion of the Court, the Court would exercise a right discretion in disallowing applications made after the period of limitation which would apply to suits or applications asking for a similar remedy. On these grounds I would dismiss the appeal with costs.

Roe, J.—I agree that S. 144 clearly does not include the application now before us. The section only applies to cases in which a decree is varied or set aside. A decree, as defined in S. 2, distinctly excludes any adjudication from which an appeal lies as an appeal

against an order. The proceedings from which the present application originated were proceedings under R. 92, O. 21, and an appeal lies in such proceedings as an appeal against an order. Since therefore the proceedings before us have been distinctly excluded from the category of decrees they have also been distinctly excluded from the operation of S. 144. As to what may be the aggrieved parties' real remedy in the matter, I would prefer not to express an opinion but I would say that I entirely agree with my learned brother that upon an application which in essence amounts to a claim for compensation, the Court should not attempt to do justice between the parties more than three years after the relief sought became open to the applicant. I agree that the appeal should be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

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SHARFUDDIN AND ROE, JJ.

Gauri Shanker Joshi—Objector — Appellant.

v.

Manraj Shukul and *another* — Petitioners and Objectors—Respondents.

Appeals Nos. 519 and 524 of 1913 and Misc. Appeal No. 75 of 1914, Decided on 29th June 1917, from Original Decrees of Dist. Judge, Saran, D/- 18th August 1913.

(a) Probate and Administration Act (1881), S. 70—One of two executors dying—Caveators can proceed against survivor.

If one of two executors dies, the representation of the estate of the deceased and of the interests of the beneficiaries vests in the remaining executor. It is open to the caveators to proceed against him alone. [P 55 C 1]

(b) Probate and Administration Act (1881), S. 70—Procedure in O. 1, R. 10 governs proceedings for discharge of caveat—Caveator should be discharged when he loses interest in estate—Civil P. C. (1908), O. 1, R. 10.

There is no provision in the Probate and Administration Act for the discharge of a caveat. The only rule of procedure governing such a proceeding is O. 1, R. 10, Civil P. C. A caveat should only be discharged where it is shown that the caveator has no interest in the estate. [P 55 C 1]

(c) Probate — Caveat — Petitioner should prima facie show that caveator has no interest and then caveator is to be called upon to rebut presumption.

The petitioner in a probate proceeding should at first produce substantial considerations upon which prima facie it can be held that the caveator cannot possibly have any interest which he claims, and upon the production of those considerations the caveator should be called upon to rebut the presumption arising from the evidence produced by the propounder. [P 55 C 2]

(d) Hindu Law — Succession — Bandhu — Nearest bandhu succeeds.

Under the Hindu law the nearest bandhu succeeds. A sister's son and a maternal uncle are therefore preferred to a mother's sister's son. [P 59 C 1]

Pugh, Abul Hassan, Muhammad Mustafa Khan, Hem Chandra Mitra, B. N. Mitra and *Khurshed Hasnain* —for Appellant.

Hasan Imam, Kulwant Sahai, Harnandan Sahay and *Harnarain Persad* —for Respondents.

Judgment.—This appeal arises out of proceedings in probate of the will of one Avadh Bihari Saran Misser, dated 7th November 1912. Babu Avadh Bihari died on 17th November 1912 leaving him surviving Brindaban Misser, since deceased, who claimed to be Babu Avadh Bihari's mother's brother, Sham Chand who claimed to be his mother's sister's son, and Gauri Shanker who claimed to be both his mother's sister's grandson and his "gotia" in the 9th degree. By the terms of the will half of the property of Babu Avadh Bihari was left to Permanand Misser the son of Brindaban and the other half was left to Mamraj the husband of Babu Avadh Bihari's deceased daughter. The date of the application for Probate is the 19th of November 1912. On the 6th of January 1913 Sham Chand and Gauri Shankar filed caveats. Notice of the propounding of the will was served upon them and on the 17th of January Gauri Shankar filed an objection. Sham Chand filed an objection on the 18th March 1913 and on 14th of April 1913 an application for Letters of Administration to the estate. We are informed that Gauri Shankar also made an application for Letters of Administration. The records of the proceedings taken upon these applications for Letters of Administration have not been printed and are not on the record of the case before us. The case as it came before the District Court was tried upon the application of the executors only. Two issues were framed: firstly, have the objectors any locus standi? Secondly, is the will genuine?

On the evidence that was taken upon the first issue it was found by the learned Judge that neither Gauri Shankar nor Sham Chand had succeeded in proving any interest under which they could contest the genuine character of the will. The will was therefore proved in common form and Probate granted. The appeals now filed are against the decision that the objectors had no locus standi and against

the order granting Probate of the will.

It is contended on behalf of the respondents, firstly, that no appeal lies; secondly, that as one of the executors, Brindaban, is dead, the appeal cannot proceed. It does not seem to us necessary to enquire into the question whether an appeal lies against the order refusing permission to the caveators to require proof of the will in their presence. For, if indeed that order was wrong, it is clear that the order granting Probate on proof of the will in common form was also wrong and that the Probate granted on such proof should be revoked.

On the second objection taken we hold that even though one of the executors be dead, representation of the estate of the deceased and of the interests of the beneficiaries vests in the remaining executor. It is open to the caveators to proceed against him alone.

In dealing with the case on the merits it is important to examine closely the position of the caveators and to decide whether it was right to put upon them, as the learned Judge has to put upon them, the burden of proof that they have an interest in the estate. There is no provision in the Probate and Administration Act for the discharge of a caveat. The only rule of procedure governing such a proceeding would be O. 1, R. 10, Civil P. C. We have had the advantage of obtaining from Mr. Hasan Imam the rules of the Calcutta High Court on its original side regulating proceedings for the discharge of a caveat. It appears therefrom that a caveat should only be discharged when it is shown that the caveator has no interest.

We are informed that the practice in Calcutta and in England is to place the burden of proof upon the caveator. We are not prepared to say that this is not in accordance with the Civil Procedure Code. But if it be correct to say that a decision that the caveator has no interest is not res judicata as laid down in *Lalit Mohan Das* v. *Radha Raman Saha* (1), it would seem unfair to deny the caveator the right to protect the estate from the effect of a spurious will unless it can be shown that the will could not possibly affect his interests. We propose therefore in dealing with the evidence upon the record before us to proceed upon the lines which we ourselves would have adopted had we been in the position of the learned Judge. We should have required the petitioners to produce first of all substantial considerations upon which prima facie it should be held that the caveators could not possibly have the interest which they claim, and upon the production of those considerations to require the caveators to rebut the presumption arising from the evidence produced by the propounders.

The first document to be considered in this regard is a letter written by Gauri Shankar himself to the deceased (Ex. 11) protesting against the action of Babu Avadh Bihari in taking criminal proceedings against him with regard to moneys with which Gauri Shankar had been entrusted by Avadh Bihari. In that letter occurs the phrase, "Never mind, you are my maternal uncle and I am your sister's son." Surely if an appeal to any relationship at all was to be made in this letter that appeal would have been made not on the basis of a maternal relationship but upon a direct claim to be Babu Avadh Bihari's nearest agnate and the heir to his estate. It is not necessary to cite numerous other instances in which Gauri Shanker has described Babu Avadh Bihari as his maternal uncle. It is sufficient to say that nowhere in any letter written by Gauri Shankar prior to the death of the deceased was it ever suggested that Gauri Shankar had any nearer claim to Babu Avadh Bihari than that of the grandson of his sister. Secondly, there are documents upon the record which show that in dealings in Calcutta for which registered documents were necessary Gauri-Shankar allowed himself without objection to be described as a "Bhader," Babu Avadh was a "Joshi" and it is admitted that by no possibility could a "Bhader" be an agnate of a "Joshi."

The learned Judge has found it not proved that this entry was made with Gauri Shankar's consent, but it cannot be denied that it was made without objection from Gauri Shankar. We feel that it is extremely improbable that Gauri Shankar should have allowed such an entry to be made if indeed he was Avadh Bihari's heir. Avadh Bihari was a very rich man; Gauri Shankar was almost penniless. His claim to succeed as the sole heir to Avadh Bihari would have been protected with the utmost jealousy. Further we have it from the evidence of the son-in-law Krishna Chandra that when the marriage negotiations were going on, it was not suggested as one of the attractions of the match that Avadh Bihari's property would, if no son was born to Gauri Shanker, descend to Gauri Shanker's

(1) [1811] 10 I C 434.

daughter if Gauri Shanker outlived Babu Avadh Bihari.

Lastly in the genealogical table given by Gauri Shankar himself we find it stated that Shiuji Ram and Rup Ram were brothers. Shiuji Ram's grandson was named Ram Chandra and Rup Ram's son was also named Ram Chandra. It is, as we believe, extremely rare for boys so near akin to be given identical names, and this belief finds corroboration in the evidence of Shanker Ojha, Gauri Shanker's brother-in-law. He says: "This has never been in my family. I do not recollect any family in which this has happened." It follows therefore that it is extremely improbable that the Ram Chandra who was Gauri Shanker's grandfather could have been so near an agnate of the Ram Chandra who was Avadh Bihari's father. All these are weighty considerations. If the executors had been put in the first instance, as we hold they should have been, to the making of a prima facie case against the caveator Gauri Shanker, they could and would have put forward a prima facie case of very great strength, amply sufficient to throw the burden of proof on to Gauri Shanker's shoulders.

We think therefore that although the learned Judge approached the matter from a point of view different to that from which we have approached it, the caveator Gauri Shanker was in no way prejudiced by the form in which the proceeding was conducted. It remains only to be seen whether in the face of the propounder's evidence, Gauri Shanker has succeeded in showing that he has an interest in the estate. It is not necessary to go in detail through the evidence of all his witnesses. The learned Judge has given ample reasons for disbelieving the evidence of Gauri Shanker's own relations. They live at Benares and their object is to get the property away from Brindaban's son and Avadh Bihari's son-in-law who live in Chapra.

We do not follow the argument of the learned Judge that even if it be proved that Rup Ram was the great-grandfather of Gauri Shanker, it has still to be proved that that Rup Ram was the son of Shiuji. It was never the propounder's case that he (Gauri Shanker) was a great-grandson of a Rup Ram who was not the son of Siwai Ram. The sole point in issue was whether Gauri Shanker's great-grandfather's name was Rup Ram and to this point we propose to confine our attention. Gauri Shanker's own evidence, the evidence of his aunt Gopi Kuer, that of his uncle Sham Chand, that of his son-in-law Krishna Chandra, of his cousin Chatardhari, of his brother-in-law Shanker and his sister Makundi is direct evidence but evidence given by partisan witnesses.

We entirely agree with all that Mr. Pugh says regarding the value of evidence given by Brahmins of their ancestry. We accept the proposition that they are taught from an early age to repeat by heart the names of their ancestors to a very remote degree. But it is to be noted that Rup Ram was only distantly connected through Gauri Shanker with all the witnesses who have given evidence. It is possible that they may have occasionally heard casually the name of their maternal cousin's paternal greatgrandfather. It is extremely unlikely that they would remember it without constant reminders from the maternal cousin. It is certain that it would not be among the names taught them from infancy. The right place to obtain the evidence of ancestry was the home of Gauri Shanker's ancestors. No evidence at all has been given from that home, which was at Jaipore. The evidence that has been given seems to us to be peculiarly valueless. It is to be noted that Krishen Kuar, the mother of Gauri Shanker who is still alive has not been examined. The evidence of casual strangers is even more valueless. We cannot go so far as the learned Judge when he says that the evidence of the witness Gobinda Acharja is throughout false. It is possible that he did on one occasion have some kind of interview with Babu Avadh Bihari. It is also possible that he told him on that occasion that Gauri Shanker was a relation of his, but that he specified that relationship is extremely improbable; that he said that he was a "gotia" is still more improbable, for it was his habit to talk of him always as his mother's sister's grandson. Bishun Dutt's evidence is no more convincing; for in the last line of it he says that he remembered that Gauri Shanker had shaved on the occasion of the death of Avadh Bihari's wife after Gauri Shanker had reminded him of the fact. Mr. Pugh contends that he would have been able to prove his relationship had he been given a fair opportunity of doing so. So far as we can gather from the proceedings in the Court, he had ample opportunity of producing any evidence which might be of value to him, from Benares.

The witnesses were cross-examined at great length by counsel brought from Patna. The hearing of the case lasted from the 5th July to the 25th and arguments were heard from the 26th to the 29th. Gauri Shanker was put upon notice that he was required to produce evidence of his locus standi on the 27th June. It cannot be suggested that he had not ample time to produce all the evidence at his disposal.

It is however further contended that he should have been given an opportunity to get his commissions, which he had had issued to Jaipore, brought on the record. We cannot find from the order sheet that Mr. Eardley Norton in arguing his case ever suggested that there should be an adjournment of the argument for the completion of these commissions. The history of them is that the first commission was issued on 10th April 1913 and was returned on the ground that the addresses given were not sufficient to identify the witnesses to be examined. An order was made for a second commission to issue on 4th June 1913. No steps seem to have been taken to issue that second commission. All that we can find with reference to it on the record is a reminder from the Jaipore Darbar that the addresses of the witnesses have not yet been received. We must presume that the evidence which it was possible to collect from Jaipore would not have been of any benefit to Gauri Shanker. We have no reason to believe that he has been prevented in any way from producing all the evidence that would have been of use to him. Upon the evidence that he has produced he has failed to make out any case sufficient to rebut the conclusion arising from the documents filed by the executors.

We come next to the claim of Sham Chand. One substantial consideration upon which he should be put to proof of his interest is his own attitude towards the proceeding. We have shown how flimsy was the claim of Gauri Shanker. Sham Chand preferred to let that claim take precedence over his own. He filed no objection until two months after Gauri Shanker's objection had been filed, and even then said that he was willing to stand aside in favour of Gauri Shanker and would only come into the contest after Gauri Shanker's case had failed. A further consideration is that at the time when Avadh Bihari was a minor Brindaban was selected to be his guardian by the Court of Wards. The inference from that selection is that Gauri Shanker was his nearest male relative. A great deal of trouble has arisen out of a note book which is alleged to have been found among Avadh Bihari's papers. In our view it adds but little to the case and since it adds so little, it is not likely to have been a forgery. Sham Chand's claim is based on the assertion that Avadh Bihari was the son of his mother's sister Manki. The propounder contests this and asserts that Avadh Bihari was the son of Brindaban's sister Phula Koer. The whole basis of the propounder's claim that this note book proves that Avadh Bihari was the son of Phula Koer is that in a genealogical table on the second page a vertical line is drawn under the name of Phula Koer and under that vertical line appears the name of Avadh Bihari. But in setting out the offspring of Avadh Bihari himself on the previous page we find the names of his two wives Durgadei and Gulab written in succession under his name and a vertical line drawn from Gulab's name and under that line the names of the children of Avadh Bihari appear. These children were admittedly born of Durgadei and not of Gulab. In the body of the history there is a smudge through which are visible the words "Manki se" before the name of Avadh Bihari as the son of Ram Chandra. These words "Manki se" were certainly an interpolation made after the rest of the history had been written. Whether the interpolation was made by Avadh Bihari himself or by Brindaban or by Sham Chand, the fact remains that it is an interpolation and this fact makes the entry of very little value. As the learned Judge has pointed out, there is a very strong balance of probability that it was done by Sham Chand, but it must be admitted that the whole of the circumstances surrounding this tampering with the record would, even if it was brought home to Sham Chand, prove only that Sham Chand was an unscrupulous person, not that Avadh Bihari's mother was Phula Koer. There is nothing in the book to indicate which of Ram Chandra's wives was Avadh Bihari's mother. We are satisfied that the family history contained in the note book was a history prepared by Avadh Bihari himself and we accept it as substantial evidence that Ram Chandra had two wives, Phula Koer and Manki Koer. The question which of those two wives was Avadh Bihari's mother must be proved by other evidence. Now it is absolutely certain upon innumerable do-

cuments on the record that Brindaban was always called Avadh Bihari's uncle. It is practically certain that he was the brother of one of Ram Chandra's wives.

Sham Chand's evidence has been devoted to a strenuous effort to prove that Ram Chandra had one wife only. That evidence, we have no hesitation in saying, is false. Seeing that he has been driven to make this case, we must presume that he was afraid of the result of admitting that Ram Chandra had two wives. If he had two wives and if Phula Koer was the second wife, it is infinitely more probable that Avadh Bihari was born of Phula Koer than of the elder wife. At the time of Avadh Bihari's birth, it is admitted by Sham Chand's witnesses that Ram Chandra was a lunatic. If he had already a son whose mother was alive and of mature age, it is extremely unlikely that a second marriage would have been allowed. Even if there was no son, it is more than probable that no marriage with Phula Koer would have been allowed until after Manki's death, and on this point it is instructive to read the evidence of Gopi Koer the daughter of Makhan Kuar, the sister of Manki, as to the death of Manki Koer's death. She says: "I came to Chapra only once during Ram Chandra's life".

Q. Where was Manki at that time?

A. She was dead.

Further on she says:

Q. What was your age when you saw Manki ?

A. Eight or nine years. I saw Manki at Chapra in the house of Chaudhuri.

In re-examination she is asked:

Q. You said that when you came to Avadh Bihari Saran's house after the birth of Avadh Bihari, Manki Koer was not alive; and you again said that you met Manki Koer lor the first time at Chapra. When was it and how do you explain?

A. When I saw Manki Koer at Chapra, Avadh Bihari was in the womb.

The evidence of this witness is valueless as proof that Avadh Bihari was the son of Manki and it is in some degree a corroboration of the suggestion that Manki died before Phula Koer was married to Ram Chandra. Another point upon which the propounders are entitled to lay stress is that if we take the ages of these various ladies as given by the caveator's witnesses, we find that it is extremely improbable that Manki could have been Avadh Bihari's mother. Avadh Bihari was born, they say, in 1859. The evidence with which we are dealing was given in 1913 and taking the genealogical table put upon the record by the caveator and writing against the names given in it the ages given by the caveator's witnesses, Sham Chand's age 58, Gopi Kuar's 53, Kishun's 70, we get it that had she been alive in 1913 Makhan the mother of these three would have been at least 84 years old. Manki was the eldest sister and the lowest age possible to be placed against her name is 85 years. She could not possibly therefore have been born before 1828. It is almost impossible to believe that her first child should have been born when she was 31 years of age and her husband had become a lunatic.

Great ridicule is poured by Mr. Pugh upon the propounder's story that Phula Koer was brought by her brother to the house of this lunatic and married to him. Still greater ridicule must be poured upon the story that after 20 years of married life this lady Manki Koer should have submitted herself to the embraces of this horrible person Ram Chandar and borne of him a son.

The oral evidence of Sham Chand that he is the mother's sister's son of Avadh Bihari consists of the evidence of his family, which as we have shown is, in regard to the statement that Ram Chandra had one wife only, certainly false. The remaining evidence is merely that Sham Chand was a 'memera bhai' of Avadh Bihari. This without doubt is true. He was called memera bhai in every letter written between the parties. But whether that relationship was merely a step relationship or a true relationship it is certain that in common parlance they would be spoken of as cousins.

Nowhere in the pleadings was it denied that Phula Koer was Brindaban's sister. All that was denied was that Avadh Bihari was Phula's son. Nevertheless an offer was made at the last moment to bring a somewhat disreputable Mukhtear and another witness to show that in a document executed for the sale by Brindaban of land in Chapra, Brindaban's father's name was given as Jiwan Ram. This was nobody's case. The women who have been examined are agreed that Brindaban's father's name was Raiji Shukul. This in itself is sufficient to show that the evidence of the Mukhtear and the other witness as to Brindaban's parentage is valueless. It cannot be as Mr. Pugh suggests that Brindaban was the son of Jiwan Ram and was in fact Manki's brother. Had that been so, he was the

nearest bandhu of Avadh Bihari at the time of his decease and it is now the accepted rule of the law that the nearest bandhu succeeds. A sister's son is preferred to a mother's sister's son, [*Gunush Chunder Roy* v. *Nil Komul Roy* (2)] and a maternal uncle is preferred to the mother's sister's son [*Mohandas* v. *Krishnabai* (3)]. But this was never Sham Chand's case. Had it been true it would certainly have been Brindaban's case. Sham Chand stood or fell on his plea that Ram Chandra had one wife only and that Brindaban was not related to that wife and could therefore have no claim to the property.

Definite evidence has been given for the propounders by two witnesses who are not connected with the family, and this evidence the learned Judge has accepted. He heard this evidence and we see no reason to disagree with him as to its value. It proves conclusively that Avadh Bihari was the son of Phula Koer and that Phula Koer was Brindaban's sister. This evidence, as we have shown, is far more in accordance with the probabilities than is the evidence adduced by Sham Chand and we feel that if the burden of proof had been put in the lower Court upon the executors to prove that Brindaban was the heir to the estate at the time of Avadh Bihari's death to the exclusion of Sham Chand, we should have had no hesitation in holding that the burden of proof had been supported and that therefore Sham Chand had no interest and could not protest against the Probate of the will of the deceased. We are satisfied that the learned Judge was right in investigating the question as fully as he has done in order to avoid a long and tedious obstruction to the Probate by parties who, it is now proved, have no interest in the estate. From the evidence of Dhanukdhari, one of Sham Chand's cousins, it appears that the object of the Benares family was to force Brindaban to give them a share in Avadh Bihari's property, and we have little doubt that their failure to induce him to forgo his rights has resulted in this jealous obstruction. We hold that Gauri Shanker and Sham were rightly denied the right to have the will proved in their presence. The appeals are dismissed with costs.

V.S./R.K. *Appeals dismssed.*

(2) [1874] 22 W R 264.
(3) [1880] 5 Bom. 597.

A. I. R. 1918 Patna 59

CHAMIER, C. J.

Dawson Downing—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 241 of 1916, Decided on 11th January 1917, against order of Dist. Magistrate, Singhbhum.

Criminal P. C. (1898), Ss. 408 and 446—European British subject waiving right to be tried as such—Ss. 408 and 446 are inapplicable and accused has no right of appeal to High Court.

Where a European British subject charged with an offence is brought before a District Magistrate and the latter explains to him the procedure which will be followed if he claims to be tried as a European British subject and the procedure which will be followed if he waives his right to be tried as such, and he elects to be tried according to the latter procedure, the result of the waiver is to render Ss. 408 and 446, Criminal P. C., inapplicable to the case, and the accused has no right of appeal to the High Court.

[P 59 C 2, P 60 C 1]

Haribhushan Mukherji—For Appellant.

Sultan Ahmad—For the Crown.

Judgment.—The appellant has been convicted by the District Magistrate of Singhbhum of an offence under S. 304, Penal Code, and has been sentenced to three years' rigorous imprisonment and to a fine of Rs. 200 or in default to three months' rigorous imprisonment more, and has also been sentenced under S. 324, Penal Code, to pay a fine of Rs. 50 and in default to undergo one month's rigorous imprisonment. The facts are stated at length in the order of the District Magistrate. For our present purpose it is sufficient to say that it has been found by the District Magistrate, and the correctness of the finding is not disputed, that the appellant went out shooting on the day in question, that he drank a great deal of liquor and became very drunk. While very drunk and incapable of looking after himself he fired off his gun which at the time was loaded with buckshot. Some of the shot struck a coolie at a considerable distance and unfortunately caused his death. Other shots struck another coolie and caused some hurt to him. The conviction under S. 324, Penal Code, is in respect of the hurt caused to the second coolie and it is unnecessaary for us to consider that part of the case.

When the appellant was produced before the District Magistrate, it was explained to him that as he was a European British subject he was entitled to be tried as such. The procedure which would be followed if he claimed to be tried as European British subject and

the procedure which would be followed if he waived his right to be tried as such were explained to him by the Magistrate, and he was given time to consult his legal adviser and his friends before giving an answer. Later in the day the appellant stated that he preferred to be tried by the District Magistrate. The order of the Magistrate leaves no doubt that the position was properly explained to the appellant and that the appellant deliberately waived his right to be tried as a European British subject. According to the authorities the result of that waiver was to render S. 446, Criminal P. C., amongst other sections, inapplicable to the case and it also rendered S. 408 inapplicable, with the result that the appellant had no right to appeal to this Court. He should have appealed if at all to the Court of Session.

But the whole case is before us and the learned vakil for the appellant asks us in the exercise of our revisional jurisdiction to consider the question of sentence and if, in our opinion, the sentence calls for revision to pass an order with regard to it, and the learned Government Advocate who appears for the Crown supports the application that the sentence should be revised by us. It has already been stated that the appellant was very drunk when he fired his gun. It also appears that the appellant is almost totally illiterate and that he does not even know the difference between buckshot and any other shot. It further appears that although the appellant must be taken to have fired at or in the direction of the coolie who was killed, the coolie was not struck by a direct shot but by a ricochet. In one sense therefore the result of the shot was an accident. Taking all these circumstances into consideration we think that we may properly reduce the sentence passed upon the appellant. We accordingly reduce the substantive sentence of imprisonment passed upon him under S. 304, Penal Code, to 9 months' rigorous imprisonment. The sentence of fine and imprisonment in default of fine will stand. The sentence under S. 324, Penal Code, will also stand.

V.S./R.K. *Sentence reduced.*

***A. I. R. 1918 Patna 60**

MULLICK AND THORNHILL, JJ.

Rameshwar Singh Bahadur of Darbhanga—Appellant.

v.

Hitendra Singh and *others*—Respondents.

Appeal No. 169 of 1917, Decided on 20th June 1918, from Original Order of Sub-Judge, Darbhanga, D/- 21st April 1917.

*** Civil P. C. (1908), S. 47—Order refusing to discharge Receiver appointed in execution proceedings falls under S. 47.**

Where a Receiver is appointed in an execution proceeding, the question as to his discharge is a question relating to the satisfaction of the decree. Therefore an order refusing to discharge the Receiver is one falling under S. 47 and an appeal will lie against it. [P 61 C 1]

Purnendu Narain Sinha and *Murari Prasad*—for Appellant.

Hassan Imam, P. R. Das and *Mritunjoy Lal*—for Respondents.

Mullick, J.—This appeal arises out of an order made on 21st April 1917 by the Subordinate Judge of Darbhanga in an execution proceeding in which the Maharaja of Darbhanga appears as the decree-holder and certain relatives of his, alleged to be holders of babuana grants, appear as the judgment-debtors. The decree-holder is due a large amount and it appears that in 1910 in consequence of a compromise made between the parties a Receiver was appointed to hold charge of the properties for the execution of the decree, and an arrangement was sanctioned by the High Court of Calcutta under which a scheme was prepared for the discharge of the judgment-debts.

The application out of which the present appeal arises relates to the question whether the Receiver, Babu Jatindra Nath Sinha, who was appointed in June 1910 should or should not be discharged. Incidentally there was a question raised as to whether the scheme prepared in 1910 could be revised and the execution of the decree secured by the sale or mortgage of the whole or part of the babuana properties, but the Subordinate Judge has declined to go into that question and has treated the dispute before him as one merely as to whether this particular Receiver should or should not be discharged; and he has come to the conclusion that no reason has been assigned for the discharge of the Receiver who is now holding this office and he has therefore dismissed the case before him. Now so far as the appeal before us is concerned it is directed against

this order of the Subordinate Judge, and no ground has been urged in regard to the conduct of the Receiver which would enable the decree-holder to ask for his discharge from us. But the real dispute goes deeper and the matters which were incidentally raised before the Subordinate Judge will, as the learned vakil for the appellant states, have to be determined in the near future. He desires that we should now go into these disputes. I think it would not be proper for us to go into matters which the judgment-debtors at all events have not come prepared to litigate here and that the proper course will be for the decree-holder, if he so chooses, to raise these matters in the first instance in the executing Court. It is his contention that he has a right to re-open the scheme which was prepared and to ask the Subordinate Judge either to discharge the receiver and to bring the properties to sale or to retain the receiver and to direct him to sell either part or the whole of the properties. We are not concerned at this stage to express any opinion on this matter.

A preliminary point is raised as to whether an appeal lies at all against the Subordinate Judge's order, but it seems clear that the order of the Subordinate Judge refusing to discharge the receiver was made under S. 47, Civil P. C., and that therefore an appeal would lie. The case of *Mothibai* v. *Limji Nowroji Banaji* (1), though not on all fours with the present case, goes some way towards establishing the contention of the appellant that where a receiver is appointed in an execution proceeding, the question as to his discharge is a question relating to the satisfaction of the decree. The appeal will be dismissed with costs. Hearing fee three gold mohurs. It is said that different counsel have been appointed respectively by the receiver and the judgment-debtors. Only one hearing fee will be allowed to both.

Thornhill, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(1) [1880] 5 Bom 45.

A. I. R. 1918 Patna 61

CHAMIER, C. J. AND SHARFUDDIN, J.

Jagdiswar Dayal Singh — Auction-Purchaser—Appellant.

v.

Raman Barai and *others*—Judgment-debtors—Respondents.

Civil Misc. Appeal No. 275 of 1916, Decided on 8th February 1917, from order of J. C., Chota Nagpur, D/- 3rd July 1916.

Chota Nagpur Tenancy Act (1908)— Rent decree, execution of—Homestead put to sale —Decree-holder purchasing it and taking possession—Application for restoration of possession made two years later by tenants— Second appeal lies to High Court—Tenants held could not go behind sale and recover possession under Civil P. C. (1908), O. 21, R. 95.

A landlord in execution of a rent-decree against certain tenants put to sale the homestead of the tenant, which was not a part of the holding within the meaning of the Chota Nagpur Tenancy Act. Some of the tenants objected that the homestead was not saleable while the other tenants in spite of the notice of sale, kept quiet. The decree-holder purchased the homestead himself and took possession. Two years later the tenants applied for restoration of possession on the ground that the sale was illegal.

Held: (1) that the case was governed by the provisions of the Civil Procedure Code and a second appeal lay to the High Court; (2) that the application of the tenants was too late and that they were not entitled under O. 21, R. 95, Civil P. C., to get behind the sale and to recover possession of the property. [P 61 C 2, P 62 C 1]

Chamier, C. J.—This is an appeal against an order of the Judicial Commissioner of Chota Nagpur confirming with a slight variation an order passed by a Munsif Deputy Collector in Palamau. The respondents object that there is no right of appeal. This objection can only succeed on the respondents showing that the Chota Nagpur Tenancy Act governs the application in the present case. If they succeed in showing this, then it is quite clear that the Courts below had no jurisdiction to entertain this case at all and we should have to set aside all the proceedings in the exercise of our revisional jurisdiction. In my opinion there can be no doubt however that the proceedings were governed by the Civil Procedure Code. In that case there can be no doubt that a second appeal does lie.

The only facts which need be stated are that the appellant obtained a decree for rent against the respondents. In execution of that decree he brought to sale certain property which admittedly was not a holding within the meaning of the Chota Nagpur Tenancy Act. An objection was taken just before the sale by some of the respondents to the effect that the property was not liable to be sold. That objection was thrown out. The sale was confirmed and a certificate was issued to the purchaser who was the decree-holder. All this took place in 1913. Two years later the appellant as auction purchaser applied to the Court for delivery of possession and in July 1915 possession was delivered to him. In August 1915 the respon-

dents came into Court with an application praying that they might be restored to possession on the ground that the sale of the property ought never to have taken place. It is quite clear that this application was made far too late. Some of the respondents had objected to the property being sold before it was actually sold. The rest of the respondents had full notice that their property was going to be sold and did not object to the sale taking place. It is quite clear that the respondents were not entitled by means of an application under O. 21, R. 95, to get behind the sale and to recover possession of the property. The Courts below have discussed at some length the question whether the property was liable to be sold. I do not think it is necessary to go into this question. As a matter of fact it was definitely decided as between appellant and some of the respondents several years ago. The other respondents did not object to the sale at the time and it is too late to raise the question now. In my opinion the decisions of both the Courts below are erroneous. I would allow this appeal, set aside the orders of both the Courts below and dismiss the application of the respondents with costs throughout. Hearing fee in this Court will be one gold mohur.

Sharfuddin, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 62

ROE AND JWALA PRASAD, JJ.

Har Chand Rai-Anand Ram and *others*—Appellants.

v.

Ram Bahadur Singh and *another*—Respondents.

Appeal No. 242 of 1917, Decided on 25th October 1918.

Civil P. C. (1908), O. 9, R. 8 and O. 14, R. 1, Cl. 5—Date fixed for settlement of issues is date fixed for hearing.

The date fixed for the settlement of issues is a date fixed for the hearing of the suit within the meaning of O. 9, R. 8. [P 62 C 2]

P. K. Sen—for Appellants.

S. Sinha—for Respondents.

Judgment. — This is an appeal against an order under O. 9, R. 9, refusing to set aside the dismissal of the plaintiffs' suit. The facts of the case briefly are that, 1st March 1917 was fixed for settlement of issue. The plainfixtiffs had failed to complete the service of summons upon either of the two defendants. But in spite of this defendant 2 had appeared, defendant 1 being still absent. The plaintiff himself failed to appear, nor did any agent or vakil appear on his behalf. The suit was accordingly dismissed. The reasons given for the plaintiffs' failure to prosecute the suit were, firstly, that the case was in charge of one Bhagwan Sahai who was ill on the day in question, and secondly, that the plaintiffs had been much upset by the death of a member of their firm named Ananta Ram. In addition to these two grounds for restoring the suit it is urged, firstly, that the 1st of March having been fixed for the settlement of issues only was not a date fixed for the hearing within the meaning of R. 8, O. 9, and, secondly, that on the day in question the District Judge having directed that the Courts should close at 2 p. m. and the order complained of having been passed at 3-30 p. m., the order was a bad order. We may deal briefly with the last two points taken. The District Court has no jurisdiction to close the Subordinate Judge's Court, and it is nowhere suggested that owing to the Subordinate Judge's failure to close the Court the plaintiff or his agent was caught unawares. Moreover, it appears that so far as the Subordinate Judge's Court was concerned, no notice of the Judge's order was received before 3-30 p. m. Wiith regard to the contention that the date fixed for the settlement of issues is not a date fixed for the hearing, it is sufficient to read O. 14, R. 1, Cl. 5. It is clear from the use of the word "hearing" in that clause that the date fixed for the settlement of issues is as much a date fixed for the hearing of the suit as any other date fixed.

Upon the merits of the case we feel constrained to accept the Subordinate Judge's findings upon the facts. It was not suggested that Ananta Ram was looking after the case; it was the plaintiffs' case that Bhagwan Sahai was in charge of it. Ananta Ram's death therefore would not have affected Bhagwan Sahai's ability to appear and either ask for an adjournment or prosecute the suit. We find it impossible to differ from the finding of the learned Subordinate Judge that Bhagwan Sahai was not prevented by illeness from taking necessary action in the case, for it has been proved to our minds conclusively that Bhagwan Sahai was not only not ill on the day in question but was actually looking after a suit of the plaintiffs in the Batwara Deputy Collector's Court. Upon all the grounds urged we are of opinion that the appeal fails. It is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 63

CHAPMAN AND ATKINSON, JJ.

Debi Saran Singh and *others*—Defendants—Appellants.

v.

Rajbans Nath Dubey and *others*—Plaintiffs—Respondents.

Appeal No. 194 of 1914, Decided on 25th January 1918, from Original Decree of Sub-Judge, 1st Class, Gaya, D/- 30th March 1914.

Civil P. C. (1908), S. 54—Decree for partition of revenue-paying estate— Civil Court can execute it—Partition effected by civil Court—Party applying to Collector for partition of land revenue—Collector can reconsider allotment of shares—Civil Court cannot re-open partition properly made otherwise than by way of review—Effect of final decree for partition considered — Bengal Estates Partition Act (1897), Ss. 10, 11 and 12.

A civil Court has jurisdiction to execute a decree for partition of a revenue-paying estate, provided that it does not assume jurisdiction to partition the liability for the land revenue. In the event of a party applying to the Collector for a partition of the land revenue after partition has been effected by the civil Court, it would be open to the Collector to reconsider the allotment of the shares granted in the civil Court proceeding. [P 63 C 2, P 64 C 1]

There is no principle of law which enables a civil Court to re-open a partition properly made under a civil Court decree otherwise than by proceedings by way of review. The effect of the final decree of a civil Court for partition is to put an end to the co-tenancy and to vest in each person or group a sole estate in a specific property or allotment. The law does not provide for a suit in the civil Courts under which these separated estates can be divested and a co-tenancy recreated for the purpose of making a fresh partition. [P 64 C 1]

Lachmi Narain Singh and *Jal Gobind Singh*—For Appellants.

Khurshed Hasnain—For Respondents.

Chapman, J.—This appeal arises out of a suit for partition and for possession of a 2-annas 3 dams odd share in an estate purchased at a sale for arrears of revenue on 5th June 1901. The plaintiff alleges that he was dispossessed in 1912. The share that was purchased by the plaintiff is an Ijmali or residuary share, that is to say, the share remaining after the creation of separate accounts in respect of other shares in the estate under the Revenue Sales Act. Defendants 17 to 22 who did not contest the suit represented, according to the finding of the learned Subordinate Judge against which there has been no appeal, a share of 5 dams only. The plaintiff claimed a partition of the entire estate. The remainder of the share-holders who contested the suit pleaded that the plaintiff was not entitled to a partition of the entire estate, inasmuch as there had been a previous partition on 27th September 1893 under a decree of the Civil Court. Under that decree the estate had been divided into 12 separate shares. The residuary share purchased by the plaintiff fell within certain of the separated shares or pattis. The defendant's contention was that the plaintiff was entitled only to have his share carved out of these pattis. Their case was that the remaining 7 separated pattis should not be interfered with. This contention was overruled by the learned Subordinate Judge on the ground that the plaintiff by his purchase of the residuary share acquired an undivided share in the entire estate and that he was not bound by the previous partition. The defendants now appeal to this Court.

The question we have to determine is connected with the concurrent jurisdiction of the Collector and of the Civil Court in the matter of partitions. The Collector is responsible for the collection of the land revenue and, with that in view, the Collector has under the various Estates Partition Acts been charged wiith the jurisdiction of making partition of revenue-paying estates including the partition of liability to land revenue. This jurisdiction is given to the Collector with the object of ensuring that the security for the land revenue shall not be imperilled by the manner in which the partition is effected. The Civil Courts have jurisdiction to grant decrees for partition of revenue-paying estates, but the Code of Civil Procedure requires that the execution of the decree for the partition shall be effected by the Collector, see S. 54 of the present Code of Civil Procedure. Under the decision of the Full Bench of the Calcutta High Court in *Jogodishury Debea* v. *Kailash Chundar Lahiry* (1) however the majority of the Judges took the view that a Civil Court has jurisdiction to execute a decree for partition of a revenue-paying estate provided that it does not assume jurisdiction to partition the liability for the land revenue. This view of the matter has been confirmed by the terms of S. 12, Estates Partition Act, 1897. It is thus possible to say that in the event of a party applying to the Collector for a partition of the land revenue after partition has been effected by the Civil Court, it would be open to the Collector to re-consider the allotment

(1) [1897] 24 Cal 725 (F B).

of the shares granted in the Civil Court proceeding.

While however the jurisdiction of the Collector to re-open a partition made by the Civil Court may possibly have been retained, there is nothing in any of the Statutes and certainly not in any principle of law which would enable a Civil Court to re-open a partition properly made under a Civil Court decree otherwise than by proceedings by way of review. This view of the matter is based both upon the principles of res judicata which was applied in the case of a previous partition by the Privy Council in the case of *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (2), and also upon the principle that the effect of the final decree of a Civil Court for partition is to put an end to co-tenancy and to vest in each person or group a sole estate in a specific property or allotment. The law does not provide for a suit in the Civil Court under which these separated estates can be divested and a co-tenancy recreated for the purpose of making a fresh partition. The learned Subordinate Judge has taken a different view upon the authority of the case of *Gungadeen Misser* v. *Kheeroo Mundul* (3). That was a decision of the year 1874. The facts of that case appear from the judgment to be as follows:

A share-holder in a revenue-paying estate had been in exclusive possession of 25 bighas of land, the subject of the suit, together with other land in lieu of his undivided share in the estate. The plaintiff purchased the 25 bighas of land above referred to from this share-holder. The contesting defendants had purchased the share of certain other co-sharers at a revenue sale. The plaintiffs' contention was that these contesting defendants by their purchase at the auction sale had obtained merely a right to exclusive possession of specific portions of the estate held by the defaulting share-holders whose shares these contesting defendants had purchased. Tha argument was that inasmuch as the defaulting share-holders had been content to hold exclusive possession of specific portions of the revenue-paying estate in lieu of their undivided share, the contesting defendants who purchased the defaulting shares were entitled only to get those specific portions. It appears that the defaulting share-holders had obtained a separation of accounts under S. 10, Revenue Sales Act and not under S. 11. The Judges held that the plaintiffs' suit must be dismissed upon the ground that under the terms of the Revenue Sales Act where an account has been separated under S. 10 and the corresponding share is sold, what is sold is an undivided share and not any specific portion of the estate, and that to enable the plaintiff to succeed in such a suit would be to introduce uncertainty into the auction sales and the security of the land revenue. The report in the Bengal Law Reporter is imperfect. A fuller report of the judgment will be found in *Gungadeen Misser* v. *Kheeroo Mundul* (3). It is not clear from that report that there had in fact been a regular partition effecting the complete separatiion of the interests of the shareholders. Phear, J., who delivered the judgment said that the different shareholders had by some sort of private partition come to among themselves appropriated different portions of the mahal; but the Judges did not expressly find that there has been such a complete partition as to put an end to the condition of co-tenancy. In such a case no question of res judicata or of the effect of a Civil Court decree for partition arises. That case obviously would be no authority to justify us in holding that a partition effected by a Civil Court decree can be re-opened in a subsequent suit in a Civil Court. I would also be disposed to qualify the statement of the law made in that case. It would be more correct to say that when a share in respect of which a separate account has been opened under S. 10 or a residuary share is sold under the Revenue Sales Act, the extent to which the share must be held to be undivided will depend on the facts of each case. It may be that the share remains undivided only in respect of liability for land revenue and is divided in every other respect subject to the power of the Collector to re-adjust the allotments in the event of the liability for land revenue being partitioned by him. In the present case the plaintiff asked that the liability to land revenue should remain joint as before.

The case of *Gungadeen Misser* v. *Kheeroo Mandal* (3) was referred to with approval in the case of *Annoda Prasad Ghose* v. *Rajendra Kumar Ghose* (4) and in the cases of *Bhawani Koer* v. *Mathura Prasad* (5) and *Kumar Kolanand Singh* v. *Syed Sarafat Hossein* (6). These cases do not carry the

(2) A I R 1914 P C 31=41 I A 247=24 I C 294 (P C).
(3) [1875] 14 B L R 170.
(4) [1902] 29 Cal 223.
(5) [1908] 7 C L J 1.
(6) [1908] 12 C W N 528.

matter any further and certainly provide no authority for the contention that a decree for partition effected by a civil Court does not finally terminate the condition of a co-tenancy and put an end to all further right to partition so far at any rate as the civil Courts are concerned. In the case of *Moonshee Buzlool Rahman* v. *Pran Dhun Dutt* (7) it was held that an auction-purchaser of the rights of Government in an estate sold for arrears of revenue is not bound by a decision previously obtained to which the defaulting proprietor was a party, and this principle has been extended to the case of an auction-purchaser of an entire estate at a sale under the Revenue Sales Act [*Kanta Prosad Hajari* v. *Abdul Jamir Sadagar* (8), *Gokul Chandra Das* v. *Hara Sundari Dasi* (9) and *Gadadhar Bose* v. *Radha Charan* (10)]. But the principle has never been applied to the purchaser of the share of an estate at a revenue sale.

In the present case it would be obviously most inequitable that the properties, created into separate estates so far back as 1893 and separately enjoyed now for 25 years, should be again thrown into the hotchpot. We set aside the judgment and decree of the learned Subordinate Judge and, in lieu thereof, we direct that there be a preliminary decree for a partition of the plaintiff's share in the pattis created by the previous partition in which the share purchased by him now lies. These parties will be ascertained by the Subordinate Judge and a preliminary decree made by him accordingly. In order to make an equitable partition of the plaintiff's share in these pattis, it may be necessary to make a fresh partition of the defendants' share also in these pattis. The defendants are entitled to their costs in this Court and to half their costs in the Court below. In assessing the costs in this Court no allowance should be given for the preparation of the paper-book having regard to the reckless manner in which numbers of unnecessary papers were included in it.

Atkinson, J.—I concur.

V.S./R.K. *Appeal allowed.*

(7) [1867] 8 W R 222.
(8) [1904] 8 C W N 676.
(9) [1905] 9 C W N 383.
(10) [1907] 44 Cal 868.

A. I. R. 1918 Patna 65

MULLICK AND THORNHILL, JJ.

Lachman Ojha — Decree-holder — Appellant.

v.

Chariter Ojha and *others* — Defendants—Respondents.

Second Appeal No. 38 of 1918, Decided on 5th July 1918, from an order of Sub-Judge, Arrah, D/- 15th December 1917.

Civil P. C. (1908), O. 21, R. 53—Mortgage suit—Decree for mesne profits and costs only remaining subsisting in favour of mortgagee—Decree attached—It is decree for money within O. 21 and it is to be executed under O. 21, R. 53.

In a suit by a mortgagee the Court passed a decree in favour of the mortgagee for recovery of possession of the mortgaged property, unless the persons in possession of the property redeemed the mortgage by a certain date. There was also a decree for costs and mesne profits in favour of the plaintiff. The defendants redeemed the mortgage, so that the only decree which remained subsisting was for mesne profits and costs. This decree was attached and sought to be sold by a creditor of the mortgagee in execution of a decree obtained by him against the mortgagee.

Held: that the decree as attached was a decree for money within the meaning of O. 21, and that the only procedure which the attaching decree-holder could adopt was to execute the decree under O. 21, R. 53. [P 67 C 1]

S. Sinha and *Sheo Nandan Roy*—for Appellant.

Atul Krishna Roy—for Respondents.

Mullick, J.—This is a second appeal which raises an interesting point of law. The execution creditor before us is one Lachman Ojha, who has got a money decree against the respondent Chariter and others. Now, Chariter had a decree against Radha, Sheodeni and others, which in execution of his decree Lachman Ojha attached. Lachman's claim against Chariter is about Rs. 500, while the decree which Chariter has against Radha and others is one for costs amounting to Rupees 278-8-0 and for mesne profits which have not yet been ascertained, but which are estimated to be of the value of Rupees 11,000. Lachman Ojha applied in the Court of the Munsif for permission to attach and sell Chariter's decree. The Munsif held that the decree was immoveable property within the meaning of S. 60, Civil P. C., that the provisions of O. 21, R. 53, which prohibited the sale of decree, for payment of money were not applicable and that therefore the sale could proceed. The decree was accordingly sold and Lachman Ojha has satisfied his claim by purchasing the decree himself. The case then went on in appeal to the Subordinate Judge,

who took a different view and held that Chariter's decree was a money decree within the meaning of O. 21, R. 53, Civil P. C., and that it was not open to Lachman Ojha to sell that decree.

The matter comes before us in second appeal by the creditor. The first contention is that the learned Subordinate Judge is wrong in holding that the decree now under consideration is a decree for money. It is contended that the decree is a decree for immoveable property which is saleable under the Civil Procedure Code. Now it is necessary to examine what was the suit in which Chariter's decree was made. It appears that Chariter was a mortgagee in possession of certain lands. Some third party brought a suit against the mortgagor on the footing of another mortgage, obtained a decree and took possession of the mortgaged lands. Chariter was then obliged to bring a suit against his mortgagor as well as the persons who had obtained the decree for possession, for a declaration that the above decree was collusive and for recovery of possession of the property, which had been mortgaged to him by the mortgagor. In the alternative he claimed that if his prayer for recovery of possession was not allowed, his mortgage claim which amounted to Rs. 1,679 must be satisfied by the persons who had taken possession of the mortgaged property. The decree in appeal in that suit was that Chariter would be entitled to recover possession as prayed for, unless the persons who were in possession redeemed his mortgage within a certain time. There was also a decree for costs and mesne profits in favour of Chariter.

It appears that the defendants in that suit availed themselves of the opportunity to redeem and paid Chariter off, so that the only part of Chariter's decree, that is, now outstanding, is that which relates to costs and mesne profits. It is that decree that Lachman Ojha seeks to sell in execution of his decree against Chariter. It is contended that as the decree was primarily a decree for recovery of possession of lands coupled with an alternative condition as to redemption, it was a decree for immoveable property. In my opinion that contention does not apply to the circumstances of this case. Here the only decree that is now outstanding is the decree for costs and for mesne profits. Now we know that a decree for mesne profits is a decree for money within the meaning of O. 21, Civil P. C., and it seems to me that the only procedure that the decree-holder before us can legally take is to attach that decree and to execute it under the provisions of O. 21, R. 53.

The learned counsel who appears for the appellant draws our attention to *Vasudeva Ravi Varman* v. *Narayana Pattar* (1). In that case there was an order in appeal dismissing the suit and entitling the defendant to recover possession. The defendant applied under S. 583, Civil P. C., 1882, to recover possession by way of restitution. One of his creditors thereupon applied to the Court to attach the defendant's right to realize mesne profits in respect of the lands, which also he was entitled to recover by way of restitution. Their Lordships of the Madras High Court held that as the decree in favour of the defendant did not expressly give him a right to recover mesne profits but merely dismissed the suit against him, it could not be said that there was any decree in existence for payment of money and that S. 273, Civil P. C., which corresponds to R. 53, O. 21, of the present Code, did not apply to the sale of the right to recover mesne profits. They held therefore that that right was immoveable property and could be sold. It is to be noticed that their Lordships did not base their decision upon the fact that the right to mesne profits was coupled with the right to recover immoveable property. Similarly in the present case, so far as Chariter's decree gave him an alternative right to recover possession of the mortgaged property, that right is not to be taken into consideration in determining the question as to whether the decree is or is not a decree for an immoveable property. The basis of their Lordships' decision was that there was no decree in existence expressly giving a right to recover mesne profits, but here there was a decree giving such a right and the ruling of their Lordships is therefore in favour of the respondents before us and not against them. This would seem to be sufficient for the disposal of this second appeal.

It is however contended that if the decree was immoveable property, then no proceeding under S. 47, Civil P. C., is competent, but that the proper provision for setting aside the sale would be R. 90, O. 21. The appellant is treading on rather dangerous ground here, because if it is held that the decree is immoveable property to which the provisions of O. 21, R. 90, apply then there is no second appeal, and

(1) [1901] 24 Mad 341.

the appellant has no right to come here at all. However upon the view that we take, the decree is, in our opinion, not one for immoveable property, but is one for money within the meaning of O. 21, Civil P. C., and therefore the proper course for the attaching decree-holder is to proceed under R. 53 of O. 21. The learned Subordinate Judge's decison is correct and the appeal will be dismissed with costs.

Thornhill, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 67

MULLICK AND THORNHILL, JJ.

Ritu Kuer—Decree-holder— Appellant.

v.

Alakhdeo Narain Singha—Judgment-debtor—Respondent.

Appeal No. 252 of 1917, Decided on 1st July 1918, from Original Order of Sub-Judge, Gaya.

(a) Civil P. C. (1908), S. 151 and O. 9, R. 9—Execution application dismissed for default cannot be restored—Execution.

An application for execution dismissed for default cannot be restored either under O. 9 or under S. 151. [P 68 C 2]

(b) Execution—Executing creditor absent—Court can still go into judgment-debtor's objections.

There is nothing in the Civil Procedure Code which ousts the jurisdiction of an executing Court to go into the merits of the judgment-debtor's objection even though the executing creditor is absent. [P 68 C 2]

(c) Execution — Court with jurisdiction rightly or wrongly deciding that decree-holder cannot proceed with execution—Decision is binding till set aside.

Where, rightly or wrongly, a Court with jurisdiction has disposed of the judgment-debtor's objections on the merits and has decided that the decree-holder is not competent by reason of a defect of parties to proceed with the execution, the decision is binding on the decree-holder till it is set aside. [P 69 C 1]

Shoroshi Charan Mitra—for Appellant.

Ganesh Dutt Singh — for Respondent.

Mullick, J.—This appeal arises out of the execution of a decree for costs passed so far back as 1904. The amount of costs allowed by the decree was a sum of Rs. 1,058, and the claim with interest and other expenses now amounts to Rs. 1,950-12-0. The course of the litigation is instructive. The original judgment-debtors were Alakhdeo Narain and his sister Anant, who is now dead, and the execution is proceeding against Alakhdeo alone. The decree-holder was a man named Bhagwat Prasad. He, on 17th July 1903, filed an execution petition which was dismissed on 22nd February 1909, because he had died subsequently to the filing of the execution petition and no substitution of his heirs had been made in the execution proceedings. Bhagwat Prasad left a widow and two daughters, one of whom, Mt. Ritu Kuer, claimed the decree in question on the ground that Bhagwat during his lifetime had made a gift of it to her and on 24th February 1911 she took out Letters of Administration in respect of her father's estate.

On 13th June 1911, Ritu Kuer as administratrix filed the execution petition. That petition was dismissed on 25th October 1911. The third execution petition filed by her on 6th January 1913, and the judgment-debtor Alakhdeo preferred an objection under S. 47, Civil P. C., contending that the decree could not be executed by Ritu Kuer in the absence of the widow and the other daughter of Bhagwat. On 28th June 1913, after several adjournments, the execution case came up before the Subordinate Judge, who made the following order: "It is clear from the testimony of the judgment-debtor's witness, Mahadeo Singha, that the mother of the applicant for execution is alive. Their plea is that as the decree stands in the name of her deceased father Bhagwat Pande she has no right to execution. The execution petition is dismissed with costs. Pleader's fee Rs. 8 ex parte. Decree-holder's Pleader is absent."

The creditor Ritu Kuer does not appear to have taken any steps to set aside this order; she simply ignored it and filed another execution petition on 3rd March 1914, before the Subordinate Judge. That execution petition was dismissed because she failed to prove service of notice upon the judgment debtor. The next and last execution case was filed on 16th November 1916, and in it the Subordinate Judge has given effect to the judgment-debtor's contention that so long as the order of 28th June 1913 stands, it is a bar to all future execution proceedings in respect of this debt. The present appeal is preferred by the creditor against the order of the Subordinate Judge dismissing the execution petition. Now the first ground urged by the learned vakil for the appellant is, that O. 9, Civil P. C., applies to execution proceedings and that under rule 8 of that Order, even though the judgment-debtor appeared the Court should have simply recorded an order of dismissal for default and was not in any way competent to go into the merits of the

objections raised by the judgment-debtor. It is urged that in going into the merits of the objections the Court acted without jurisdiction, and therefore the order made on 28th June 1913 is a nullity.

Now I am quite satisfied that O. 9, Civil P. C., does not apply to execution proceedings. S. 141, Civil P. C., has been distinctly interpreted as meaning that it is not necessary for Courts to apply the provisions of O. 9 to proceedings in execution and we have the clear authority of Sir Lawrence Jenkins in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (1) supporting this view.

There has been, it is true, some attempt on the part of other Courts to distinguish this case and to apply O. 9, Civil P. C., to cases which seemed to those Courts to be proceedings of an original nature, but in my opinion it is impossible in view of the ruling of their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (2) as interpreted by Sir Lawrence Jenkins in the case cited above, to make any distinction between proceedings in execution which are of an original nature and those which are not. This is also the view taken by their Lordships of the Calcutta High Court in *Bharat Chandra Nath* v. *Yasin Sarkar* (3).

The learned vakil for the appellant has drawn our attention to the case of *Satya Narayan Lal* v. *Gobind Sahay* (4) but that case does not touch the present case. In that case a claim was made by a person who was not a party to the proceedings, and it was held by their Lordships of this Court that the proceeding was of an original nature and that O.9, Civil P. C., would apply for restoring the case after it had been dismissed for default. It is not necessary for the purposes of the case now before us to consider how far that decision is consistent with the view previously taken by their Lordships of the Privy Council in *Thakar Prasad* v. *Fakir Ullah* (2). It is sufficient to say that the proceeding before the execution Court was not a proceeding similar to that in *Satya Narayan Lal's* case (4). In my opinion a decree-holder, whose case is dismissed for default, has his remedy by way of fresh applications within the period of limitation or by resort to the provisions of O. 47 for review. There is no reason why additional facilities should be given to him by applying the provisions of O. 9.

Then it has been contended that although O. 9, Civil P. C., may not apply the inherent powers of the Court should be invoked for the purpose of restoring the case, and reliance has been placed upon *Bharat Chandra Nath's* case (3) in support of the view that it is open to this Court to direct the Subordinate Judge to consider whether or not he should use his powers under S. 151, Civil P. C. Speaking for myself I should be entirely averse to any Court's using its inherent powers for the purposes of restoring execution cases. Execution creditors as well as the judgement-debtors have ample facilities under the existing law for restoring cases dismissed for default, and there is no reason why the extraordinary and vague jurisdiction given by S. 151 should be resorted to for supplementing those facilities. I hold therefore that O. 9, Civil P. C., was not applicable. It was therefore not illegal for the Subordinate Judge to go into the merits of the judgment debtor's objection. Moreover, if the Court has acted illegally by contravening O. 9, that would have been at best an error of law made by a Court with jurisdiction. The Court had the right to apply the law as it understood it and if in doing so it made a mistake, it cannot be said that the Court acted without jurisdiction.

In order to support his argument as to the want of jurisdiction on the part of the Subordinate Judge, the learned Vakil has also brought to our notice R. 57 of O. 21, which says that if after attachment the decree-holder fails to appear the attachment is void. That is an additional penalty but it has no bearing on the question of jurisdiction. In my opinion there is nothing in the Civil Procedure Code which ousts the jurisdiction of the executing Court to go into the merits of the judgment-debtor's objections even though the executing creditor is absent. I cannot, therefore accept the contention that even though the judgment-debtor is anxious to have the case decided on the merits, the Court cannot proceed in the absence of the executing creditor. It cannot be the intention of the law that judgment debtors should be placed in this unsatisfactory and insecure position.

Finally it is contended that there is no principle of law under which the order of the 28th June would be a bar to future executions. Now, the learned Subordinate Judge has based

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(1) A I R 1914 Cal 126=41 Cal 1.
(2) [1895] 17 All 106=22 I A 44=6 Sar 526 (P C).
(3) [1917] 41 I C 586.
(4) [1918] 43 I C 951.

his order on the principle of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (5). In that case the judgment-debtor was absent and in his absence the Court decided that a decree which was manifestly barred by law was not so barred, and proceeded to execute the decree under that erroneous view of the law. Their Lordships held that it was not open to the judgment-debtor in a subsequent execution to challenge the decree-holder's right to execute the decree by showing that the previous proceedings were incompetent.

Here, rightly or wrongly, a Court with jurisdiction has disposed of the judgment-debtor's contention on the merits, and has decided that the decree-holder was not competent, by reason of a defect of parties, to proceed with the execution. The principle of *Mungul Pershad Dichit's* case (5) clearly applies and it is not open to the decree-holder to come in and say that the previous order was wrong. The learned vakil contends that in *Mungal Pershad Dichit's* case (5) the judgement-debtor, though he did not appear before the order was passed, did do so subsequently and accepted the order of attachment. That may be so, but the principle upon which their Lordships decided *Mungul Pershad Dichit's case* (5) was founded upon any subsequent ratification by the parties.

The learned vakil next relies on the case of *Bholanath Dass* v. *Profulla Nath Kundu Chowdhry* (6). In that case *Mungal Pershad Dichit's case* (5) was distinguished by their Lordships of the Calcutta High Court on the ground that there was in fact no adjudication upon the merits, and the execution case was dismissed merely by reason of the absence of the decree-holder. Their Lordships held that as there had been no adjudication upon the merits, the principle of res judicata did not apply. Therefore that case is no authority for the contention that the principle of *Mungul Pershad Dichit's* case (5) does not apply in every case where a judgment-creditor is absent. It was open to the decree-holder to appear on the day fixed for the hearing of the judgment-debtor's objections. The Court might certainly have dismissed the case without going into the merits, but it chose to go into the merits and its decision is, therefore, binding till it is set aside. The appeal is dismissed with costs.

Thornhill, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(5) [1882] 8 Cal 51=8 I A 123=4 Sar 249 (P C).

(6) [1901] 28 Cal 122.

A. I. R. 1918 Patna 69

ROE AND COUTTS, JJ.

Keshwa Surendra Sahi— Appellant.

v.

Mt. Malukrani Kuer— Respondent.

Civil Misc. Appeal No. 64 of 1918, Decided on 1st November 1918, from decision of Sub-Judge, Saran.

Limitation Act (1908), Art. 182, Cl. 5—Application for execution against minor through mother without application for appointment of guardian-ad-litem operates to save limitation.

An application for execution of a decree made against a minor judgment-debtor represented by his mother, without any application to the Court for an order appointing the mother guardian-ad-litem of the minor, is in accordance with law and operates to save limitation. [P 69 C 2]

Hasan Imam, Rajendra Prosad and *Ambika Prosad*—for Appellant.

Rai Tribhuannath Sahay—for Respondent.

Judgment.—In this case the appellant is aggrieved by an order of the Subordinate Judge of Saran disallowing his objection to the execution of a decree. That objection was made on the ground that the decree was now extinct under the Law of Limitation, no step-in-aid of execution having been taken in accordance with law within three years prior to the present application. It is conceded that an application was made to execute the decree in 1916. But it is urged that this application was not in accordance with law by reason of the fact that the judgment-debtor was then a minor, and the application was made as against the minor represented by his mother without any application to the Court for an order appointing the mother as guardian ad litem. We are of opinion that the application must be held to have been a step-in-aid of execution taken in accordance with law, for it was open to the decree-holder either to include in his application for execution an application for a formal order appointing a guardian or to make that application as a separate application. The first step-in-aid of execution was obviously to pursue the property of the minor, stating that he was a minor and naming the person who would be his natural guardian. The appointment of the guardian by the Court would not be the first step but the second step-in-aid of execution. Therefore clearly the application itself was a first step made in

execution of the decree and was in accordance with law. Even if it were not so, I should be loath to hold otherwise than was held in *Gopal Chunder Manna* v. *Gosain Das Kalay* (1) by the Full Bench, *Kalka Dube* v. *Bisheshar Potak* (2) and *Hari* v. *Narayan* (3). A decree does not become time barred by reason of a trivial defect in the form in which the former application was made. I would dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

(1) [1898] 25 Cal 594. (F B).
(2) [1901] 23 All 162.
(3) [1888] 12 Bom 427.

A. I. R. 1918 Patna 70

CHAPMAN AND ATKINSON, JJ.

Budhan Mahton and *others*—Defendants—Appellants.

v.

Wazi Hunnissa Begum and *another* Plaintiffs—Respondents.

Appeals Nos. 61 to 88 of 1917, Decided on 1st February 1918, from Appellate Orders of Dist. Judge, Patna.

Bengal Tenancy Act (8 of 1885), S. 37—Legal contract for enhancement does not bar subsequent suit for enhancement.

Section 37 contemplates a prohibition against enhancement of rent in respect of a contract validly made and binding between the parties; an illegal or invalid contract made within fifteen years of the last enhancement does not come within the provisions of the section so as to operate as a bar to the institution of a suit for enhancement of rent. [P 70 C 2]

Kulwant Sahai and *Sant Prasad*—for Appellants.

Fakhruddin and *Khurshed Husnain*—for Respondents.

Atkinson, J.—These appeals have come before us from a decision of Mr. Ross, the District Judge of Patna. The plaintiffs sued to enhance the rent payable by certain tenants on their property. Thirty-four appeals were taken before the learned District Judge and out of 34 only 28 cases are now pending in second appeal before us. The plaintiffs, who are the zamindars, let the lands in suit to the defendants as tenants. Sometime about the year 1882 they leased the property to a ticcadar, who was entitled to collect from the tenants the rents payable by them.

In the year 1882 the ticcadar sued the tenants for an enhancement of rent. The suit was dismissed; and after the dismissal of the suit while an appeal was pending the parties came to an agreement, the ticcadar on the one side and the tenants on the other. By that agreement, the tenants agreed to pay an enhanced rent for the years 1291 to 1293. In 1294 the agreement was revived and again the tenants entered into an agreement with the ticcadar to pay an enhanced rent from the years 1294 to 1301. In 1301 the ticcadar again came to an agreement to enhance the rent for the years 1302 to 1310. The tenants agreed to pay a further enhanced rent to the ticcadar by an agreement which continued in operation till 1310. In 1311 a further arrangement was come to between the ticcadar and the tenants by which the tenants agreed to pay a further enhanced rent for the years 1311 to 1319. Subsequently when the matter came before the Settlement Officer it was pointed out that the contract that was made between the parties in 1311 was illegal. The grounds on which it was declared to be illegal do not appear. But there are obvious reasons for holding that the agreement was illegal; firstly, because it was an agreement which was made within 15 years of the date of the last enhancement. Such an agreement is prohibited by S. 37, Ben. Ten. Act. Therefore the agreement that was arrived at in the year 1311 between the parties was illegal. No doubt after that agreement was entered into, the tenants did pay the rent provided thereby to be paid, but clearly the rent was in excess of the amount provided in the agreement in 1302.

It is urged now in second appeal that the learned Judge was wrong in holding in point of law that this suit was not barred by the provisions of S. 37, Ben. Ten. Act. It was contended before the learned Judge that inasmuch as there was a contract providing for enhancement of rent in the year 1311 that no suit could be instituted by the plaintiffs now to enhance the rent, an enhancement of rent having already taken place within 15 years prior to the institution of this suit. It is right to observe that the ticcadar made the contract in 1311 and not the plaintiffs as zamindars. The learned District Judge, Mr. Rose, has held that the provisions of S. 37 do not apply to this case. That section, we think, clearly contemplates a prohibition against enhancement of rent in respect of a contract validly made and binding between the parties; but that if an illegal or invalid contract and one not legally binding is made within the period of 15 years that such a contract does not come within the provisions of S. 37, Ben. Ten. Act, so as to operate as a bar to the institution of a suit for enhancement of rent. We think the view taken by the learned Judge as to the

proper construction to be put upon S. 37 was right. The wording of the section runs as follows: "A suit for enhancement of rent of a holding shall not be entertained if within 15 years next preceding its institution the rent of the holding has been enhanced by a contract made between the landlord and the tenants." Giving a legal interpretation and construction to these words, it appears to us that they must mean that the contract then made between the parties to operate as a bar to a subsequent suit for enhancement must be a contract legally binding and operative as between the parties to it; but that these words cannot apply to a contract which is void and illegal. This appears to us to be the correct interpretation of S. 37. Therefore the enhanced rent arrived at by the agreement of 1311 would not operate as a bar to the present suit for enhancement of rent. Accordingly we think the learned District Judge was right in his view of the construction of S. 37 and we dismiss these appeals with costs.

It is right to say that the plaintiffs must suffer for the illegal action of the ticcadar in so far as the receipt of rent over and above the rate stipulated by the agreement of 1302 is concerned. After the enhancement is made by the learned Judge on remand, which we confirmed, we direct that in the future payment of rent the tenants will be entitled as against future rent to deduct in respect thereof the sums paid by them between the years 1311 to 1316 in excess of the rent provided by the agreement of 1302. The deductions will be without interest. We dismiss the appeals.

Chapman, J.—I agree.

V.S./R.K. *Appeals dismissed.*

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CHAPMAN AND ATKINSON, JJ.

Raghu Singh and *others*—Plaintiffs—Petitioners.

v.

Usuf Ali and *others*—Defendants—Opposite Parties.

Civil Revn. No. 258 of 1917, Decided on 22nd March 1918, against order of Dist. Judge, Monghyr, D/- 25th June 1917.

Bengal N. W. P. and Assam Civil Courts Act (1887), S. 21-A—Suit valued at more than Rs. 5,000—Appeal preferred to District Judge—No objection as to jurisdiction raised and appeal decreed—District Judge has no jurisdiction to entertain appeal and his order is nullity—No inherent jurisdiction to try case—Consent of parties cannot confer jurisdiction and objection to it can be taken at any time.

Where there is an inherent want of jurisdiction, the consent of parties cannot confer jurisdiction and objection can be taken at any time. Where a Court has no inherent jurisdiction to try a case it cannot pronounce any decree and if it does pronounce a decree that decree is null and void. On the other hand, if a Court has jurisdiction and the law requires some preliminary conditions to be observed ancillary to such jurisdiction being exercised, the parties may waive these conditions and in that event the jurisdiction cannot be impeached on the ground of irregularity in the exercise of the Court's jurisdiction.

A suit for recovery of money on the basis of a mortgage valued at more than Rs. 5,000 was instituted in the Court of the Subordinate Judge who decreed it ex parte and dismissed an application by the defendant for re-hearing under O. 9, R. 13, Civil P. C. The defendant preferred an appeal to the District Judge against the order dismissing his application under O. 9, R. 13. The parties did not raise any objection as to the jurisdiction of the District Judge, who decreed the appeal.

Held: (1) that under S. 21, Cl. (a), Bengal, N. W. P. and Assam Civil Courts Act, the District Judge had no jurisdiction to entertain the appeal and his order was a nullity; (2) that the fact that the plaintiff did not raise any objection as to jurisdiction in the appeal did not estop him from raising it before the High Court.

[P 72 C 1, 2]

Purnendu Narain Singh—for Petitioners.

Abani Bhushan Mukerji for *Muhammad Mustafa Khan*—for Opposite Parties.

Atkinson, J.—This application comes before us in revision seeking to set aside the order of the District Judge of Monghyr, dated 25th of June 1917. The facts out of which this application arises are that the plaintiffs, the petitioners before us, instituted a suit for recovery of money due on foot of a mortgage-bond, dated 13th September 1904; and for the purpose of court-fee the suit was valued by the plaintiffs at Rs. 5,992-3-5. The case came on for hearing and was decreed ex parte. An application was then made by the defendants to set aside the ex parte decree under O. 9, R. 13, Civil P. C. The learned Subordinate Judge declined to set aside the ex parte decree and from that order there was an appeal to the District Judge. It is contended before us that the learned District Judge had no jurisdiction to entertain the appeal by virtue of the provisions of S. 21, Cl. (a), Civil Courts Act of 1887. That section provides that a District Judge shall have jurisdiction in first appeal where the value of the suit appealed from does not exceed Rupees 5,000. Here, it is conceded that the value of the suit exceeds Rs. 5,000 and

is nearly 6,000. Thus it is contended that the order of the learned District Judge is a nullity and is void. With that view we agree; and that view is amply supported by authority. The authorities may shortly be summarized to be that where a Court has no inherent jurisdiction to try a case it cannot pronounce any decree and if it does pronounce a decree that decree is null and void. On the other hand, if a Court has jurisdiction and the law requires some preliminary conditions to be observed ancillary to such jurisdiction being exercised, the parties may waive these conditions and in that event the jurisdiction cannot be impeached on the ground of irregularity in the exercise of the Court's jurisdiction. The learned vakil appearing on behalf of the petitioners has referred us to the case of *Ledgard* v. *Bull* (1) and at p. 203 their Lordships of the Privy Council say:

"When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by mutual consent convert it into a proper judicial process although they may constitute the Judge their arbiter and be bound by his dicision on the merits when these are submitted to him." I think that what their Lordships mean to lay down is that where the parties agree to submit their differences to a particular person who has no jurisdiction as a Judge that then they are bound by the decision of that arbiter to whom they submit for determination the matter in dispute between them. But where a Court has no inherent jurisdiction the consent of parties cannot give jurisdiction. That proposition has never been denied. The learned vakil for the defendants has endeavoured to argue that the plaintiffs, not having raised the question of jurisdiction before the learned District Judge when the application was before him, are estopped from doing so at this stage. In my opinion, there is no foundation for, or substance in, this argument. I think that at p. 384 of the latest edition of Woodroffe's Code of Civil Procedure a correct summary of the law is to be found, where it is stated as follows: "A party can only appeal when so allowed by Statute; and it is only the Court to which jurisdiction is given to entertain an appeal in a particular matter which can determine it. And where there is inherent incompetency in a Court, it has been held that objection can be taken at any time and that consent cannot confer jurisdiction."

Two cases have been referred to by the learned vakil for the defendant. One is *Jose Antonio Barreto* v. *Francisco Antonio Rodrigues* (2). That case is clearly distinguishable on its facts, because in that case the learned Judges were not dealing with the general proposition of law with which we are concerned. The only question in that case was as to the determination of the market value of a certain property for the purposes of establishing jurisdiction and it was held that as neither party raised any question as to want of jurisdiction on the part of the Court which tried the case, they must be taken to have admitted that the market value of the property in suit was below Rs. 5,000. That case was essentially different from the present case. The second case relied upon by the learned vakil for the defendant is *Dayaram Jagjivan* v. *Goverdhandas Dayaram* (3). That case seems to be a very strong case because the learned Judges there admitted that the Court has no jurisdiction; but they declined to interfere on the ground that the plaintiff to whom relief was granted by the lower appellate Court would, if the application was allowed, be obliged to bring a suit to establish a right which he claimed to the property in dispute after the expiry of the period of limitation within which he was entitled to bring that suit. I cannot follow the reasoning of the judgment of the learned Judges in that case. It seems to me to be quite inconsistent with the principles laid down in the Civil Procedure Code. In my opinion, the learned District Judge in the case with which we are dealing had no inherent jurisdiction to hear the appeal and that his judgment is therefore is illegal and must be set aside. I would therefore allow this application and set aside the order of the learned Judge, dated 25th of June 1917. There will be no order as to costs.

Chapman, J.—I agree.

V.S./R.K. *Application allowed.*

(1) [1887] 9 All 191=13 I A 133 (P C).

(2) [1910] 35 Bom24=7 I C 950.
(3) [1904] 28 Bom 458.

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MULLICK AND JWALA PRASAD, JJ.

Jadab Lal—Plaintiff—Appellant.

v.

Debi Lal Singh and *others*—Defendants—Respondents.

Appeal No. 208 of 1915, Decided on 28th June 1917, from Original Decree of Sub-Judge, Purulia, D/- 21st November 1914.

(a) Land Tenure—Jagir—Police jagirs in zamindari of Pachete are hereditary subject to certain conditions—Sale of jagir in execution of decree for arrears of rent—Objection to sale by jagirdar dismissed and suit to set aside also dismised—Suit by subsequent jagirdar for possession of jagir is barred by doctrine of res judicata.

The police jagirs in the zamindari of Pachete are hereditary, subject to the condition that it is competent to the representative of Government to dismiss the heir of the last jagirdar and to appoint, if necessary, even an outsider, but till the Collector exercises his option the customary rule of inheritance must operate. Where the Collector does not exercise his power of appointment and allows the rule of succession to take its course, particularly where he actually withdraws his right of nomination, the heir of a jagirdar can take only what the jagirdar had. But where the Collector does step in to exercise his power of nomination and dismisses a lineal heir, the new appointee succeeds not as an heir but so to speak by vis major. [P 75 C 2, P 76 C 2]

A police jagir in the zamindari of Pachete was sold in execution of a decree for arrears of rent. The heir of the judgment-debtor, the succeeding jagirdar, objected to the sale, but his objection was overruled. Subsequently he brought a suit to set the sale aside but the suit was dismissed as barred by limitation. His heir again brought a suit for possession of the jagir.

Held: (1) that the jagirdar who held the jagir at the time of the sale represented the whole jagir, and that by the sale it passed to the purchasers so that nothing was left to which the plaintiff could lay claim; (2) that the plaintiff's claim was barred by the doctrine of res judicata by reason of the dismissal of the objection and suit preferred by his father. [P 76 C 2]

(b) Execution sale—Rights of parties are fixed with reference to state of law at that time.

When a sale is held the rights of the parties are fixed with reference to the state of the law at that time, and any subsequent interpretation will not operate to affect the results of that sale. In every sale what matters is what the Court intends to sell and what the auction-purchaser intends to buy. [P 76 C 1]

Abani Bhushan Mukerji—for Appellant.

Sivinarain Bose and *Naresh Chandra Sinha*—for Respondents.

Mullick, J.—This suit was instituted by Chandra Mohan Singha Thakur, son of Surja Narayan Singh Thakur, on 31st January 1912 against the following defendants: (1) Debi Lal Singha Deo, son of Raja Nilmani Singha Deo of Pachete in the District of Manbhum (2) Jyoti Prasad Singha Deo, son of Hari Narayan Singha Deo, a zamindar of Manbhum, and, (3) The Secretary of State for India in Council. During the pendency of the suit Chandra Mohan Singha Thakur died and his son Jadav Lal Singha was substituted as plaintiff. The suit is for recovery of possession of three mouzas, named, Jori, Tari and Het Jori, which are dsecribed in the plaint as a Government Police jagir property. It appears that a suit for rent was brought in 1859 by the Rajah of Pachete against Kinu Singha, the holder of the jagir, for arrears of rent which had accrued in respect of these mauzas during the period when Mahakum Singha, father of Kinu Singha, held the jagir and a decree was made in favour of the Raja on 13th March 1861. For some reason, which has not been fully disclosed, execution proceedings on the decree were stayed by the Collector from 1852 to 1876. There are however indications in the record that during this period the jagir was under attachment by the Collector under the provisions of the Civil Procedure Code of 1877, and consequently the execution of the decree could not proceed in the civil Court. The attachment was released in or about 1876 when the decree-holder again applied for execution. On 29th March 1876 Surjan Singha, the son of Kinu Singha, filed an objection to the effect that the jagir was inalienable; that for arrears due from Mahakum no decree could be made against Mahakum's son Kinu; and that in any event while the jagir was in the possession of Surjun as jagirdar, no sale could take place for arrears which were not due from him. That objection was rejected on 15th August 1877, the sale was held in due course and a certificate issued to the auction-purchaser, the Raja, on 21st November 1878.

In April 1879 the Raja settled the mauzas with one Kirti Choudhury, who sold them to defendant 1 on 6th Falgun 1295, B. S., corresponding to the English year 1888. Surjun Singha however was not satisfied and we find that on 8th March 1888, he instituted a regular suit against Raja Nilmani Singha for recovery of the property. That suit was dismissed on 25th August 1881. There was an appeal to the High Court, which also was dismissed on 8th August 1882. It is not clear what was the precise date of Surjun's death, but it is admitted by the defendants that at or about 1900 Chandra Mohan was appointed jagirdar by the Deputy

Commissioner of Manbhum. Shortly after that, he by some means succeeded in getting the Deputy Commissioner to depute a peon to deliver possession of the mouzas in suit to him by beat of drum and the finding of the lower Court is that he realised rent from a few tenants; but the Deputy Commissioner's order was set aside by the Commissioner on the ground that the Deputy Commissioner was not competent to make any delivery of possession. In 1902 Chandra Mohan again applied to be put in possession, but he was directed to sue in the Civil Court. He thereupon brought the present suit in 1912. Defendants 1 and 2 have each filed separate written statements, while defendant 3, the Secretary of State for India in Council, does not enter appearance. The following issues will indicate the nature of the contest in the Trial Court:

1. Has the plaintiff any cause of action for this suit? 2. Is the plaintiff's suit barred by the general and special law of limitation? 3. Is the plaintiff's suit barred by the principle of res judicata? 4. Are the properties in suit Police jagir as alleged in the plaint and is there any restriction on sale of such property? 5. Had the plaintiff's father a life-interest only in the property in suit? 6. Are the properties in suit inalienable and is the sale mentioned in para. 5 of the plaint illegal and not binding against the plaintiff? 7. Has the plaintiff any right to the property in suit and was he ever in possession of them? Are the allegations of possession and dispossession as stated in the plaint true? 8. Is the plaintiff entitled to the relief sought?

The learned Subordinate Judge came to the conclusion that although there was no patta or kabuliyat to show the inception of the tenure and its incidents, there was evidence, both oral and documentary, which indentified it as a tenure created for Police purposes at a period anterior to the Decennial Settlement. The learned Subordinate Judge is of opinion that the jagirdar was not an officer holding the land in lieu of wages but a grantee of land to which a condition of service was attached; that the incidents of the tenure are analogous to those of a similar tenure in the same zamindari which was the subject-matter before their Lordships of the Privy Council in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (1): that Surjun Singha represented the entire tenure in 1878; that the sale passed not his right, title and interest but the whole tenancy itself, and that nothing remains for which the plaintiff can now sue. The learned Court also finds that Surjun Singha's suit of 1880 to set aside the sale, which was dismissed on the ground of limitation, estops by the rule of res judicata, Surjun Singha's successor, namely, the plaintiff, from recovering the property which passed by the sale. The plaintiff now prefers the present appeal in forma pauperis. Now the first question that arises is, what is the nature of the tenure? In the plaint the case made is that it was a life tenure held in lien of wages and that no jagirdar is bound by the private alienation of his predecessor. It was contended therefore that a decree for rent due from Mahakum could not be made against Kinu and certainly no sale held in 1878, when Surjun had succeeded as jagirdar, could pass any title to the auction-purchaser.

Now the reply to this is that the present plaintiff, who has been substituted in the place of his father Chandra Mohan, is not a jagirdar at all and that he is not competent to maintain the suit. This jagir was formerly situated within the District of Birbhum, from which it was separted in 1805 upon the formation of the Jungle Mahal District of which the present District of Manbhum was once a part. Regulation 29 of 1814 recites the incidents of certain police and ghatwali tenures and enacts rules as to their devolution, sale and management. It has not been seriously denied that the tenure now in suit before us is analogous in nature to the ghatwali tenures to which the Regulation above referred to applies. That is the footing upon which the trial appears to have proceeded before the learned Subordinate Judge and although before us the respondents at first somewhat faintly attempted to maintain that the plaintiff had not shown that the tenure was analogous to the Birbhum ghatwali tenures referred to in Reglulation 24 of 1814, it was eventually admitted that the principles applied by their Lordships of the Privy Council in *Nilmoni Singh Deo* v. *Bakranath Singh* (1) must, as far as possible, be applied also in the case. Therefore let us see what the position is upon the footing of the case made in the plaint. If the tenure was a life tenure held in lieu of wages, obviously it could not be hereditary, for the very principle of such a tenure is that the person entrusted

(1) [1883] 9 Cal 187=9 I A 104=4 Sar 335 (P C).

with the power to appoint each successive jagirdar must be left free to appoint whomsoever he likes. It would be a mistake to say that such a tenure could be heritable in the sense that it would pass by the ordinary rules of descent according to Hindu or Muhammadan law. Such a tenure would only pass to the person to whom the authority capable of appointing a jagirdar did in fact choose to appoint.

In the present case it is admitted that the power of appointment rests with Government and therefore until appointed a jagirdar by the Deputy Commissioner, who is the representative of the Government, the plaintiff acquired no title whatsoever to hold the lands constituting the tenure. He could not plead heritability as a title for possessing those lands, for the tenure would not be heritable in the ordinary sense of the term and the Deputy Commissioner alone would be competent to give a valid title for the recovery of the villages. Realising therefore his difficulty in supporting the case which was made in the plaint the learned vakil for the appellant has fallen back upon the position that this is a tenure burdened with a condition of service and heritable, although the line of inheritance may not be strictly one which is allowed by Hindu law; in other words that the tenure is heritable so far as custom permits. He contends that in the present case the tenure is governed by primogeniture or possibly by a rule that the member most fitted to perform the duties is entitled by law to succeed and that this immemorial rule or custom entitles the present plaintiff to step into the shoes of Chandra Mohan in the same manner as he in his turn was entitled to step into the shoes of the previous jagirdar.

It may be conceded that it is not at first sight quite clear whether their Lordships of the Privy Council in *Nilmoni Singh Deo* v. *Bakranath Singh* (1), above cited, viewed the tenure as one held in lieu of wages which was not heritable. There are expressions in the judgment of the Deputy Commissioner, which was the Court which tried the suit in the first instance, which their Lordships have quoted in the course of their judgment and which might lead to the impression that their Lordships were inclined to find that the jagir was a life tenure held in lieu of wages. But on the whole upon a careful reading of their Lordships' judgment, I think the finding is that it was a tenure, held on a condition of service heritable, transferable and permanent till such time as the Collector representing the Government chose to exercise his direction for the dismissal of the jagirdar. As soon as the Collector chose to exercise the powers which were vested in him the rule of succession and transferability ceased to operate and the appointee of the Collector was entitled to step in and claim the jagir free of incumbrances and alienations created and made by his predecessors without the consent of Government.

In the judgment of their Lordships arrears of rent which accrued during the life of one jagirdar could not be recovered by the sale of the jagir in the time of his successor, because such a course would deprive the jagirdar appointed by the Collector of the means of sustenance necessary for carrying on his duties which was one of the conditions of the tenure. If therefore which in my opinion seems to be the correct view, the jagir now in question is a tenure granted to the predecessors of the plaintiff with a condition attached that they would perform certain public police duties, then the question arises whether Surjun Singha at the time that he lost his suit in 1881 did or did not represent the plaintiff in the fullest capacity. The learned vakil for the appellant urges strongly that Surjun Singha did not, that all that passed by the sale of 1878 was only the right, title and interest of Surjun Singha and that the sale could not affect the rights of Surjun Singha's successor to recover the jagir lands. Their Lordships of the Privy Council in *Bakranath's* case (1) have, in my opinion, held that the police jagirs in the zamindari of Pachete are hereditary subject to the condition that it is competent to the representatives of Government to dismiss the heir of the last jagirdar and to appoint, if necessary, even an outsider, but that till the Collector exercises his option the customary rule of inheritance must operate. In the present case the evidence that the rule of premogeniture prevails has not been contradicted. Therefore the present plaintiff would, in my opinion, be entitled to succeed to the jagir by inheritance from his father, Chandra Mohan, if it had not been already sold. In this view Surjun Singha fully represented the tenure and a decree made against him must bind the plaintiff. The rent decree and the sale in execution thereof must therefore operate to pass the tenure and it is no longer competent for the plaintiff to say that what passed was the life interest

of Surjun Singha and that the plaintiff's interest revived as soon as he succeeded to his father Chandra Mohan. Regarded in this aspect, the question is one of estoppel by res judicata and the plaintiff has no cause of action.

The plaintiff is further estopped by the order rejecting Surjun Singha's objection petition of 15th August 1877 and directing the sale to be held on the footing that it was not the right, title and interest of Surjun Singha but the whole jagir that was being sold. On behalf of the plaintiff it is urged that the view of the Court which rejected this objection petition was wrong, for 4 years later, i. e., in 1882, their Lordships of the Privy Council ruled in *Bakranath's* case (1) that a jagirdar was not responsible for the debts of his predecessor, and it is contended that an erroneous decision ought not to bind the plaintiff. Now it is a settled proposition of law that when a sale is held the rights of the parties are fixed with reference to the state of the law at that time, and any subsequent interpretation will not operate to affect the results of that sale. In every sale what matters is what the Court intends to sells and what the auction-purchaser intends to buy. In the present case the Court intended to sell the whole interest in the jagir and the auction purchaser intended to buy that interest. An authority for this proposition is *Abdul Aziz Khan* v. *Appayasami Naicker* (2).

Then there is another obstacle in the plaintiff's way, for if Surjun Singha was his predecessor-in-title then the dismissal of Surjun Singha's suit on 25th of August 1811 debars the plaintiff from suing now. It is urged by the learned vakil for appellant that that suit was dismissed only on the ground of limitation and that the issue of title was not tried. In my opinion it is immaterial whether the issue of title was or was not tried. The suit was to set aside the sale of 1878. If Surjun Singha had any right to recover the properties he could only do so by setting aside the sale, and the Court held that such a suit was barred by limitation as it was brought more than one year after the date of sale. Surjun Singha was therefore completely barred from again seeking to recover the properties sold and if Surjun Singha was barred, the plaintiff is also barred.

The other obstacles in the plaintiff's way, if the tenure is a grant burdened with a condition of service, come under the head of limitation. The learned vakil for the appellants contends that the tenure was hereditary but inalienable and therefore the sale of 1878 passed nothing to the auction-purchaser. If that was so, then the auction-purchaser became a trespasser so far as Surjun Singha is concerned, and as neither Surjun Singha nor any of his successors took steps to challenge the adverse possession of the auction-purchaser his title became absolute by prescription. Therefore so far as Surjun Singha was concerned, all right, title and interest which he had in the tenure was extinguished. The plaintiff being the successor of Surjun Singha by inheritance cannot therefore sue for the property. But the learned vakil endeavours to escape from this position by urging that the plaintiff does not sue as the heir of Surjun Singha but as a jagirdar succeeding to the office of the previous jagirdar. I am unable to appreciate the difference in the two titles. Where the Collector does not exercise his power of appointment and allows the rule of succession to take its course and particularly where the Collector actually withdraws his right of nomination as he did in this case in 1881, the heir of a jagirdar can take only what the jagirdar had. But where the Collector does step in to exercise his power of nomination and dismisses a lineal heir, then the new appointee succeeds not as an heir but so to speak by vis major. In this case therefore I hold that the plaintiff has all the rights and liabilities of Surjun Singha and that as Surjun Singha was estopped by res judicata from bringing the present suit, the plaintiff also is estopped. For the same reason the plaintiff's suit is barred by limitation.

There is the further consideration that in 1878 the Government was a party to the litigation which ended in the sale and it is stated by the learned Subordinate Judge and not denied by the appellant that the tenure was sold with the consent of Government. If that is so, then upon the authority of their Lordships in *Bakranath's* case (1), it would appear that the successor of the jagirdar in the tenure would not be competent to challenge the sale. The learned vakil for the respondents has contended that the Government Order of 1881 withdrawing its powers of interference in respect of the jagir would operate to extinguish the bar of inlienability. Possibly this may be so and upon the authorities there may be good reason for thinking that from that date

(2) [1904] 27 Mad 131=3I A 1 = 8 Sar 586 (P C).

the tenure would become transferable in the ordinary course. But as the present sale took place in 1878 previous to that order, this would not avail the defendants. We must judge the rights of the parties according to the state of affairs not in 1881 but in 1878. The learned vakil for the appellant has placed before us the followng resumption cases to which no detailed reference is necessary:

(1) *Raja Letanund Sing Bahadoor* v. *Government of Bengal* (3), relating to ghatwali lands in the District of Bhagalpur (2); *Joykishen Mookerjee* v. *Collector of East Burdwan* (4), relating to chaukidari chakran lands in the District of Burdwan; (3) *Kooldeep Narain Singh* v. *Government of India* (5), relating to a ghatwali tenure in Pergana Bhagalpur; and (4) *Jogendra Nath Singh* v. *Kali Charan Roy* (6), relating to ghatwali land in the District of Bankura. These cases do not materially advance the plaintiff's case. They lay down the proposition that if a tenure is burdened with a condition of service, resumption cannot be made either by Government or the zamindar merely upon releasing the service holder from the service. Here there is no question of resumption and upon the view which I have taken the heir of the last jagirdar would be competent to retain the jagir till ousted by Government. In *Bakranath's* case (1) their Lordships of the Privy Council held that the tenure could not be sold for arrears of rent due from a previous jagirdar. Adopting that view for the tenure now under consideration the most that can be said is that the sale of 1878 was illegal. But the plaintiff is met with the bar of res judicata and limitation and must fail. The result is that the appeal is dismissed with one set of costs.

Jwala Prasad, J.—I am of opinion that the suit of the plaintiff is barred by limitation. The suit was originally instituted by the plaintiff's father Chandra Narain Singha on 31st January 1912. The tenure in question was sold in execution of a rent decree obtained by the Raja of Pachete on 15th August 1878. Possession of the property purchased at the auction sale was delivered to the Raja in October 1879. The then jagirdar Surjun Singha, grandfather of the plaintiff, made attempts to have the sale set aside and to recover possession of the property. Ultimately a suit was brought by him in March 1880 for recovery of possession from the Raja. In that suit in para. 3 of the plaint, Ex. 16, it was clearly stated by Surjun Singha that he was dispossessed by the plaintiff from the tenure in October 1879. There is no evidence that Surjun Singha ever recovered possession of the property after that suit which was dismissed by the Subordinate Judge. The decision of the Subordinate Judge was upheld by the High Court in August 1882. The father of the plaintiff managed to obtain a sanad from Government appointing him as a jagirdar of the tenure in May 1900. On the strength of that sanad he made attempts to collect rents from tenants of lands in the tenure, but was soon dispossessed from what he had only partially and temporarily taken possession of. That happened in 1901. Prior to this there is absolutely nothing to show that the father of the plaintiff ever came into possession of the property. It is obvious that dispossession of 1879 continued at least up to 1900-01 when some attempts were made by the father of the plaintiff to have possession of the property. Thus plaintiff's father was already out of possession for over 12 years prior to 1900-01. If the contention of the plaintiff be correct that the tenure in question is not saleable in execution of a decree, in that case the possession of the Raja or his lessees, represented by the defendants in this case, was adverse to the father of the plaintiff.

The Raja and the defendants acquired perfect and indefeasible title to the property by the adverse possession against the father of the plaintiff. The present suit, as already stated, was instituted on 31st May 1912, when the right, if any, of the plaintiff was extinguished. The plaintiff's father himself could not have succeeded inasmuch as his suit was barred by limitation. The plaintiff was substituted after the death of his father, which occurred on 20th May 1913, as a representative-in-interest of his father. The adverse possession which affected the title of the plaintiff's father would affect the title of the plaintiff as well. Whatever be the nature of the tenure and whatever be the incidents of the particular tenure, whether it was in lieu of wages for services rendered by the holder or it was a tenure burdened with certain services to be performed

(3) [1854-57] 6 M I A 101=1 Sar 505=1 Suth 248 (P C).
(4) [1863-66] 10 M I A 16=1 Suth 542=2 Sar 54 (P C).
(5) [1870-72] 14 M I A 247=2 Suth 491=2 Sar 734 (P C).
(6) [1905] 9 C W N 683.

by the holders of the tenure, it is clear that the plaintiff cannot succeed on the sole ground that his rights, if any, were barred by limitation. On this ground alone, the plaintiff's appeal should be dismissed.

I would not be long in my observations regarding the other points in this case. It appears to me that the learned Subordinate Judge was perfectly right on evidence to hold that the tenure was in existence long before the Decennial Settlement which was subsequently made permanent. No document evidencing the grant of the tenure has been produced and there is no evidence to trace exactly the origin and incidents of the tenure, but from the various ancient documents that have been filed in this case the learned Subordinate Judge was perfectly justified in coming to the conclusion that the tenure was an ancient one and was in existence before the Decennial Settlement. The tenure was a grant of a jagir burdened with certain services, namely, the performance of the police and thanadari duties by the holders of the tenure. It may be said that a tenure of this description is in some sense hereditary for the relations of the holder of the tenure have preferential rights to succeed and as in making appointments and selections of successors, the principle of heirship according to the law that governs the holder of the tenure has invariably been taken into consideration by Government. According to that policy, in this case the succession went by the rule of lineal primogeniture, but it does not follow that in case the successor of a tenure-holder was found to be incompetent or unfit to perform the duties, Government was debarred from selecting anybody else, but so long as the heir of the last tenure holder was not declared unfit and removed, he as a matter of course succeeded.

The tenure holder in this case used to pay some quit rent to the Raja of Pachete, under whose zamindari the tenure is situated. He was exempted from payment of full rent in consideration of the public services that he had to perform. In order to control the proper performance of the services Government had a right to dismiss the tenure holder when found unfit to hold that post. In order that an unsuitable person may not hold the tenure by purchase at a sale effected either by the tenure holder or in execution of a decree, Government always prevented the sale of this property and it appears that whenever rent decrees were obtained, the tenure was not allowed to be sold in execution except with the permission or sanction of the Government. This was the restriction attached to the saleability of the tenure to preserve the right of Government to have a proper person for the performance of the public duties. The restriction which attached to this tenure would not go to show that this was an absolute bar to the sale of the tenure in execution of a rent decree. It rested with the Government to prevent the sale or to allow the sale, as it thought fit in the circumstances of the particular case. I gathered this position from certain Government correspondence relating to the estate of the tenures Exs. D to X. So far back as 1881 it was decided by the Government that it was not necessary to retain the services of the jagirdars and Government relinquished all claims to the services of jagirdars including the jagirdar of the tenure in question. Government declined to be a party to any litigation between the zamindars and the jagirdars and in 1882 the Government order was published in its letter No. 1015-T., dated 13th August 1881 to the following effect: Ex. X from which the following passage may be quoted: "Government having now decided not to require service from the jagirdars of Pachete, the restriction against sales need not any longer be enforced in their cases."

From the above it is clear that if the Government did not object to the sale of the tenure, the sale would not be invalid and that there is nothing inherent in the incidents of the tenure itself to make it either unsaleable or untransferable. The restriction enforced by the Government was with a view to safeguard the interest of the public and to have proper persons as jagirdars of the tenure. I do not mean for a moment to say that the order of 1881-82 of the Government withdrawing the restriction against the sales of the tenures including the one in question would apply to the sale in this case of 1878, but what I do mean is this that Government and Government alone could object to the sale of the tenure. The sale was not ab initio void. There is no provision in any of the regulations attaching to police jagirs that they will not be transferable or saleable. Unless there is a statutory prohibition of sale of a jagir, it will be impossible to hold that a jagir which is heritable and permanent would be deprived of its saleability or transferability that must attach to a tenure of this nature. In the

particular case, the fact that the tenure was burdened with certain rents to be paid to the Raja goes to show that the tenure was primarily liable for the rent, and if sale was to be prevented, it was only to be done under certain restrictions imposed upon it by Government. Government has not mixed itself in this case and as shown above is not interested in the litigation or in the sale of this tenure, and it does not matter to Government now who holds the tenure, whether the Raja or the heirs of the old tenure holders. I am therefore of opinion that the sale of 1878 was not null and void.

It is needless for me to say anything more upon the question whether the suit of the plaintiff is barred by res judicata. I think that there is no doubt that the appeal upon the grounds referred to above should be dismissed. It does not matter whether the suit is or is not really barred by res judicata. My learned brother has gone at some length into that question. It is therefore unnecessary for me for the purpose of this appeal to go into it over again. I agree with the order passed by my learned brother.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 79

ROE AND COUTTS, JJ.

Ram Sunder Sahu—Appellant.

v.

Ram Narain Sahu and *others*—Respondents.

First Appeal No. 129 of 1917, Decided on 10th December 1918, from decision of Sub-Judge, Mozafferpore.

(a) Specific Relief Act (1877), S. 42—Right ceasing to exist—S. 42 has no application.

Section 42 provides for the declaration of a present legal character or a present legal right. It has no application to a case where the plaintiff seeks a declaration as to a right which has ceased to exist. [P 80 C 2]

(b) Transfer of Property Act (1882), S. 41—Transfer by ostensible owner—Transferee making reasonable inquiries—Owner is debarred from setting up his title.

Defendant purchased a mahal from the farzidar of the plaintiff after making reasonable inquiries which satisfied him that the farzidar was the real owner of the mahal.

Held: that the defendant being a bona fide purchaser for value from the ostensible owner, the plaintiff was debarred by S. 41, T. P. Act, from setting up his title to the mahal. [P 81 C 1, 2]

Hassan Imam, M. Yunus, Lakshmi Narain Sinha and *Shiveshwar Dayal*—for Appellant.

P. K. Sen, Fakhruddin, Rai Guru Saran & Nirsu Narain—for Respondents.

Coutts, J.—This was a suit in respect of a certain temporarily settled estate called Chak Jalal Charidar Diari, bearing No. 11918 on the revenue roll of the District of Muzaffarpur. We do not know much about the history of this estate, but it appears to have been settled by Government for short terms of years from about the year 1842. In the years 1896 default was made in payment of revenue by the proprietors and according to the case of Ram Narain Sahu, the plaintiff, who was one of the defaulting proprietors, he purchased at the sale in the name of a servant of his, named Kuldip Narain. What was purchased at the sale was the right, title and interest of the settlement holders who were holding for a term of years. After the expiry of this term there were further settlements by Government with Kuldip Narain, the last settlement being for 3 years from 1st April 1913 to the 1st March 1916, and the plaintiff's case is that all these settlements were really made with him in the name of Kuldip Narain. In December 1913 Kuldip was very ill and as he appeared to be dying the plaintiff alleges that in order to protect the property from the heirs of Kuldip, he got the latter to execute a Kobala in the names of his brothers. There was delay in registration of the Kobala and Kuldip died before it was registered.

After his death registration was applied for but execution was denied by Kuldip's heirs and registration was refused. Subsequently in February 1914. Kuldip's minor son Harendar Prosad, defendant 6, through his mother executed a Kobala in favour of Ram Sunder Sahu, defendant 5. Ram Sunder got his name registered and appeals to the Collector and Commissioner by Ram Narain were infructuous. Ram Sunder did not at once get possession, but in April 1916 he got settlement from Government for 3 years and in a case under S. 144, Criminal P. C., he got possession. This case was after the institution of the present suit. In his plaint Ram Narain asked that it might be declared that Chak Jalal was held in Milkiat by him, that Kuldip Narain was his Farzidar, and that the defendants had got no right in the Mahal. Further having been dispossessed in the case under S. 144 the plaintiff asked that he might be put back into possession. The defendants raised various pleas which appear sufficiently from the issues framed in the case, which were as follows:

1. Whether the Secretary of State for India in Council is a necessary party to the suit? 2. Whether S. 36 of Act 11 of 1859 bars this suit? Is the plaintiff otherwise estopped from prosecuting the suit? 3. Whether defendant 2 party Ram Sundar Sahu is a bona fide purchaser for value and is the plaintiff estopped from disputing his title? 4 Whether Kuldip Narain was a Farzidar of the plaintiff and whether the plaintiff has got any title to the Mouza in suit? 5. Whether defendant 1 party entitled to confirmation of possession? 7. To what relief, if any, the plaintiff is entitled?

The learned Subordinate Judge found the first four issues in favour of the plaintiff. But in view of the fact that it was outside the jurisdiction of the Court to decide whether Government was justified in giving settlement to the defendant, he declined to give a decree for possession. He has however passed a decree declaring that the plaintiff was the real auction-purchaser of the temporarily settled Mahal, Chak Jalal Charidar Diara; that he was a settlement holder up to March 1916, and that Kuldip Narain was his Farzidar. He however held that the defendants 1 to 4 were not necessary parties. Against this decree the defendant Ram Sunder has appealed and there is a cross-appeal against the decision of issue 5 declaring that defendants 1 to 4 had no interest in the property. The plaintiff's cross-appeal has not been pressed and I would dismiss it without costs.

Two points have been argued in the appeal by Ram Sunder Sahu: (1) that S. 41, T. P. Act, is a bar to the suit, and (2) that the decree is bad in view of the provisions of S. 42, Specific Relief Act. I will deal with the latter point first. The first clause of S. 42, Specific Relief Act, runs as follows: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief." The question, in the present case, is whether the plaintiff is entitled to any legal character or to any right as to any property which would entitle him to a declaration such as has been given. With regard to this point the portion of the decree with which we are concerned, runs as follows: "It may be declared that the plaintiff is the real auction-purchaser of the temporarily settled Mahal, Chak Jalal Charidar Diara, and that he is the settlement holder up to March 1916, and Kuldip Narain Singh was his Farzidar." On the face of it this is not a declaration that the plaintiff is entitled to any present legal character or that he has any present right to the property in dispute. The learned Subordinate Judge realised this, for he says in his judgment: "It may at first appear that it (the declaration) can be of no practical use to the plaintiff," but he continues as follows: "as Chak Jalal is a temporarily settled estate, the property of a private individual, and as some right is reserved to the last settlement holder as is indicated by Kuldip Narain's Patta, Ex. 16, Cl. 4, namely, the right to receive some Malikana in case of refusal to take fresh settlement, and as it further indicates that settlement would be offered in the first instance to the last settlement holders, I think the declaration will be of great use to the plaintiff in approaching the Government and asking for a temporary settlement with him after the expiry of the term of the present settlement, even if it is conceded that he cannot do so now." Now it is not and it cannot be contended that Government would either with or without this declaration be bound to give the plaintiff a settlement and it is in fact almost certain that Government, when they knew the facts, would not give a settlement. They would certainly not give a settlement if Kuldip Narain is not his Farzidar and even assuming, as the learned Subordinate Judge has found, that Kuldip Narain was his Farzidar, he is a co-proprietor who has gone behind the backs of his co-sharers and has got a settlement by means of a Farzi transaction. This would certainly not find favour with Government and in fact it would appear that it has not done so, for settlement has, as I have already said, been made with the defendant Ram Sunder in 1916, who has also got his name registered in the Collectorate. The decree therefore in so far as any settlement is concerned, could be nothing more than a recommendation to Government. It was no declaration to Government. It was no declaration of a present legal character or a legal right, and it is not within the scope of S. 42, Specific Relief Act.

The learned Subordinate Judge however seems to think that by reason of a certain clause in Kuldip Narain Patta of 1910 the declaration which he has

given will assist the plaintiff in getting Malikana. The clause runs as follows: "That at the end of the aforesaid period of settlement you shall have the right to a renewal of the settlement on the revenue that may be fixed. If you do not take the settlement on the revenue that be then fixed, you shall be entitled to receive Malikana at the usual rates." The plaintiff however never asked for a declaration that he was entitled to receive Malikana nor has any such declaration been made. All that the Subordinate Judge intends by the declaration is that it shall help the plaintiff in the event of his making a claim for Malikana and apparently conveying a pious hope that he may get it. The declaration then in regard to this also is nothing more than a recommendation to Government from the Subordinate Judge and is not within the scope of S. 42. Apart from this there is, in my opinion, no ground for the finding of the Subordinate Judge that the plaintiff can have any right to re-settlement Malikana. He relies on the Patta of 1910, but the Patta under which Kuldip was holding when he died was a Patta of 1913, which has not been produced. Ram Sunder's Patta of 1916, Exhibit T however has been produced and it contains no provisions for either re-settlement or payment of Malikana and there is nothing to show whether the Patta of 1913 was similar to the Patta of 1910 or to that of 1916. In fact as the onus was on the plaintiff and as he has not produced the Patta of 1913, there is a suspicion that if he did produce it, it would be against him. In any case in the absence of the Patta, I am not prepared to accept the view of the learned Subordinate Judge that there is any provision in it for either Malikana or for settlement.

I now come to the question whether S. 41 of the Transfer of Property Act is a bar to the suit. This section runs as follows:—"Where, with the consent, express or implied, of the person interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith." So far as the first part of the section is concerned, it is not even suggested that the plaintiff has any case. The question is whether, as required by the proviso, Ram Sunder took reasonable care to ascertain that the transferor had power to make the transfer and acted in good faith. On this point, it seems to me, there can be no doubt. Ram Sunder says that at the time he made the purchase he made inquiries about the title of Kuldip Narain and what he did was to consult Register D, to make inquiries from the raiyats of Chak Jalal and to consult his Mukhtear named Badri Narain. The register showed the name of Kuldip and Badri Narain got for him copies of documents relating to Chak Jalal. These copies, he says, related to a suit between Kuldip Narain and Ramdhari, to a dakhil kharij case between Ram Charitar and Ram Narain and to a Kat-band case between Kuldip and the tenants of Chak Jalal. There was also a copy of a deposition and a copy of judgment in a Balabandi case between Kuldip Narain and Lalji Babu. Now we have on the record most of these documents. The first of them to which I shall refer is the deposition of Ram Narain in the dakhil kharij case with Ram Charitar and related to a village called Daudpur, which the applicant said was owned by him and was in his possession. In the course of that deposition, which was made before the Sub-Deputy Collector on 1st October 1910, Ram Narain stated:—"Village Chak Adam is in the name of Gobind Shah. No other milkiat excepting the village in dispute stands in others' name as benami." This clearly indicates that the plaintiff had no Malikana right in the lands in the present suit Chak Jalal. Again on 16th March 1911 deposing to another suit the plaintiff stated:—"Mouza Chak Jalal Diara formerly belonged to me. It was sold for arrears of Government revenue. Kuldip Narain is in possession of the Mouza as auction-purchaser since it was sold for arrears of Government revenue. I can swear I have no concern with the present settlement of the Mouza."

The next document is Exhibit N, a plaint in a suit between Kuldip Narain and Ramdhari. The suit was in respect of a piece of land in Chak Jalal. The suit was compromised and nowhere was there any suggestion made that Kuldip Narain was a Farzidar of Ram Narain or that Ram Narain had anything to do with the Mouza.

The next document to which I will refer is a judgment in a suit brought by Kuldip against one Bindeswari Prosad, who was the proprietor of a neighbouring Mouza, for a certain piece of land

which Kuldip Narain claimed as a part of Chak Jalal. In that suit one of the issues was whether the plaintiff was a benamidar of Ram Narain Sahu and after going into the evidence very fully the Subordinate Judge, who heard the suit, found that Kuldip Narain was not the benamidar of Ram Narain.

This then was the evidence on which Ram Sunder relied, and on these documents it is difficult to understand what other conclusion he could have arrived at than that Kuldip Narain was the real settlement holder. I fail also to understand what more he could have done to ascertaiin that the transferor had power to make the transfer. The learned Subordinate Judge has said that as Badri Narain has not been examined, he has no materials to decide whether the papers which were read over to Ram Sunder were sufficient to lead a reasonable man to be satisfied with what they embodied. But, as I have already pointed out, these documents are on the record and they are, in my opinion, more than sufficient to satisfy any reasonable man that Ram Narain had nothing to do with the Chak Jalal estate. The learned Subordinate Judge seems to think that Ram Sunder Sahu should have insisted on the production of the original sale-certificate by which Kuldip Narain purchased. But there was very little object in this, because this was a temporarily settled estate. The sale-certificate merely transferred the right, title and interest of the remainder of the temporary settlement and Ram Sunder was perfectly justified in relying on the terms of the settlement which was running at the time when he made the purchase, and this he knew was in the name of Kuldip Narain. It appears then that up till the time when Ram Sunder applied for registration of his name, Ram Narain had never suggested that he was the real owner and in fact had on oath specifically denied his connection with the Mouza. Under these circumstances, I am satisfied that whether Kuldip Narain was the Farzidar of Ram Narain or not, Ram Sunder made all reasonable enquiries and acted in good faith. For the above reasons, therefore, I would set aside the decree of the learned Subordinate Judge and would decree this appeal with costs.

In conclusion I would note that Ram Narain has committed gross perjury. In his examination on oath before the Sub-Deputy Collector Babu Suresh Chander Deb on 1st October 1910 he stated that "Village Chak Adam is in the name of Gobind Shah. No other milkiat excepting the village in dispute stands in other's name as benami." Again in his statement before the Munsif of Hajipur on 16th March 1911 he stated: "Mouza Chak Jalal Diara formerely belonged to me. It was sold for arrears of Government revenue. Kuldip Narain is in possession of the Mouza as auction-purchaser, since it was sold for arrears of Government revenue. I can swear that I have no concern with the present settlement of the Mouza." In the present suit Ram Narain has stated on oath before the Subordinate Judge on 22nd January 1917: "Chak Jalal was sold for arrears of revenue in 1896. It was I who purchased it. It was in the name of my servant Kuldip Narain that I purchased." It is impossible to reconcile these statements and I would direct that he be called on to show cause why he should not be prosecuted for pertjury.

Roe, J.—I entirely agree that the plaintiff has no present title in this estate and that therefore he is not entitled to a decree under the Specific Relief Act. I also agree that the plaintiff should be prosecuted for perjury. Let notice be issued to him to show cause why a direction for his prosecution should not be made under S. 476, Criminal P. C. The 6th of January next may be fixed for hearing.

V.S./R.K. *Appeal decreed.*

A. I. R. 1918 Patna 82

ALI IMAM AND THORNHILL, JJ.

Makru Rai and *others*—Defendants—Appellants.

v.

Sarjug Pershad Misser and *others*—Plaintiffs—Respondents.

Appeal No. 107 of 1918, Decided on 31st July 1918, from the decision of Dist. Judge, Darbhanga.

Bengal Tenancy Act (1885), S. 174 — Amount to be deposited under S. 174 is amount of decree with costs and not amount specified in proclamation—Civil P. C. (1908), O. 21, R. 89.

The amount of money required to be deposited by the judgment-debtor under S. 174, Ben. Ten. Act, is the amount recoverable under the decree with costs, and not the amount specified in the proclamation, as is the case under O. 21, R. 89, Civil P. C. [P 83 C 1]

Murari Prasad—for Appellants.

Har Nandan Pershad—for Respondents.

Ali Imam, J.—The only point of law on which the learned vakil on behalf of the petitioner has addressed us arises on the question of the construction of S. 174, Ben. Ten. Act, and R. 89,

O. 21, Civil P. C. The appellants were the judgement-debtors in a rent-decree. In execution of that decree a proclamation of sale was issued for satisfying the decretal amount. Thereafter the sale took place under S. 174, Ben. Ten. Act, the appellants deposited the amount mentioned in the sale proclaimation with five per cent on the purchase-money. The learned Munsif, before whom the amount in question with the five per cent was deposited, accepted the sum and set aside the sale. The respondents then preferred an appeal to the learned District Judge of Darbhanga, who reversed the order passed by the Munsif and directed the sale to be restored. The ground on which the learned District Judge has held that the deposit made by the judgment-debtors was insufficient is based upon a comparison of the language of S. 174, Ben. Ten. Act, and R. 89, O. 21, Civil P. C. S. 174 with reference to the amount contains these words: "the amount recoverable under the decree with costs," whereas the rule contains the words, "the amount specified in the proclamation.

It is not for a moment claimed by the appellants that they deposited the amount recoverable under the decree with costs. Their learned vakil frankly admits that the amount specified in the proclaimation was deposited, but he has contended that in fact, although the language of the two sections is different, the deposit made of the amount specified in the proclamation would work out to be the amount recoverable under the decree with costs. With this contention we are not in sympathy, nor are we satisfied that the amount in question is the same. The difference of language has a purpose, as the two Acts have different legislative schemes. The learned Judge in dealing with this aspect of the question has very rightly drawn attention to sub-S. 3, R. 89, O. 21, which clearly shows the position of the decree-holder under the Code with respect to any further charges that he may claim under the decree and in respect of which he may receive satisfaction. No such provision has been made in S. 174. We are therefore of opinion that the learned Judge below was right in the construction he has placed upon the sections and that therefore his order restoring the sale was a just and proper one. In the circumstances the application is rejected with costs.

Thornhill, J.—I agree.

V.S./R.K. *Application rejected.*

A. I. R. 1918 Patna 83

DAWSON-MILLER, C. J. AND MULLICK, J.

Kunj Lal—Appellant.

v.

Banwari Lall and *others*—Respondents.

Civil Misc. Appeal No. 178 of 1917, Decided on 5th December 1918, from order of Sub-Judge, Muzaffarpur.

(a) Civil P. C. (1908), O. 11, R. 21—Order for discovery of document not obeyed—Proper remedy is to apply for stay proceedings or dismissal of suit.

Where a party fails to comply with an order for discovery, the proper remedy is for the party seeking discovery to apply to have the proceedings stayed or the suit dismissed. [P 89 C 1]

(b) Arbitration—Parties to reference cannot revoke.

Where parties submit their differences to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. [P 85 C 2]

(c) Arbitration—Delay in making award caused by party's voluntary absence—That party cannot impugn award on ground of delay.

Where delay in making an award by the arbitrators was caused by the voluntary absence of one of the parties, that party cannot impugn the award on the ground of delay. Nor is such delay a sufficient ground for revocation of the submission by the party in default. [P 86 C 2]

(d) Civil P. C. (1908), Sch. 2, Para. 14—Arbitration without intervention of Court—Court has no power to remit award for determination of undetermined matters—If any matter referred to in para. 14 is proved Court must refuse to file award—Civil P. C. (1908), Sch. 2, Para. 21.

In cases where a reference to arbitration is made by the order of the Court, the Court may remit the award for the determination of matters left undetermined under para. 14, Sch. 2, Civil P. C., but in the case of arbitration without the intervention of the Court para. 21 confers no such power on the Court and if any of the matters referred to in para. 14 is proved, the Court has no option but to refuse to file the award. [P 86 C 2]

(e) Limitation Act (1908), Art. 178—Date of award is date when it was delivered and not that on which it was written and signed.

The date of the award referred to in Art. 178, is the date when the award is delivered to the parties so that they have notice of its contents, and not the date on which it is actually written and signed. [P 90 C 2]

Saroshi Charan Mitter and *Sudhansu K. Mitter*—for Appellant.

Purnendu Narain Singh, Gour Chandra Pal and *Nitai Chandra Ghose*—for Respondents.

Dawson-Miller, C. J.—This is an appeal from an order of the Additional Subordinate Judge of Muzaffarpur refusing the appellant's application to file an arbitration award under Sch. 2, Cl. 20, Civil P. C. The plainitiff and the defendants 1 and 2 are members of a Hindu

joint family. The defendant 3 is the widow of a deceased co-parcener of the family. In 1908 the members of the family had separated in mess. On 1st April 1911 by a registered deed the plaintiff and defendants 1 and 2 submitted the partition of the family property and settlement of certain matters in dispute between them in connection therewith to the arbitrament of Babu Jnanendra Mohan Dutta and Babu Apurba Krishna Mitter as arbitrators. The submission provided that the award order and partition and arbitration of the arbitrators or umpire in all or any of the matters so referred should be final and conclusive between the parties and their representatives. No limit of time was prescribed for making the award. By a previous agreement of 27th January 1908 the same parties had submitted a partition of their joint property to three arbitrators, who had entered on the arbitration and made a partial partition of the property but owing to delay in completion of the award the parties agreed by mutual consent to cancel the submission, and by the present submission it was provided that the arbitrators might adopt partially or wholly the matters already settled or decided by the former arbitrators. The arbitrators duly entered on the arbitration in the year 1911 and adjourned from time to time. A great number of meetings were held and it was not until 8th October 1915 that the final award was made. The value of the property was about Rs. 2,10,000 and no doubt there was a considerable amount of work to be done. It further appears that the defendant 2 lived during a considerable portion of that time at Patna and Hilsa, a long distance from Muzaffarpur where the meetings were held, and probably it was not always easy to convene meetings to suit the convenience of all paties. Further defendant 2 was absent for about a year of the time on pilgrimage. The defendant 3 Mt. Deoki Bibi joined in the arbitration by agreement in writing dated 1st May 1915, submitting her interest in the property to be determined by the same arbitrators in the same arbitration.

The procedure adopted by the arbitrators with the consent of all parties appears to have been to deal with separate portions of the property at different times as the arbitration proceeded and provisional decisions were arrived at from time to time distributing the different properties between the co-sharers in proportion to their shares. Minutes of the proceedings were kept and the decisions were entered in the minute book. By July 1915 practically the whole estate had been in this way partitioned. On 14th July in that year a draft award was drawn up and submitted to the parties, who were invited to formulate objections thereto for final discussion. Up to this time there was nothing to show that any party was dissatisfied with the manner in which the arbitration was conducted or the length of time occupied, but on 12th July 1915 on the eve of the publication of the draft award the defendant 2 wrote a letter to each of the arbitrators in similar terms, purporting to revoke and cancel the submission on the ground of delay in completing the award. The arbitrators apparently did not feel justified at this stage in desisting from their labours at the request of one party alone and they proceeded to hear objections by the parties to the draft award. The defendant 2 himself appeared and took part in objection proceedings, and on 8th October 1915 the arbitrators having disposed of the objections published their award. On 14th March 1916 the plaintiff applied to the Subordinate Judge to file the award. The defendants filed objections. The Subordinate Judge rejected the plaintiff's application upon a number of grounds, which may be summarised as follows:

(1) That there was no valid reference to arbitration as undue influence was exercised by one of the arbitrators Babu Jnanendra Mohan Dutta on defendant 1 to induce him to agree to the submission. (2) That the defendant was justified in revoking the submission owing to long and unreasonable delay in making the award. (3) That the arbitrators left undertermined certain matters submitted to them. (4) That the arbitrators were guilty of misconduct in the following particulars: (a) In failing to insist upon the production of certain accounts in the possession of the plaintiff dealing with matters in controversy in the arbitration. (b) In that one arbitrator sat alone from 7th November 1914 to 11th August 1915. (c) In that on three days there were ex parte hearings. (d) In that certain matters outside the scope of the reference were dealt with by the arbitrators. (5). That the arbitrators exhibited a bias in favour of the plaintiff. (6). That the application was barred by limitation.

With regard to the first point it appears that Babu Jnanendra Mohan Dut-

ta had acted as pleader to the family and was more or less in their confidence. Both the defendants were educated men and presumably capable of looking after their own affairs. It would appear that there had been some discussion and possibly dissatisfaction about the dilatoriness of the arbitrators appointed by the earlier submission referred to and on the 18th March 1911 Babu Jnanendra Mohan Dutta wrote a letter to the defendant 1 in these terms:—"I am sorry the arbitration matter is still pending without final decision. I don't think the arbitrators will finish the work soon. As we look to the interest of you all, we advise you to refer to a separate arbitration and I and Apurba Babu are willing to act as arbitrators on moderate fees. Babu Harish Chandra and Babu Kunja Lal are agreeable to this. If you also consent to the matter please come and settle the affairs. May this find you alright."

In the result the parties agreed to revoke the earlier submission and to appoint Babu Jnanendra Mohan Dutta and Babu Apurba Krishna Mittra in their place. The Subordinate Judge came to the conclusion that this was an improper letter to write, that Jnanendra Babu should have advised the parties to seek independent advice which was not done, and sums up the matter by saying that defendant 1 was persuaded by Jnanendra Babu to submit to the new arbitration and adds: "In my opinion defendant 1 was not free to act to the best dictates of his conscience. There was no valid reference in this case." I confess I have some difficulty in following the reasoning by which the learned Judge arrives at the conclusion that there was no valid reference. I can see nothing improper in a letter such as that written by Babu Jnanendra Mohan Dutta to the defendant 1, offering himself as arbitrator after apparently discussing the matter with the plaintiff and the other defendant who were agreeable to the course suggested. I have also read the evidence of the defendant 1 and I am unable to discover the slightest indication of anything in the nature of fraud or even of undue pressure or persuasion upon the defendant to agree to the terms of the submission. Even had there been some persuasion exercised to induce the defendant 1 to consent to a course agreed to by the other parties, I cannot see unless some fraud or impropriety is shown, that this would be any reason for holding that the submission was not valid. In my opinion this part of the learned Judge's decision cannot stand.

The second point on which the Subordinate Judge's decision is based cannot, in my opinion, be supported. His decision on this point appears to me to be based upon a misunderstanding of the effect of the judgment in *O. R. Coley* v. *V. A. DaCosta* (1). Where parties submit their differences to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. In the present case before any objection was taken to the delay by defendant 2, the arbitration was practically completed and although no final award had been made, this defendant had a very fair idea as to how he would stand at the end of it. One cannot shut one's eyes to the fact that he was not altogether satisfied with the properties allotted to his share. Some of them had not turned out as well as he expected. But up to the eleventh hour he had shown no inclination to be dissatisfied with the length of time occupied in the proceedings. Indeed it was mainly due to the fact that he himself had been on pilgrimage for a year and for part of the rest of the time lived at a distance from the other parties that the proceedings were protracted and, in my opinion, it would be contrary to the whole spirit of the law affecting submission to arbitration to permit one party to revoke his authority at his own pleasure without shewing some better reason than that which appears in the present case.

In *O. R. Coley* v. *V. A. DaCosta* (1) shortly after the submission the arbitrator appointed by the respondent (one of the parties to the submission), before any material progress had been made in the arbitration, went to a hill station for the benefit of his health and all proceedings were suspended for about 7 months from the date of the submission and there was no prospect of anything further being done in the near future. The appellant (the other party) thereupon revoked the submission. In spite of this the Subordinate Judge shortly afterwards ordered the submission to be filed, and on the refusal of the appellant's arbitrator and the umpire to act, appointed another arbitrator and umpire in their places without any notice to the appellant. The new arbitrators then met and subsequently delivered an award. The proceedings of the new arbitrators were heard ex parte in the absence of the appellant, although he was served with

(1) [1890] 17 Cal 200.

notice. The Court found that where there is unreasonable delay in proceeding with the arbitration, one of the parties may revoke the submission if the delay is not explained or justified by any act on his part. They also found that the proceedings of the new arbitrators were tainted with illegality for other reasons not material to the present discussion. I agree with the principles laid down in that case, but the circumstances of the present case are entirely dissimilar. The only reason which appears for any delay in completing the proceedings in the present case is that mentioned by the arbitrators themselves in their award, namely, the voluntary absence of the party who now seeks to impugn the award on the ground of delay. In my opinion, no case has been made out which would justify the Court in refusing to file the award on the ground of delay.

The third point is the one which presents most difficulty in this appeal. By the terms of the submission the arbitrators had the option of adopting partially or wholly the matters already settled and decided by the former arbitration. It was also proved that the arbitrators should divide and partition in any manner as to them might seem fit and proper all such property, moveable and immoveable, as was still jointly owned by the parties. They were also to settle and decide all accounts between the parties and to adjust or otherwise settle and decide all credits and debts due and owed by the joint banking business of the parties, and for the purposes of such division make any allotment of such credits and debts between the parties as to them seem just and proper. There were a large number of villages jointly owned by this family. Most of these villages had been partitioned in the former proceedings, including certain zamindaries at Ulao. The allotment of those villages previously arrived at was adopted by the arbitrators. There were however three or four villages of Ulao Elaka which had not been previously partitioned, and these were advisedly kept joint by the arbitrators as they were adjacent to the family residence of the parties and the award provided that each of the parties should take a third share in each of these villages. There were also some diara lands consisting of two villages, which were advisedly kept joint as they could not be valued with precision. The learned Judge came to the conclusion that the award was bad by reason of this defect and could not therefore be filed. The rules contained in Sch. 2, Civil P. C., relating to arbitration without the intervention of the Court provide (para. 21) that where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in para. 14 or para. 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paras. 14 and 15 form part of the procedure applicable to references ordered by the Court. Para 14 authorises the Court to remit the award to reconsideration of the arbitrators where (inter alia) the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred. Para 15 relates to the grounds upon which alone an award can be set aside. These include corruption or misconduct of the arbitrator or umpire, fraudulent concealment of material matters by the parties or their wilfully misleading or deceiving the arbitrator or umpire.

Whilst it is clear that in cases where the reference is made by the order of the Court the Court may remit the award for the determination of matters left undecided under para. 14 of the Schedule, it has been held by the Courts of this country that para 21 of the Schedule confers no such power in the case of arbitration without the intervention of the Court and that if any of the matters referred to in para 14 are proved, the Court has no option but to refuse to file the award. It is in my opinion regreatable that such power does not exist and the absence of any such power under the rules must, in many cases, work great hardship and inconvenience upon the parties. It may well be that after great labour and expense have been incurred by the parties in settling their differences by arbitration, one of them in whose favour the matters referred have been decided may find himself unable to file the award and obtain the judgment of the Court thereon if some small portion of the matters referred to arbitration has been left undetermined. It is, however, in my opinion, too late now to question the construction which has been placed upon para 21 by the High Courts of Bombay, Allahabad and Calcutta and if it should appear that the arbitrators without the consent of the parties have fail-

ed to partition the Mauzas in question when they were required to do so by the submission, there will be no option but to refuse to file the award. It becomes necessary, therefore, to consider how far, if at all, the parties have either by the submission or by subsequent consent agreed to the course followed by the arbitrators. It is true that the submission by clause 2 gives the arbitrators the option to adopt partially or wholly the matters already settled or decided by the former arbitrators. The former arbitrators partitioned practically the whole of the villages leaving those in question joint, and it is contended that para. 2 of the submission entitled the arbitrators to adopt in its entirety the decision arrived at by the former arbitrators and to retain these villages and the diara lands as joint property. I am afraid I cannot accept this argument. In so far as the previous arbirtators left undivided any of the joint property, I think it was the intention of the submission that the present arbitrators should deal with it.

It is next contended that Cl. 17 of the submission, which provides that the award order, partition and arbitration of the arbitrators or umpire in all or any of the matters referred to them shall be final and conclusive, contemplates that any of the matters referred to the arbitrators and dealt with by them shall be binding upon the parties notwithstanding that other matters are left undecided. Had this clause stood alone there would have been much force in this argument but after consideration of the document as a whole and especially Cls. 3, 4 and 5 I have come to the conclusion that it was the intention that all the joint property of the parties should be partitioned in one way or another, in so far as it was capable of partition. And even if the arbitrators with the best intentions in the world failed to carry out the terms of the submission in any material particular, it seems to me that we have no power to file the award which would on this hypothesis be incomplete. So far as the Ulao villages are concerned, they were in fact partitioned between the parties in equal shares. Their interest therefore ceases to be that of joint tenants such as the intertest enjoyed by coparceners and becomes that of tenants-in-common, giving, each of the parties a separate interest and separate rights in the subject matter. The submission nowhere provides that the whole of the immoveable properties shall be partitioned by metes and bounds, although speaking generally I think it must be assumed that it was the intention of the parties that this method should be adopted. And had the whole of the immoveable property been divided by shares instead of by metes and bounds, I think it would have been correct to say that the arbitrators had failed to carry out the duties imposed upon them.

Where however there are special incidents attaching to a small portion of the property, such as the four villages of Ulao Elaka by reason of their propinquity to the family residence of the parties which make it more convenient for all of them that this property should be divided into shares only, I think it may safely be assumed that such a mode of division in this particular instance was not outside the contemplation of the parties. In the well-known judgment delivered by Lord Westbury iin the case of *Appovier* v. *Rama Subba Aiyan* (2) it is pointed out that "if there be a conversion of the joint tenancy of an undivided family into a tenancy-in-common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement and that is a separation in interest and in right although not immediately followed by a de facto actual division of the subject matter." In my opinion there was within the terms contemplated by the submission a partition of this property having regard to its peculiar character. The same reasoning applies, in my opinion, with equal force to the diara villages which, as I read the award, were also partitioned in the same manner, namely, into thirds, and which could not be valued with that precision necessary to enable the arbitrators to divide them by metes and bounds.

It appears moreover from a perusal of the minutes of the meetings of the arbitrators that there was some discussion between the parties as to the manner in which this property not hitherto partitioned should be dealt with. At the 14th meeting held on 7th January 1912 the matter was referred to and it was agreed to consider at a subsequent meeting whether any partition would take place or not. At a later meeting held in 1912 the following minute is recorded: "The parties agree that excluding certain properties which they agree to keep joint, we shall divide the properties in three lots and then put the lots up to bids and then make the allotments." The property therein re-

(2) [1866] 11 M I A 75=2 Sar 218 (P C).

ferred to was clearly immoveable property as no personal property was kept joint, and at a later date at a meeting held on 30th April 1913 after the arbitrators had been to Ulao to inspect the residential house of the parties, it is recorded that the immoveable properties were arranged in three lots of nearly equal value and drawn by lot between the parties. It is clear I think that the word "bids" in the previous entry refers to something in the nature of drawing lots. Now it is not suggested that there was any other property except that of the diara villages and Ulao which the parties agreed to keep joint, and I think it must be taken until the contrary be shown that the agreement to keep joint in the sense of not dividing by metes and bounds can only refer to the diara mahals and the Ulao villages which the arbitrators in their award say were advisedly kept joint. It is true that at a subsequent date when objections to the draft award were put forward at the invitation of the arbitrators in October 1915, defendant 1 claimed that the four Ulao villages should be divided and that he should get one of them which he named. I do not think, however that at that stage of the proceedings when he had agreed to the previous partition two years earlier and the parties had been put in possession, he was entitled to insist upon a different basis of partition, and in my opinion the arbitrators were justified in refusing to accede to this demand. The reasons given by him for claiming the division of the Ulao villages by metes and bounds are that the villages which had been already allotted to him were some distance away in the Bhagalpur and Dumka districts and that labourers and other necessaries could not be obtained in those Mauzas whilst in the village which he claimed they could. I hold that the award cannot be impeached on this ground.

Under the same heading it was also contended that the arbitrators failed to partition Mauza Rahimpur. The defendants claimed this as joint property. The evidence about it is very scanty but so far as it goes, it appears that this village was purchased by the plaintiff in the farzi name of Gobind Sahai in the year 1909 after the parties had separated in mess and were carrying on a separate business. There was no evidence to show that it was joint property. The award does not specifically mention it but in Sch. 10 which deals with claims and objections of the respective parties, the arbitrators after dealing with a number of claims and objections state in para. 17 "claims made by the one party or the other similar to those mentioned in the foregoing paragraphs of this award are all disallowed." The paragraphs in question deal with many things the partition of which was claimed as being joint property. In some cases it was found that they did not exist and in others that the claim failed for want of proof. I think therefore it must be taken that the arbitrators intended to disallow this claim. In any case it is for those contesting the validity of the award to show that the property in question was joint property which the arbitrators omitted to partition in compliance with Cl. 3 of the submission. They have failed to do so.

It was next contended that certain moveables were not divided. These consisted of a sewing machine, some iron safes and a diamond ring. It is sufficient to say that the arbitrators dealt with this claim in Sch. 10, para. 12, and dismissed it for want of proof. In the same way it was contended that debts due by the banking business had not been apportioned. There is no evidence that any such debts existed but if they did, they would be covered by Cl. 11 of the award and each party would be liable for one-third share. Moreover debts due from the joint family could be realised by creditors from any member of the family and a division of particular debts between the members could not for any practical purpose be made otherwise than by shares. The assets might be and were allotted, but the debts could not be assigned so as to bind the creditors. Cl. 5 of the submission gave the arbitrators a wide power as to the method of adjusting the debts of the banking business if any, and the method adopted seems to me to have been the most practical and in accordance with the terms of the submission. The next point was that a balance of Rs. 1,298 out of a sum of Rs. 5,015 said to have been paid to Gobind Sahai, one of the former arbitrators, was left unaccounted for. The arbitrators dealt with this in Sch. 10, Cl. 5, and disallowed the claim for want of proof. I do not see how we can question this finding. Such evidence as there was in support of the contention that any such balance existed was certainly inconclusive.

The fourth objection, heading (a), refers to certain documents relating to some of the lahnas awarded to the plaintiff and which the arbitrators

ordered the plaintiff to produce. The lahnas in question appear as items 2 and 7, Sch. 1-A of the award. 2 was a mortgage decree obtained by the family against one Mukhram Singh. No. 7 was some shares in the Tirhut Stores. The decree appears to have been for a sum of Rs. 400 and was assessed by the arbitrators after bidding by the parties at that amount. There is nothing to show that it was worth more. The Tirhut Stores shares were assessed in the same way and valued at Rs. 200. On 11th August 1915 defendant 1 applied by letter to the arbitrators to order the plaintiff to produce the decree and account of Mukhram Singh's decree and an account of dividends received from the Tirhut Stores. The letter was sent on to the plaintiff, who endorsed it: "It is not stated which bahi is required." On the 14th August a discussion took place before the arbitrators, who ordered the plaintiff to produce the accounts asked for. The order was not complied with. Defendant 1 called attention to this again in his written objections to the draft award on the 2nd October. Defendant 2 does not appear to have mentioned it. In Sch. A of the award giving the list of lahnas allotted to the plaintiff, a note appears to the effect that no evidence was adduced by the parties about the amount of Mukhram Singh's debt and the dividend of Tirhut Stores. Where a party fails to comply with an order for discovery, the proper remedy is for the party seeking discovery to apply to have the proceedings stayed or the suit dismissed. The decree against Mukhram or a certified copy could also have been produced by the defendants themselves without any difficulty, if it would assist them and if any dividend was paid by the Tirhut Stores which carried on business in Muzaffarpur, the defendants could easily have obtained evidence of the fact. None of these courses were adopted and I am not prepared to hold that the arbitrators were bound of their own initiative to refuse to proceed until the order had been complied with, still less to hold that the course adopted amounted to misconduct. The defendants, both before the arbitrators and again in present proceedings, have had every opportunity of proving that the accounts not produced would have shown that the assessment of the two items named was under-estimated, if such were the fact, and that the arbitrators were misled, but they have not availed themselves of the opportunity and there is nothing to show that any injustice has been done. This objection in my opinion fails.

As to objections 4 (b) and (c), it is true that one arbitrator sat alone for the period named to hear and record objections by the parties and on three days there were ex parte hearings in which each party in turn explained his objections. This procedure, which would have been objectionable in ordinary circumstances, was adopted with the full concurrence of all the parties and they cannot now be allowed to take exception to a course in which for the sake of convenience they previously concurred. The minute of the 24th meeting on the 16th September 1914 records: "It is agreed by all the parties that J. M. Dutta would receive the objections of the parties and their evidence if any, the decision to be come to by both arbitrators jointly." The procedure thus agreed to was carried out. One of the arbitrators sat to hear and record the objections on a number of days and subsequently on the 19th September and the 1st and 2nd October 1915 each of the parties appeared before the arbitrator in turn and explained his objections. It appears from the evidence that no decisions were come to by the arbitrator on these occasions. He merely recorded the objections. The objections as recorded were considered and decided subsequently by the two arbitrators sitting together. In the circumstances no exception can be taken to this course.

The objection 4 (d) refers to two suits referred to as Nos. 126 and 132 of 1911. In the first the claim was by the mother of defendant 2 claiming money deposited in the defendants' banking business. In the second the plaintiff was the present plaintiff's son claiming a like deposit. The learned Judge says these matters were beyond the reference and the action of the arbitrators was ultra vires, but gives no reasons for arriving at this conclusion. It seems to me that under Cl. 5 of the submission it was within the powers of the arbitrators to settle all debts due by the joint banking business, which these claims were. It is said that the real claimants were the defendant 2 in the one case and the plaintiff in the other. If this is so, the arbitrators would have power to deal with it under para 4 of the submission which enables them to settle all accounts between the parties. Moreover from a perusal of the minutes of the 8th, 9th and 10th meetings it is impossible

to arrive at any other conclusion than that all parties consented to these claims being dealt with in the arbitration. This objection cannot be supported.

As regards the fifth objection, the learned Judge draws attention to some instances in which the arbitrators refused by their final award to alter the provisional allotment by which certain properties were apportioned to the plaintiff's share, although in the meantime these properties turned out better than anticipated. In one case a mortgage decree allotted to the plaintiff at the decretal amount was realised by him by sale of the property which he purchased. The property proved worth more than the decretal amount. The arbitrators refused to revise the assessment of the decree and, in my opinion, quite rightly. The increment was due to the fact that the plaintiff purchased the mortgaged property, which it was open to anyone to purchase. His speculation turned out profitable. In another case a garden house was allotted to the plaintiff and he was put in possession. Before the final award it was purchased by Government under the Land Acquisition Act for a larger sum. The properties of this nature had been allotted by the former arbitrators and the parties had been in separate possession for a long time. The arbitrators had adopted the previous allotment and retained the parties in possession long before the final award and refused to interfere with the assessment: see Cl. 3 of the award. The learned Judge said, this showed undue bias in favour of the plaintiff. Many similar instances were discussed by the parties before the arbitrators in objection to the draft award and before the final award. The arbitrators in some instances, for reasons given modified the provisional assessment in favour of one party or the other. In other cases they refused to do so.

The learned Judge appears to have reviewed the evidence and pointed out some instances in which the award turned out profitable to the plaintiff and criticises the decision come to by the arbitrators. His criticisms would have been appropriate in argument before the arbitrators before the award was made, but with due respect to the learned Judge I think he was travelling outside his province in reviewing the evidence and accusing the arbitrators of bias because he himself would have arrived at a different decision on the evidence. We were invited to adopt the same course but must resppectfully decline to do so. The next point dealt with by the learned Judge appears to me to be based on a misapprehension of Sch. 8 of the award. This schedule adjusts the monetary liability between the parties and makes the amounts payable in two kists of three months each with interest at 6 per cent, and adds that if the conversion of the award to a decree of Court is delayed by any party entitled to get the same, interest will not run on the amounts awarded. The learned Judge treats this as a penal clause designed to stifle fair and legal objections to the award on pain of forfeiting interest. In my opinion this was not meant to penalise proper legal objections to the award. If a valid objection to the award were taken by any party and upheld, then the award could not be filed and the stipulation as to interest would avail nobody. If a baseless objection be taken and delay be caused in filing the award, I can see nothing objectionable in depriving the unsuccessful party of interest for the period of delay in filing the award caused by his own unsuccessful objection.

The last point dealt with the question of limitation. The learned Judge treated the date of the draft award as the date of the award within the meaning of Art. 178, Sch. 1 of the Limitation Act. With great respect to the learned Judge his decision is based upon a misapprehension of the judgment in *Dutto Singh, In the matter of the petition of* (3). That case decides that the date of the award referred to in the Limitation Act was the date when it was delivered to the parties so that they had notice of its contents, and not the date when it was actually written and signed which in many cases might be much earlier. In other words the date was the date of publication, which is not complete until delivery to the parties. The draft award was not the award at all and its publication was not the publication of the award. The final award differed in many respects from the draft, which from its very nature and purpose for which it was made could not be regarded as the award. The present application was clearly within six months of the date of the award, and this objection also fails. In the result the appeal will be allowed and the judgment and decree of the Subordinate Judge will be set aside; the award will be filed and judgment entered in accordance therewith. The appellant will be allowed costs here and

(3) [1333] 9 Cal 575.

in the Court below against the parties who appeared.

Mullick, J.—I agree.

V.S./R.K. *Appeal allowed.*

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DAWSON-MILLER, C. J. AND MULLICK, J.

Krishna Lal Jha—Defendant — Appellant.

v.

Nandeshwar Jha—Plaintiff Respondent.

Appeal No. 399 of 1915, Decided on 31st January 1918, from original decree of Dist. Judge, Darbhanga, D/- 4th August 1915.

(a) Hindu Law—Partition—Mithila School—Paternal grandmother is entitled to share—But it does not become her stridhana.

According to the Mithila School of Hindu law a paternal grandmother is entitled to a share on partition of the joint property between her son and grandson. Such share however is not her stridhan and on her death goes back to the estate from which it came. The mother or grandmother's share on partition is taken in lieu of maintenance and on her death reverts to the general estate and does not cease to be ancestral property. [P 94 C 1]

(b) Hindu Law—Partition—Institution of suit for partition is sufficient indication to separate.

The institution of a suit for partition of joint family property is a sufficient indication to separate, so that the birth of a member subsequent to the institution of the suit does not affect the share which the plaintiff is entitled to receive. A minor can either himself or through his guardian express an intention to do that which is clearly not against his own interest. The institution of a suit by a minor member of a joint Hindu family for partition of the family property may therefore amount to the indication of an intention to separate. [P 94 C 2, P 95 C 1]

(c) Practice — Precedents — Decisions of Calcutta High Court should not be departed from without cogent reasons.

The decisions of the Calcutta High Court, which until recently exercised jurisdiction in the Province of Bihar and Orissa, although they do not prevent the Patna High Court from exercising an independent judgment, are entitled to the greatest respect and should not be departed from without cogent reasons. [P 92 C 2]

Lakshmi Narain Singh and *L. K. Jha*—for Appellant.

Soroshi Charan Mittra and *Murari Prashad*—for Respondent.

Judgment.—This is an appeal from a judgment of the District Judge of Darbhanga in a suit for partition brought by one of the members of a joint Hindu family governed by the Mithila School of Law. The family consisted of Krishna Lal Jha, his mother Girija Ojhain, his two wives Jaimangla Ojhain and Aina Ojhain and his son Nandeshwar Jha by his first wife Jaimangla. The suit was instituted on 11th August 1913 by the son Nandeshwar Jha against his father and the other members of the family as defendants. At that time the plaintiff was a minor and in his plaint made certain charges against his father of mismanagement of the family property and preferential treatment of his step-mother to the detriment of himself and his mother Jaimangla. Since the institution of the suit and before the date of the judgment appealed from the plaintiff attained his majority and those charges then ceased to be material and were not dealt with in the judgment. The plaintiff claimed an eight-annas share in the family property. The defendants, the father, step-mother and grandmother of the plaintiff opposed the partition and each claimed in the event of partition one-fifth part as their respective shares. The defendant, mother of the plaintiff supported the partition and claimed one-fourth part as her share. The plaintiff's father also claimed that several of the properties set out in the schedule were his self-acquired property and not part of the family estate. Judgment was delivered in the Court below on 4th August 1915. The learned District Judge decided that each of the members of the family including the plaintiff's grandmother Girija was entitled to one-fifth share and that the properties claimed by Krishna Lal Jha the plaintiff's father were not his separate property but formed part of the family estate. From this decision the defendant Krishna Lal Jha presented an appeal on 2nd September 1915, on the ground that the properties claimed by him were wrongly found to have been joint family property. The plaintiff entered a cross-appeal on 10th November 1915, on the ground that his mother and step-mother were wrongly awarded a share and that his grandmother should have been allowed maintenance only and further that proper directions were not given either for ascertaining the properties which might be assertained to be liable to partition before passing the final decree or for taking accounts.

Since the date of the judgment now under appeal two events have happened which complicate the issues between the parties and the final adjustment of their rights. On 21st November 1915 a son was born to Aina Ojhain the plaintiff's step-mother and on 5th August 1916 Girija Ojhain his grand-mother died. It was agreed between the parties that these events should be taken into consideration by this Court

and that the legal consequences resulting therefrom, in so far as they affect the shares which the parties are now entitled to, should be determined and given effect to in our judgment.

The points argued by the defendant were (1) that on the evidence the Judge wrongly decided that the properties claimed by him in schedule kha of his written statement were joint family property; (2) that he was entitled to succeed by inheritance to his dead mother's one-fifth share apportioned to her by the judgment, on the ground that it devolved on him as her stridhan property to which he was sole heir or as her deceased husband's property of which he was also heir; (3) that the after-born son of his wife Aina Ojhain was entitled to a share, he having been conceived before the partition took place though born afterwards.

The plaintiff contended (1) that his grandmother was not entitled to a share at all according to the Mithila Law on a partition between her son and grandson and that in any case the grandmother's share, if any, was not her stridhan but family property allotted to her by way of maintenance and after her death went back to the estate and was divisible in equal shares amongst the co-parceners; (2) that the after-born son was not entitled to a share, on the ground that the partition must be regarded as taking place not later than 11th August 1913 when the plaint was filed and the son was not born until more than two years later. The point that his mother and step-mother were not entitled to share under the Mithila Law was not pressed. As to the question of fact whether the disputed property belonged to the defendant, we have been referred to the evidence and the learned Judge's reasons for the findings at which he arrived and we have no hesitation in coming to the conclusion that those findings were amply justified. There were no separate accounts of the alleged self acquired property produced, nor is there any reliable evidence to show how the defendant could have himself acquired the funds necessary to purchase properties worth nearly Rs. 24.000 except by recourse to the ancestral property. On the other hand, there is evedence from which the inference is almost irresistible that the family funds were employed in paying for the properties claimed. This part of the appeal must, in our opinion, fail.

The next question is whether Girija Ojhain the grandmother of the plaintiff and mother of the defendant Krishna Lal Jha was entitled to a share on partition. Upon this point divergent views have been expressed by the High Courts of Calcutta and Allahabad. The decisions of the Calcutta High Court which until recently exercised jurisdiction in this Province, although they do not prevent this Court from exercising an independent judgment, are entitled to the greatest respect and should not be departed from without cogent reason. In *Badri Roy* v. *Bhugwat Narain Dobey* (1) it was decided by Mitter and Maclean, JJ., that in a partition between a father and son at the instance of the son both the mother of the latter and his paternal grandmother were entitled to share equally with him and his father. That was a case of a Mitakshara family and the Mitakshara together with the Vivada Ratnakara and the Vivada Chintamani is the leading authority recognized by the Mithila School. In the case of *Sheo Narain* v. *Janki Parshad* (2) a Full Bench of the Allahabad High Court on the other hand held that in a partition between a father and his sons the father's mother is not entitled to a share according to the Benares School of the Mitakshara Law. The latter case appears to be based mainly upon the consideration that whilst the author of the Mitakshara expressly recognises the right of the wife of the father to share equally with the sons when distribution is made during the lifetime of the father no mention is made of the father's mother, although after the father's death, if the sons separate, the mother is mentioned as entitled to an equal share with the sons. The passage relied on is found in S. 8 of the Mitakshara and reads as follows in Colebrooke's translation: "When a distribution is made during the life of the father the participation of his wives, equally with his sons, has been directed." (If he makes the allotments equal his wives must be rendered partakers of the portions). The author now proceeds to declare their equal participation when the separation takes place after the demise of the father: "Of heirs dividing after the death of the father let the mother also take an equal share." It seems fairly clear that Vijnaneswara in the passage just referred to is considering the claim of the same person, first, as a wife of the head of a joint family when a partition takes place and secondly, as the widow of the late head of the family when the sons themselves are seeking separation, and in

(1) [1882] 8 Cal 649.
(2) [1912] 34 All 505=16 I C 88 (F B).

either case she is awarded a share equal to that of a son. In the case now under appeal if the defendant Krishna Lal Jha had had a brother alive and unseparated from him, it would appear that on a partition taking place between them their mother would be entitled to share with them the ancestral property, they being "the heirs dividing after the death of the father," in which case the Mitakshara provides "let the mother also take an equal share." The fact that either or each of the brothers had issue living would not, we apprehend, affect the rights of the mother although in such a case she might with equal accuracy be described as a grandmother concerning whom the Mitakshara is silent. How then ought her claim to be considered when the partition takes place, not between her sons as heirs of her deceased husband, but between her only son who is undoubtedly an heir and her grandson ? On referring to the text of Yajnawalkaya it also appears that where the father in his lifetime makes an equal distribution among his sons, his wives to whom no stridhan has been allotted take like portions and where after his death the sons separate their mother takes a share equal to that of a son. Separation between a father and an only son does not appear to be contemplated by Yajnawalkaya nor is it in terms referred to in the text of the Mitakshara.

It is not improbable that at the time when the Mitakshara was written a partition between a father and an only son at the instance of the latter was seldom if ever resorted to. However this may be, the propriety of such a proceeding could hardly be challenged at the present day. It is not easy to see on what principle of justice or equity the mother of an only son on a partition between him and his heirs should be excluded, when if two or more of her sons as coparceners were dividing the family property she would be entitled to share equally with them. It was argued as a reason for leaving her unprovided that her maintenance should properly fall after partition as a charge upon her son's share. This argument appears to us to have little to recommend it. Before partition he would have control of the whole of the family property from which to provide for his mother's maintenance. After partition that control would cease and his resources would be limited in proportion to the number of shares with whom he divided. It could be urged with equal force that on partition between sons after the death of a father the mother should have no portion as her maintenance should fall on the eldest son or any other, but in such a case she is in fact allotted a full share equal to that of her sons. But as the Mitakshara makes no express provision for the case now under consideration, we should have some difficulty in coming to a decision not expressly authorised by the great commentator if the Mitakshara were the only authority recognised by the Mithila School. The Vivada Ratnakara and the Vivada Chintamani, which are authorities of at least equal weight amongst the followers of the Mithila School, both quote a text of Vyasa which says: "But the sonless wives of the father are pronounced equal shares and all grandmothers also are pronounced equal to mother." The above question occurs in Chap. IV-31 of Golapchandra Sarkar's translation of the Vivada Ratnakara. In Tagore's translation of the Vivada Chaintamani the passage is rendered: "Even childless wives of the father are pronounced equal shares and so are all the paternal grandmothers who are declared equal to mothers." It has been argued before us that the quotation from Vyasa should be treated as applying only to cases of partition amongst brothers as in the Vivada Ratnakara it occurs in a Chapter dealing with partition among brothers and in Vivada Chintamani it forms one of the paragraphs under the heading "grandsons of different fathers." We can see no reason for so restricting its application and we are supported in this view by the decision of the Calcutta High Court in the case of *Badri Roy* v. *Bhugwat Narain Dobey* (1) already referred to. If we are right in supposing that in Vijnaneswara's day a separation between a father and an only son was not an established practice, this may account for the fact that no mention is made in the Mitakshara of the father's mother in such a case. It would not, however, account for the case of a separated brother as the head of a new line of descent partitioning with his sons in the lifetime of his mother. But such a case ex hypothesi supposes an earlier separation between the present head of the family and his brothers, in which case his mother would have already been provided for by her share in the earlier partition. There is no evidence that the grandmother had been so provided for in the present case. This does not exhaust all possible cases where the question could arise, but other cases would necessarily be of rare occurrence. In

any case the claim of the grandmother is distinctly recognised in two out of three of the leading authorities governing the Mithila School and although we have great hesitation in view of the Full Bench decision of the Allahabad High Court in arriving at a conclusion in favour of the grandmother's claim, we think that such a claim should be recognised amongst those governed by Mithila Law.

The next question for consideration is whether the share allotted to the plaintiff's grandmother on partition is to be regarded as her *stridhan* and if not, how it should now be dealt with. If it constitutes her *stridhan,* there being no daughter or other nearer heir in the line of inheritance applicable to such property, her son the defendant Krishna Lal Jha would succeed. In *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (3) it was decided by the Judicial Committee that the share which the mother in a joint Hindu family governed by the Mitakshara Law obtains on partition of the family property is not her stridhan and on her death does not devolve upon her stridhan heirs but goes back to the estate from which it came. It is sufficient to say that in our opinion that case is not distinguishable from the present.

A further point was taken but not pressed that the defendant Krishna Lal Jha was entitled to the exclusion of the other co-sharers, on the ground that it reverted to him as the heir of her deceased husband and that a partition having been effected before the mother's death the other co-sharers ceased to have any interest in the property. We think the proper view is that the mother's share is taken in lieu of maintenance and on her death reverts to the general estate and does not cease to be ancestral property. Moreover in the present case the partition has not been finally carried out, the decree being a preliminary one, and the mother had had no separate enjoyment and no actual allotment had been made at the time of her death and if the property has not lost its character of ancestral property, it would remain subject to partition in the present proceedings. The case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (4) would appear to support this view. In that case a partition took place between several co-sharers including an uncle and nephew and the mother of the former. The last named died pending an appeal in the partition suit and after the preliminary decree a claim was made to her share by a person alleging herself to be her devisee. Mitter, J., in delivering judgment said:—"It is quite clear that the share which ought to have been allowed to Golaba (the mother) was merged in the general estate...But the mother or grandmother (as the case may be) can never be recognised as the owner of such a share until the division has been actually made. She has no pre-existing vested right in the estate except a right of maintenance." In our opinion the share of the defendant's mother Girija Ojhain should be divided amongst the cosharers as part of the ancestral property.

The next point is whether the after-born son of Aina Ojhain is entitled to a share as against the plaintiff. This depends upon whether the date of the preliminary decree or the date of the institution of the suit must be taken as the time when the plaintiff's interest became severed from that of the other members of the family, for it is conceded that if the after-born son was conceived before the partition he is entitled under the Mitakshara Law to a share in the estate. The case of *Girja Bai* v. *Sadashiv Dhundiraj* (5), which is the latest pronouncement of the Judicial Committee on this question, appears to conclude the matter in favour of the plaintiff. In that case the plaintiff's husband one Harihar, a member of a joint Mitakshara family, having previously expressed his intention to effect a separation instituted a suit for that purpose. The defendants did not dispute the right which he claimed to a third share in the family property, but after some attempts at a compromise and before any decree in the suit was made Harihar died and his widow applied for substitution as heir and legal representative of her deceased husband. The defendants claimed Harihar's share by right of survivorship on the ground that no partition had taken place at the date of his death. Mr. Ameer Ali in delivering their Lordships' judgment referred to the earlier case of *Suraj Narain* v. *Iqbal Narain* (6), where it was laid down that "a definite and unambiguous indication by one member of an intention to separate himself and to en-

(3) [1912] 34 All 234=14 I C 1000=39 I A 121 (P C).
(4) [1868] 9 W R 61.
(5) A I R 1916 P C 104=43 Cal 1031=43 I A 151=37 I C 321 (P C).
(6) [1913] 35 All 80=18 I C 30=16 O C 129=40 I A 40 (P C).

joy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed." He then proceeded: "It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October 1908 coupled with this suit and that these acts amounted to a separation with all its legal consequences." It is true that there was no denial in that case of the plaintiff's right, but it is clear from the rest of the judgment that the principle upon which their Lordships' decision was based was not confined to cases of agreement between the parties. A passage in the judgment of Dwarkanath Mitter, J., in *Musammat Deo Bunsee Kooer* v. *Dwarkanath* (7) in which that learned Judge says: "It is settled law that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not," was referred to with approval. And in referring to the judgment of the Board in *Appovier* v. *Rama Subba Aiyan* (8), Mr. Ameer Ali says: "Some of the Courts in India have supposed Lord Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view."

We think that the plaintiff in the present case unequivocally and unmistakably manifested his intention to separate himself from the defendants at the latest on the 12th August 1913, the date when he instituted the suit. The other material dates are 4th August 1915 when the preliminary decree was made, and 21st November 1915 when the son was born. It was contended that as the plaintiff was a minor when the suit was instituted, he was incapable of expressing any intention at that date, but no argument was adduced in support of this contention nor were any authorities referred to and we are unable to accede to the proposition that under Hindu law a minor cannot express either himself or through his guardian an intention to do that which is clearly not against his own interest. We think therefore that the plaintiff's share in the family property should not be diminished by reason of the birth of another member of the family more than two years after the time when he must be deemed to have separated from the joint family.

The result of this decision will be that the plaintiff will receive one-fifth of the whole property in the first instance, the remaining four-fifths being distributed between the four defendants and the after-born son, the female members taking in lieu of maintenance only. These shares will be one-fifth of four-fifths or four-twenty-fifths of the whole. Girija Ojhain's share will then be distributed between the three male members of the family, including the after-born son who was born before the death of Girija. They will therefore each receive in addition to their original shares one-third of four-twenty-fifths, that is, four-seventy-fifths. This works out in the following proportions: The plaintiff nineteen-seventy-fifths, his father sixteen-seventy-fifths, the after-born son sixteen-seventy-fifths and the two surviving females twelve-seventy fifths. The decree will direct partition of the property moveable and immovable which belonged to the joint family at the date of the institution of the suit and of any property acquired subsequently by employment of the joint family funds and for that purpose the Commissioner will take the usual accounts. As neither party in this case has succeeded in his appeal there will be no order as to costs.

V.S./R.K. *Order accordingly.*

(7) [1868] 10 W R 273.
(8) [1866] 11 M I A 75=1 Suth 657=2 Sar 218 (P C).

A. I. R. 1918 Patna 95

ATKINSON AND MANUK, JJ.

Manindra Nath Roy and *another* — Appellants.

v.

Kanhai Ram Marwari—Respondent.

Misc. Appeal No. 127 of 1918, Decided on 21st November 1918, from the decision of Dist. Judge, Manbhum.

(a) Limitation Act (1908), S. 20—Part payment of principal must be in debtor's handwriting in order to give fresh start.

Under S. 20 a fresh period of limitation can only begin to run if the fact of the person making the payment or part payment of the principal debt appears in the handwriting of such person. [P 96 C 2]

(b) Limitation Act (1908), Art. 182—Instalment decree — Instalments not paid—Unless decree compels decree-holder to execute for whole amount once and for all, he may execute on each default and limitation would run separately from date on which each instalment became payable.

Unless an instalment decree clearly leaves the decree-holder no option on the happening of a

default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him only in respect of each instalment separately from the date on which each such instalment may become due and payable. [P 97 C 1]

Hari Bhusan Mukerji — for Appellants.

N. C. Roy—for Respondent.

Atkinson, J.—The plaintiff in this suit sued the defendants for a money-debt alleged to be due by the defendants to the plaintiff. The suit was compromised on the basis that the defendants would pay to the plaintiff a sum of Rs. 975 in full discharge of principal and interest by annual kists. A decree was drawn up in the form of a consent decree; and it provided that a sum of Rs. 975 should be paid by instalments. The decree itself is dated 29th April 1912, and the instalments were to become payable on 1st April of each succeeding year after the date of the decree until entire debt of Rs. 975 was satisfied and discharged. The decree also provided that in the event of default being made in the payment of any one of the instalments, the balance remaining unpaid should immediately fall due and be forthwith recoverable. The instalment payable on 1st April 1913 amounted to Rs. 200 and that sum was in fact paid. The instalment due on 1st April 1914 was Rs. 150 and this sum was also paid. Both the aforesaid instalments were paid on 1st April 1914. Since 1st April 1914 no payments have been made in respect of the kists for the year 1915, 1916 and 1917. The plaintiff accordingly instituted an application seeking leave to execute the decree to recover the unrealized instalments for the respective kists due for the year 1915, 1916 and 1917.

Admittedly the first two instalments amounting to Rs. 350 have been paid by the judgment-debtor. The learned vakil appearing on behalf of the petitioners and defendants contends before us that inasmuch as no payment or valid acknowledgment was made or given for the payments made for the kists falling due on 1st April 1913 and on 1st April 1914, the amount due for the succeeding kists could not be recovered, and the right to issue execution of the decree is now barred by lapse of time. The foundation of this argument is based on the construction of S. 20, Limitation Act (9 of 1908). On the analysis of this section it is quite clear that the argument addressed to us is not well-founded in point of law. It is contended that the learned Judge was wrong in the conclusion at which he arrived, inasmuch as he held that the signature of the person endorsing the fact of payment at the time the instalments for 1913 and 1914 were paid, was the genuine signature of the person called Kangal Rai, and that therefore the debt for which execution was sought should be recovered. It is from the tenor of the judgment of the learned Judge that he never had present to his mind the application of the proviso to S. 20, Limitation Act. If he had, he would have been obliged to hold on the evidence that the signature of Kangal Rai in respect of the payments made was invalid, inasmuch as it was not established by proof that Kangal Rai was the duly authorised agent of the judgment-debtor, and that Kangal Rai in fact made the payments alleged in discharge of the instalments for the years 1913 and 1914. The decree-holder himself admits in his evidence that the kists for the years 1913 and 1914 were paid by the judgment-debtor and by no one else; and that the same were paid in discharge of principal and interest due, and consequently by virtue of the proviso to S. 20, Limitation Act, it is clear that a fresh period of limitation can only begin to run if the fact of the person making the payment or part payment of the principal debt appears in the handwriting of such person. The part payment made was made by the judgment-debtor and not by Kangal Rai, and therefore in order that such payment should operate as a fresh period from which limitation should begin to run, it was essentially necessary that the judgment-debtor should sign and endorse the fact of the payment so made by him. The signature as to the fact of payment, even if genuinely made by Kangal Rai, would not satisfy the requirements of the Limitation Act inasmuch as he did not make the payment relied on even though he may have been authorized to endorse the fact of payment by the judgment-debtor.

This point was considered in this Court in a case reported as *Bishun Perkash Narain Singh* v. *Muhammad Sadique* (1). In that case we adopted the interpretation of S. 20, Limitation Act laid down in the Full Bench ruling reported as *Mukhi Haji Rahmuttulla* v. *Coverji Bhuja* (2). The case reported in the Patna Law Journal (1) and the the Full Bench ruling in Calcutta (2),

(1) [1916] 1 P L J 474=35 I C 375.
(2) [1896] 23 Cal 546 (F B).

in their facts, resemble very much the facts of the present case. Therefore we are of opinion that the point taken by the learned vakil on behalf of the petitioner is not well-founded and cannot be supported in point of law. It does not appear that the learned Judge properly applied the law aplicable to the facts of this case. If the case rested merely on the true interpretation of S. 20, Limitation Act, the learned Judge's decision would have been erroneous. The short answer given by Mr. Roy, learned Counsel appearing on behalf of the decree-holder, to the point taken by the judgment-debtor, seems completely to dispense with the necessity of deciding the question of the construction of S. 20, Limitation Act, in this case. However we feel it right to express our opinion thereon owing to the erroneous decision of the learned Judge. Mr. Roy bases his argument on Art. 182, cl. 7, Limitation Act, and he argued that the learned Judge was in error as to the nature and effect of the alleged payments made in 1913 and and 1914 which he conceived, had the legal effect of keeping the principal debt alive. Mr. Roy argues that he is not concerned with any such proposition.

The application before the Court was for leave to execute the decree for recovery of specified sums of money due on the respective dates upon which the same were payable; and Mr. Roy contends that because the decree is in that form, it gives the decree-holder a right to enforce payment of each instalment as it falls due within 3 years from the date on which the instalment became automatically payable under the decree. The wording of Cl. 7, Art. 182, runs as follows: "(Where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date." Accordingly Mr. Roy argues that by reason of Cl. 7 of Art. 182, he is entitled to execute the decree for 1915, 1916 and 1917 and to recover all the kists respectively payable on the 1st April 1915, 1st April 1916 and 1st April 1917, these being instalments which accrued due and were payable within 3 years from the date of the application for leave to issue execution. We think that Mr. Roy's argument is well-founded; and that he correctly interprets the powers exercisable under Art. 182, Cl. 7. The cases reported as *Ajudhia* v. *Kunjal* (3), *Shankar Prasad* v. *Jalpa Prasad* (4) and *Lachmi Narain* v. *Sarju Parshad* (5) all consistently support the argument addressed to us by Mr. Roy and, as we believe, accurately declare the law. The right to execute accrues and continues for three years from the date when the default is made in the payment of any one instalment.

The learned Vakil on behalf of the petitioner relies on the case reported as *Hurri Pershad Chowdhry* v. *Nasib Singh* (6), where a different view of the law appears to have been taken from that laid down in the long line of decisions in the Allahabad High Court. With great respect to the learned Judges' decision reported as *Hurri Pershad Chowdhry* v. *Nasib Singh* (6), we are unable to follow their reasoning. The decisions reported in the *Allahabad Series* (3), (4), (5) appear to us to be consistent with the exact wording of Art. 182, Cl. 7, and it would be in our opinion, contrary to the ends of justice if any artificial construction was to be put on Art. 182, Cl. 7, which is clear and express in its terms and void of ambiguity. It must be remembered that in the cases cited in the *Allahabad Series* (3), (4), (5), it was pointed out that a decree-holder having a decree in the form of the decree in the present case, has a right to execute the decree for the whole amount due if default be made; and to have the decree, as far as possible, construed in his favour. Therefore unless the decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default; and limitation will run only against him in respect of each instalment separately from the time when each such instalment may become due and payable.

For these reasons we think that the arguments of Mr. Roy is well-founded and that the application for leave to issue execution is not barred; and that the plaintiff is entitled to recover by this execution proceeding the kists due for the years 1915, 1916 and 1917. We accordingly dismiss the appeal and we direct that the judgment-debtor do pay to the plaintiff the sum of 2 gold mohurs as costs of this appeal.

Manuk, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(3) [1908] 30 All 123.
(4) [1894] 16 All 371.
(5) [1917] 39 All 220=38 I C 624.
(6) [1894] 21 Cal 542.

A. I. R. 1918 Patna 98

MULLICK AND THORNHILL, JJ.

Godhan Ahir and *others* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 259 of 1918, Decided on 25th July 1918, from order of Dist. Magistrate, Motihari.

Criminal P. C. (1898), Ss. 110 and 190 (c)—Principle of S. 190 (c) applies to proceedings under S. 110—Magistrate influenced by local inspection in finding accused guilty under S. 110—Conviction is bad.

Although S. 190 (c) in terms applies only to offences, the principle of that section must apply to ocases of a miscellaneous character, e. g., to proceedings under S. 110. Where a Magistrate was influenced by his preliminary local investigation in coming to a finding as to the guilt of an accused person under S. 110:

Held: that the conviction was bad inasmuch as the Magistrate should not, under the circumstances, have tried the case himself. [P 98 C 1, 2]

Hasan Imam, G. C. Pal & Ambica Prasad Upadhia—for Petitioners.

Govt. Pleader—for the Crown.

Mullick, J.—The petitioners before us have been ordered by the Sub-Divisional Magistrate of Bettiah to execute each a bond on their own recognizances for Rs. 100 with two sureties of Rs. 50 each to be of good behaviour for one year. There was an appeal to the District Magistrate, without success. It appears that proceedings were instituted by the Sub-Divisional Magistrate after inspection of a certain locality during his winter tour, in consequence of numerous complaints to the effect that the petitioners were in the habit of committing mischief by letting loose their cattle upon the lands of their neighbours and of using violence if resisted. Now altough he recorded a proceeding purporting to be based upon information received from a complainant named Jotil Ahir, it is clear that he was considerably influenced by his own enquiry before he drew up proceedings and that he was really in the position of a prosecutor. He ought not to have, therefore, tried the case himself. Although S. 190 (c), Criminal P. C., applies only to offences, I think the principle of that section must apply to cases of a miscellaneous character. The principle was applied by a Division Bench of this Court to a proceeding under S. 147, Criminal P. C., the case of *Ram Asis Singh* v. *Abdus Samad Barahil*, Criminal Revision No. 401 of 1916, and by their Lordships of the Calcutta High Court in a case under S. 110, Criminal P. C., in *Alimuddin Howaldar* v. *Emperor* (1).

Mr. Lewis, the trying Magistrate, has very candidly observed in his judgment that it was impossible for him to remove from his mind the impression which was produced upon seeing large tracts of land completely devastated by ravages of cattle, and he also states in his explanation that in addition to the 28 witnesses who had deposed before him some 150 others were present and made oral complaints to him. It is clear therefore that his finding as to the guilt of the accused was affected by the preliminary local investigation. The order therefore calling upon the petitioners to execute bonds must be set aside, but we think that as there was evidence to justify the proceedings there must be a re-trial. It has been strongly contended that there is no evidence of habitual mischief to bring the petitioners within the operation of S. 110 (d), Criminal P. C., nor of any association such as would justify a joint trial, nor any specific finding as to the part which each of the accused took in the acts which have been held to constitute habitual mischief. These are matters, however, which must be the subject of the new trial, which we now direct the Magistrate to hold. The Magistrate, of course, will bear in mind that a joint trial is not permissible unless there is evidence of something in the nature of conspiracy or of concert in respect of the various acts of habitual mischief to which the witnesses have deposed. He must also bear in mind that he cannot use entries in the station diaries or Police reports without legal evidence of the acts alleged. There must also be an investigation as to whether each of the petitioners who have been bound down has taken part in the various acts or otherwise acted in concert.

The learned Government Pleader has contended that the local inquiry made by Mr. Lewis was merely made for the purpose of testing the evidence of witnesses. But that does not appear to be the case. His inquiry was made not with the object of testing the evidence of witnesses who had already deposed before him, but for the purpose of finding out whether or not any proceedings were to be instituted against the accused. That being so, the principle that a Court is free to make a local inquiry for the purpose of understanding the evidence which has been given before him, does not justify the proceedings in this case. We direct

(1) [1902] 29 Cal 392.

that the order of the Court below be set aside and that the case be retried by a Magistrate other than the Magistrate upon whose inquiry the proceedings were started. If having regard to the fact that the petitioners have already been in jail for sometime, the trying Magistrate is of opinion, that no further proceedings are necessary, it will be competent to him to drop the proceedings and to discharge the petitioners. Pending the trial of the petitioners, they will be released on their own recognizances in such sums as the District Magistrate may deem proper.

Thornhill, J.—I agree.

V.S./R.K. *Order set aside.*

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ROE AND COUTTS, JJ.

Surat Lal Chowdhery—Defendant—Appellant.

v.

Murlidhar and *others*—Plaintiffs—Respondents.

Appeal No. 740 of 1917, Decided on 9th July 1918, from Appellate Decree of Sub-Judge, Durbhanga.

Bengal Tenancy Act (1885), S. 167—No notice annulling mortgage—Still subsequent purchaser under mortgage decree cannot oust prior purchaser under rent decree.

A subsequent purchaser of a holding under a mortgage decree cannot oust a prior purchaser under a rent decree even where there has been no notice under S. 167 annulling the mortgage. The former is merely in the position of a second mortgagee who has a right to redeem the latter. [P 99 C 2]

Saroshi Charan Mitter and *Sudhanshu Kumar Mitter*—for Appellant.

Siveswardyal for *Rajendra Prasad*—for Respondents.

Judgment.—The facts relevant to the decision of this case are that on the 12th January 1910 the defendant first party obtained a mortgage decree against the *pro forma* defendants and in execution of that decree purchased the property in dispute on the 16th July 1913. The plaintiff purchased the property at a rent sale on the 7th December 1910, and obtained possession of the property in dispute and remained in possession until he was ousted therefrom by an execution taken out by the defendant first party on the basis of the auction-purchase of 1913. The plaintiff instituted proceedings under O. 21 R. 100. He was defeated in these proceedings and, therefore, was driven to bring the present suit to recover possession. The learned Munsif decided in his favour but the learned Subordinate Judge, on the grounds that notices were not issued under S. 167, Bengal Tenancy Act annulling the mortgage of the defendant and that the landlord was a party to the mortgage decree of the defendant first party, held that the landlord could not oust the mortgagee from the tenure without anulling the incumbrances and that this would be so even if the mortgagee had completed his sale before the purchase of the landlord. This decision is based on the case of *Banbihari Kapur* v. *Khetra Pal Singh Roy* (1).

It is urged on behalf of the appellant that the case of Banbihari Kapur is not authority for the proposition stated by the learned Subordinate Judge but is a mere obiter dictum upon the point, and it is urged further that even as an obiter dictum it has been challenged by several subsequent decisions of the Calcutta High Court, particularly in the case of *Salimullah Bahadur* v. *Rahenuddi* (2) and *Kapil Rai* v. *Sheo Baran Rai* (3). Reliance is further placed on the decision in *Gopi Nath Mahapatra* v. *Kashi Nath Beg* (4). The position seems to us to be clear. Supposing that the Munsif had allowed the plaintiff's objection under O. 21, R. 100, the present defendant first party would have been in the proceedings before us in the position of a plaintiff, and it is settled law, so far as this Court is concerned, by the decision in *Cheoditti A. B.* v. *Quadress* (5) by Mullick, J. upheld in Letters Patent by Chamier, C. J. and Sharfuddin, J. that in a suit to recover possession he could not possibly have succeeded in redeeming the mortgage by payment of the amount due under the rent decree. This decision is in accordance with the decision in *Meherunnessa* v. *Sham Sundar Bhuiya* (6). The purchaser under the mortgage decree could not oust the purchaser under the rent decree, even though there had been no notice under **S**. 167. He might be regarded as a second mortgagee.

It seems to us entirely inequitable that the present plaintiff should be put into an unfavourable position by an erroneous summary decision of the Executing Court under O. 21, R. 100. Had the Munsif considered the two decisions to which we have referred, he would have seen that he could not make an order in execution ousting the

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(1) [1911] 38 Cal 923=13 I C 785.
(2) [1915] 43 Cal 263=30 I C 68.
(3) [1913] 21 I C 126.
(4) [1909] 1 I C 35.
(5) [1916] 1 P L J 161=36 I C 498.
(6) [1902] 6 C W N 834.

plaintiff. The induction of the mortgage purchaser upon land, even though it was done by the authority of the Court, was in fact a trespass and such a trespass could give no title. Title to the land undoubtedly lies with plaintiff as the purchaser in execution of a decree made upon a charge prior to the defendant's charge. We therefore decree this appeal and order that the plaintiff be restored to the land without prejudice to any rights that may still subsist in the defendant as suggested in the case we have quoted, namely, the right to redeem as a second mortgagee. The appellant is entitled to his costs as against the defendant first party in all Courts. The order of the Subordinate Judge is discharged and that of the Munsif restored.

V.S./R.K. *Appeal decreed.*

A. I. R. 1918 Patna 100

MULLICK AND THORNHILL, JJ.

Braja Bhusan Trigunait and *others* —Petitioners.

v.

Sris Chandra Tewari—Opposite Party.

Civil Revn. No. 141 of 1918, Decided on 24th July 1918, against the order of Sub-Judge, Manbhum.

(a) Civil P. C. (1908), O. 40, R. 1—Receiver —Application to sue—Leave cannot as a matter of course be refused.

The general principle applying to cases in which application is made to sue a Receiver in respect of properties in charge of the Court is that unless the Court is satisfied that there is no question at all to try or there is no legal foundation to the claim, leave should not as a matter of course be refused. [P 101 C 2]

(b) Civil P. C. (1908), O. 40, R. 1—Receiver — Applicant to sue is entitled to inquiry—Court disposing of application summarily acts with material irregularity and High Court can interfere under Civil P. C. (1908), S. 115.

A petitioner in an application to sue a Receiver is entitled to an inquiry upon the materials furnished by the parties and if he so desires, to ask the Court to take evidence if the Court is not inclined to give leave as a matter of course. If the Court refuses to take evidence and proceeds to dispose of the application summarily, it acts with material irregularity in the exercise of its jurisdiction, and the High Court is therefore entitled to interfere in such a case under S. 115. [P 102 C 1, P 103 C 1]

(c) Civil P. C. (1908), S. 115—"Case"—Scope.

An application for leave to sue a Receiver is a case within the meaning of S. 115. [P 103 C 1]

(d) Civil P. C. (1908), O. 40, R. 1—Receiver —Application to sue—Rule requiring party to take leave of Court is based on public policy and grant is made in exercise of inherent power of Court.

There is no statutory provision which requires a party to take the leave of the Court to sue a Receiver. The rule is based on public policy and the grant of leave is made not in exercise of any power conferred by statute but in exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to abuse of its authority. [P 103 C 1]

(e) Government of India Act (1915), S. 107—High Court can supervise and correct subordinate Courts when wrongly exercising inherent power.

A High Court is entitled in the exercise of its powers of superintendence under S. 107 to correct and supervise subordinate Courts whenever they appear to have wrongly exercised their inherent powers. [P 103 C 1, 2]

P. R. Das, S. N. Palit and *Achalendra Nath Das*—for Petitioners.

Hasan Imam, S. M. Mullick and *S. K. Mitra*—for Opposite Party.

Mullick, J.—This is an application for revision of an order made by the Subordinate Judge of Manbhum refusing leave to the petitioners to sue a Receiver who has been appointed by the Court in an administration suit between certain members of a family known as the Trigunait brothers. It appears that so far back as 1894 a Mokarrari lease of certain properties was given by the Trigunait brothers to one Nagendra Nath Mitra. In 1899 Nagendra Nath gave a sub-lease of 101 bighas out of that property to Jogendra Nath Bose, whose interest by subsequent transfers devolved in 1908 upon a company called the Angarpatra Coal Company. Charu Chandra Mitra, the representative of Nagendra Nath subsequently defaulted in payment of rent and royalty upon his lease and in 1914 it became necessary for the Receiver who had, as stated above, been appointed in the administration suit between the co-sharers to sue Charu Chandra Mitra for arrears amounting to something like Rs. 61,000. On 4th May 1914, an application was made in the course of that suit by the Receiver for an attachment before judgment and a conditional attachment was in fact issued by the Court. In the meantime, the Angarpatra Coal Company had gone into liquidation and on 4th November 1914, Charu Chandra Mitra purchased the right, title and interest of the Company from the liquidator. On 6th November 1914, Charu Chandra Mitra executed a sub-lease of those properties in favour of the present petitioners, Braja Bhusan Trigunait and others who were at that time and still are also one-third co-sharers in the property which is the subject of the adminstration suit.

The case of the petitioners is that the purchase of 4th November 1914, made by Charu Chandra Mitra was in fact made with the money of the petitioners and in their behalf and that Charu Chandra Mitra was a mere benamidar. It is contended that by that purchase and the subsequent lease, the petitioners have entered into the shoes of the Angarpatra Coal Company as sub-lessees under the lessee, and that their interest has not merged in the interest of Charu Chandra Mitra, the judgment-debtor in the above mentioned rent suit, which ended in a decree on 27th April 1916. It next appears that when the decree-holders proceeded to bring the leasehold properties to sale, the Executing Court discovered that the conditional order of attachment of 4th May 1915, was defective and on 11th June 1917 made the following order:—"Copies of attachment, peon's reports etc., filed. No description or mention of the properties attached given in the writ (copy of which has been filed) under the circumstances ordered: Issue process of attachment of immovables fixing 3rd July for its return. Decree-holder to file process-fee at once." Apparently nothing was done before the 3rd July by the decree-holder, but we find that without issuing a fresh attachment, the Court did proceed to issue a sale proclamation fixing 15th June 1918, nor the sale.

Desirous of protecting their leasehold interest, the petitioners on 18th May 1918 applied to the Subordinate Judge before whom the administration suit was pending, for leave to sue the receiver or in the alternative, for an order that the receiver should sell the properties subject to the right, title and interest of the petitioners. The Court called for a report from the receiver and on 4th June 1918 recorded an order declining either to sell the property subject to the right of the petitioners or to give leave to the petitioners to sue the receiver. Against that order the petitioners came to this Court on the 13th June 1918, and obtained a Rule calling upon the Receiver to show cause why leave should not be granted. There was an application for an interim stay of the sale which was refused, but we learn that in fact no sale has yet taken place. Since the issue of notice upon the receiver and in anticipation of sanction from this Court, the petitioners have filed their threatened suit. Now the question for decision is whether or not this Court should interfere with the Subordinate Judge's order refusing leave to the petitioners to sue the Receiver. It will be convenient to deal wiith the merits of the case first. The general principle applying to cases of this kind in which application is made to sue a Receiver in respect of properties in charge of the Court, is that unless the Court is satisfied that there is no question at all to try or there is no legal foundation to the claim, leave should not, as a matter of course, be refused. The onus is, therefore, strongly, on the Court to show that no foundation for any claim has been made out.

In this case the petitioners contend that they are the purchasers of the right, title and interest of the Angarpatra Coal Company and that on the 4th May 1918 when the conditional order of attachment was made, Charu Chandra Mitra, the defendant, had no possession or title thereto. In the second place the petitioners desire to establish that they and not Charu Chandra Mitra are the real perchasers of the interest of the Coal Company. If they can establish that Charu Chandra Mitra is their benamidar and that he acquired that status on 4th November 1914, then obviously that which can be sold in pursuance of the attachment of the 4th May 1914, must be something exclusive of the right, title and interest of the Angarpatra Coal Company. It is contended by the opposite party and found by the Subordinate Judge that the petitioners have no bona fide claim, that the allegation of benami purchase is on the face of it false and that on the 4th May 1914, what was attached, was the whole right, title and interest of Charu Chandra Mitra in the 101 bighas of land leased out to Nagendra Nath Mitra. It is also argued as an alternative that if the property purchased by Charu Chandra Mitra on the 4th November 1916, was not included within the property attached on the 4th May, then upon the principle of merger that which was acquired on the 4th November 1916, merely augmented the right, title and interest which Charu Chandra Mitra had on the 4th May 1914, and, therefore, is liable to be sold in execution of the decree, and reliance is placed in support of this contention on *Umes Chunder Sircar* v. *Zahur Fatima* (1).

Now if the petitioners can establish as a fact that there was a benami purchase made in their behalf and with their money by Charu Chandra Mitra,

(1) [1891] 18 Cal 164=17 I A 201 (P C).

then obviously the argument as to augmentation is needless. That contention can only be supported if Charu Chandra was the real purchaser and the true owner of the properties on the 4th November. In the case above cited, the interest of a mortgagor was augmented by a subsequent addition of properties and what was attached, was the whole right, title and interest of the mortgagor judgment-debtor and it was held that it was perfectly competent to the decree-holder to bring to sale by reason of the principle of accession all the properties of which the mortgagor became possessed after the mortgage, and before the sale. That case, however, has no application here. The question of merger and augmentation can only apply if in fact the whole right, title and interest of Charu Chandra was attached on the 4th May and Charu Chandra was the true owner on the 4th November 1916. Now both these points are points which the petitioners desire to establish by a suit. On what materials then has the Court below come to the finding that there is no shadow of a claim, that there is no legal foundation and that there is no question for trial?

It appears to me that the learned Judge has proceeded on suspicion. He may be right but the petitioners in an application to sue the Receiver, are entitled to an inquiry upon the materials furnished by the parties, and if they so desire, to ask the Court to take evidence if the Court is not inclined to give leave as a matter of course. The question whether there was a benami sale, is a question of fact which cannot be determined without investigation. The question whether the whole right, title and interest of Charu Chandra was attached on the 4th May, is again a question which cortainly requires a fuller investigation than that which has been made by the learned Subordinate Judge. From the attachment order it appears that no boundaries are shown to have been published by the Court on the 4th May 1914. But it is contended by the opposite party before us that the Court was subsequently satisfied that the attachment order was sufficient, and on that footing the Court proceeded to advertise the properties for sale. That again is a question which depends upon evidence. If it should turn out that there was no specification of boundaries which would entitle the decree-holder to sell the properties which are now in suit, the petitioners will be seriously prejudiced if the sale is allowed to proceed. The learned Subordinate Judge, however, brushes these considerations aside by the observation that the application is premature and and that in any event the petitioners will have ample remedy after the sale by bringing a suit against the purchasers. In my opinion such a course will seriously prejudice the petitioners.

If the properties of the petitioners are about to be wrongfully sold, then it is very little comfort to inform them that they will have ample remedy after the properties have passed to third party purchasers. It is for these cases that an action in the nature of a "*quia timet*" is designed so that the party who apprehends injury to his property, may obtain a declaration from the Court as to his interest in the property before any damage in fact takes place. Therefore unless the Court can show strong ground for throwing out the petitioners' application, I think the petitioners are entitled to get leave to sue the Receiver. It is not necessary in this connection to cite many authorities. The principle is well recognised in the Courts in England and has been followed among others in the case of *Lane* v. *Capsey* (2) and in *Pound, Son and Hutchings, In re* (3). In my opinion upon the materials at our disposal there is *prima facie* evidence of a case to be tried and the foundation of a legal claim.

We will now deal with the legal question which has been raised as to our jurisdiction to interfere with the order of the Subordinate Judge either under S. 115, Civil P. C., or under S. 107, Govt. of India Act, 1915. Reliance has been placed by Mr. Hasan Imam on behalf of the opposite party on *Balakrishna Udayar* v. *Vasudeva Aiyar* (4), where their Lordships of the Privy Council affirmed the principle that S. 115 applies to jurisdiction alone or the irregular exercise, or the non-exercise of it, or the illegal assumption of it. In other words, where a Court with jurisdiction makes an order erroneous either in law or in fact that order cannot be revised under S. 115. To like effect has reliance been placed upon *Kumar Chandra Kishore Roy* v. *Basat Ali* (5).

On the point whether the decision in the present matter was a case within

(2) [1891] 3 Ch. 411.
(3) [1889] 42 Ch. D. 402.
(4) A I R 1917 P C 71=40 Mad 793=44 I A 261=40 I C 650 (P C).
(5) [1918] 44 I C 763.

the meaning of S. 115, Civil P. C., I will assume that it was. An ex parte application or an application to a Court for leave to sue a Receiver may upon the analogy of the case which their Lordships of the Privy Council were called upon to consider in the above cited decision may, I think, be held to be covered by S. 115. Then a more serious question is whether there was material irregularity in the exercise of the jurisdiction which was admittedly vested in the Subordinate Judge. In my opinion the omission of the Subordinate Judge to go into the allegations which were made, was material irregularity. If a Court which has jurisdiction to try a suit, declines to go into evidence when required to do so, but merely proceeds to dispose of the suit upon the pleadings or upon allegations made in petitions, that is material irregularity in the exercise of jurisdiction which is, I think, revisable under S. 115, Civil P. C. Upon the view that I take of the proceedings of the learned Subordinate Judge, there was such material irregularity in this case. On the other hand if he had investigated the facts either by taking evidence or by some other adequate mode of enquiry, I should have said that there was no irregularity in the exercise of his jurisdiction and our interference would not have been warranted on that ground.

But apart from S. 115, the petitioners are on much stronger ground under S. 107, Govt. of India Act. There is no statutory provision which requires a party to take the leave of the Court to sue a Receiver. The rule has come down to us as a part of the rules of equity, binding upon all English Courts of Justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it, the authority of that Court is not to be obstructed by suits designed to disturb the possession of the Court. The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a suit, is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by Statute but in exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority. Now it is a settled principle that the High Court is entitled in exercise of its powers of superintendence to correct and supervise subordinate Courts whenever they appear to have wrongly exercised their inherent powers. The question is fundamentally one of jurisdiction and therefore attracts the operation not only of S. 107, Govt. of India Act, but also of S. 115, Civil P. C.

This jurisdiction under S. 107, Govt. of India Act, must of necessity be vague, but there is no doubt that there is a residue of jurisdiction which the Court will always exercise whenever it appears that there has been something in the nature of a denial of the right of fair trial. In the case before us there has been, in my opinion, such a denial. As to what the effect of the grant of leave will be, it is scarcely our province to inquire at the present moment, but we may mention that an offer was made by Mr. Das on behalf of the petitioners that he was ready to pay the whole of the decree money into Court pending the trial of the suit. No doubt an application will be made in the Court in which the suit is instituted for an injunction prohibiting the defendants from proceeding with the sale. Whether that injunction will be granted, and, if so, on what terms, are matters for the trial Court. Possibly the parties may be able to arrange that the whole of the decree money or at least that part of it which is due to the opposite party as proprietors of the two-thirds share, may be paid into Court and that those proprietors will be permitted to draw it out on giving adequate security for the same. We have however already observed that we cannot at this stage give any directions upon these matters. The result is that the application is allowed with costs. Hearing fee three gold mohurs.

Thornhill, J.—I agree.

V.S./R.K. *Application allowed.*

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Full Bench

DAWSON-MILLER, C. J., MULLICK AND ALI IMAM, JJ.

Sheo Nandan Prasad Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 65 of 1918, Decided on 5th June 1918, against proceedings of Special Tribunal of three Commissioners of Bihar and Orissa.

(a) Defence of India Act (Criminal Law Amendment) Act (4 of 1915), Ss. 8 and 11—High Court has no power of superintendence over Commissioners appointed under Defence of India Act—Governor-General in Council can constitute Courts not subject to superinten-

dence of High Court—Governor-General in Council can amend Letters Patent (Calcutta) (1865), Cl. 44—Indian Councils Act (24 and 25 Vict. C. 67), S. 22—Indian High Courts Act (24 and 25 Vict. C. 104), Ss. 9 and 15.

Dawson-Miller, C. J.—The Defence of India Act does not purport to take away any existing powers of superintendence of the High Court, but merely creates a new Court which shall be independent of the High Court. The power of superintendence conferred on the High Court by S. 15, High Courts Act, is confined to superintendence over those Courts which are subject to the appellate jurisdiction of the High Court. The Special Tribunals created under the Defence of India Act are, by the very Act which created them, subject to no appellate jurisdiction whatever. [P 107 C 1]

It is clearly expressed by S. 8, Defence of India Act, that the decision of the Commissioners appointed under the Act should be final and conclusive and that no other Court should have any power of interference either by way of appeal, revision or in any other way whatsoever. [P 105 C 2]

In so far as jurisdiction is directly conferred on the High Courts by S. 9, High Courts Act, it is subject to the legislative powers of the Indian Legislative Council, and in so far as it is left to be conferred by Letters Patent it is such "as Her Majesty may thereby grant and direct." [P 107 C 1]

The Governor-General in Council had power to pass the Defence of India Act providing for the creation of new Courts of criminal jurisdiction independent of the control or superintendence of the High Courts. [P 108 C 1]

It is within the legislative powers of the Governor-General in Council to amend or alter the Letters Patent of a High Court and to direct that a particular Court shall not be subject to the appellate jurisdiction of the High Court, thereby removing a condition which is essential to the exercise of the power of superintendence granted by S. 15, High Courts Act. [P 113 C 1]

Per *Mullick, J.*— The Indian Legislature, though it has no power to amend or modify S. 15, High Courts Act, has power to affect the operation of that section by depriving the High Court of superintendence and appellate jurisdiction in regard to a particular inferior Court.

Per *Ali Imam, J.*—The words of exclusion contained in S. 8, Defence of India Act, embrace not only the appellate and revisional jurisdiction of the High Court over the Commissioners appointed under the Act, but also powers of superintendence, which is one of the ways in which the High Court exercises its jurisdiction over inferior Courts. [P 120 C 1]

(b) Interpretation of Statutes—Intention of Legislature—Statutory enactment ambigous—Such construction is to be preferred as would avoid consequences not intended by Legislature.

If a statutory enactment is ambiguous and capable of two interpretations, one is entitled to take into consideration that there are certain consequences which it may be presumed the Legislature did not intend to bring about and to prefer a construction which would avoid such consequences rather than one which would lead to them. [P 105 C 2]

P. C. Manuk, A. Sen, P. R. Das and *Mullick*—for Applicant.

T. C. Gibbons and *Sultan Ahmad*—for the Crown.

Dawson-Miller, C. J. — The question for determination in this case is whether this Court has any powers of superintendence or revision over the proceedings of a Special Tribunal consisting of three Commissioners appointed by the Government of Bihar and Orissa to try certain criminal offences under powers granted by Act 4 of 1915 known as the Defence of India (Criminal Law Amendment) Act. Two points have been argued before us. The first is that the Defence of India Act does not, when properly interpreted, purport to create Courts which shall not be subject to the superintendence of the High Court. The second is that it was not competent to the Governor-General in Council to create Courts of criminal jurisdiction which should not be subject to the superintendence of the High Court and if and in so far as the Act purports to do so, it was ultra vires.

The Act in question was a temporary measure passed after the outbreak of the war "to secure the public safety and the defence of British India and for the more speedy trial of certain offences." Its operation was to cease six months after the termination of the war, and one of its main objects undoubtedly was to secure the speedy trial of certain of the more serious classes of offences which were regarded as particularly undesirable in times of emergency. It provides that the Governor-General in Council may make rules for securing the public safety and the defence of British India and further enables the Local Government by order in writing to direct that any person, accused of anything which is an offence under any of such rules or of any offence punishable with death or transportation or imprisonment for seven years, shall be tried by a Court composed of three Commissioners to be appointed under the Act, of whom two at least shall have certain specified legal qualifications and whose judgments shall be final and conclusive, and subject to any rules made by the Local Government the procedure to be followed by the Commissioners in trying accused persons is to be that of the Criminal P. C., for the trial of warrant cases by Magistrates. The S. 7 provides that the Criminal P. C., where inconsistent with the special procedure

prescribed by or under the Act, shall not apply to the proceedings of the Commissioners. S. 8 provides:

"(1) Notwithstanding the provisions of the Criminal P. C., 1898, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of Commissioners appointed under this Act, and no Court shall have authority to revise any such order or sentence, or to transfer any case from such Commissioners, or to make any order under S. 491, Criminal P. C., 1898, or have any jurisdiction of any kind in respect of any proceedings under this Act. (2) Nothing in sub-S. (1) shall be deemed to affect the power of the Governor-General in Council or the Local Government to make orders under S. 401 or S. 402, Criminal P. C., 1898, in respect of persons sentenced by Commissioners under this Act."

Section 11 provides: "No order under this Act shall be called in question in any Court, and no suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act."

In October and November last what are known as the Bakr-id raiyats occurred in this province and on 7th November 1917, in exercise of the powers conferred by the Act, Commissioners were appointed by the Local Government of Bihar and Orissa for the trial of persons under the Act in the districts of Gaya and Patna. In January this year the petitioner was tried for and convicted of the offence of dacoity by the Tribunal so appointed and was sentenced to undergo 7 years' transportation under S. 395 read with with S. 59, Penal Code, and the rents and profits of his property were declared forfeit to Government during that period, subject to such provision for his family and dependents as Government should think fit to allow. He now petitions this Court to exercise its powers of superintendence over the said Tribunal and to set aside the conviction, on the grounds (1) that the provisions of the Defence of India Act are beyond the legislative competency of the Governor-General in Council, (2) that the Act is invalid as it involves the abrogation of functions essential to the operative existence of this High Court and of all other High Courts, (3) that the trial of the petitioner was not under the provisions of the Criminal P. C. but under certain rules framed by the Government of Bihar and Orissa, which rules are wholly ultra vires. These are the main grounds, but several others are set out in the affidavit upon which the petition is based, alleging irregularities in the conduct of the trial such as the wrongful admission of evidence, failure to give due wight to evidence on behalf of the petitioner, the severity of the sentence, etc.

The grounds upon which we are asked to interfere assume that the Tribunal created under the Act was one which by the provisions of the Act itself was not subject to the powers of superintendence or revision of the High Court, and this is the real ground of complaint. But as it was contended in the course of the argument that the Defence of India Act, when rightly interpreted, left the powers of superintendence by the High Court untouched, I propose first to deal with this argument. It was urged that as the word superintendence was not mentioned in the clauses of the Act above set out, it was not intended to create a Tribunal over which the High Court should have no powers of superintendence and that, in any case as this was a penal enactment, the words were not sufficiently explicit to warrant an interpretation which would exclude any sort of control by the High Court over the proceedings of the Commissioners. I agree that if a statutory enactment is ambiguous and capable of two interpretations, one is entitled to take into consideration that there are certain consequences which it may be presumed the Legislature did not intend to bring about and to prefer a construction which would avoid such consequences rather than one which would lead to them. See *Vacher and Sons Ltd.* v. *London Society of Corpositors* (1). I am unable, however, to discover any ambiguity or obscurity in the sections in question and with every desire to uphold the jurisdiction of this Court, I am unable to find any express or implied intention in the Act to create a Tribunal which should be subordinate to this or any other existing Court. It seems to me to be quite clearly expressed by the language of the Act that the decision of the Commissioners should be final and conclusive and that no other Court should have any powers of interference either by way of appeal, revision or in any other way whatsoever. In my opinion the wording of the Act is incapable of any other interpretation.

(1) [1913] A C 107.

It remains to consider whether the Governor-General in Council had power to create Courts which should not be subject to the superintendence of the High Courts. The Defence of India Act received the assent of the Governor-General on the 19th March 1915. The present Government of India Act 1915 (5 and 6 Geo. V. c. 61), which consolidated and re-enacted the provisions of earlier Statutes relating to the powers of the Governor-General in Council and the jurisdiction of the High Courts, did not come into operation until nearly a year later on the 1st January 1916, and this High Court was constituted by Letters Patent dated the 9th February 1916 issued under powers conferred by the last mentioned Act. Before that date the High Court at Calcutta exercised jurisdiction over this province. It is necessary therefore to turn to the earlier Statutes relating to the powers of the Governor-General in Council and more particularly the Indian Councils Act 1861 (24 and 25 Vict. c. 67) and the Indian High Courts Act, 1861 (24 and 25 Vict. c. 104) and the Letters Patent constituting the High Court at Calcutta, to ascertain whether the Governor-General in Council had power to pass the enactment in question.

In the case of *Parmeshwar Ahir* v. *Emperor* (2), decided by a Full Bench of this Court in February last, it was contended that the Governor-General had no power to create by legislative enactment new Courts of justice in India and that the provisions of the Defence of India Act purporting to do so were ultra vires. The judgment in that case dealt at length with the history of the powers conferred by successive Acts of Parliament from early times upon the Governor-General in Council and decided that the Indian Legislature had power to create new Courts of justice in India. I see no reason after further consideration to modify the opinion which I expressed in that judgment and it is not necessary to deal at length again with the history of this subject, but the point now raised as to the powers of superintendence of this Court was not directly argued or determined in that case.

At the time when the Defence of India Act was passed, the powers of the Indian Legislature were derived from the Indian Councils Act, 1861. S. 22 enacted that the Governor-General in Council should have power "to make laws regulations for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now (or hereafter) under the dominion of Her Majasty and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever and for all places and things whatever within the said territories." [Words in brackets are added by 55 and 56 Vict. c. 14, S. 3.] The powers here conferred are clearly wide enough in themselves to cover the cases under consideration, but the section contains certain limitations which, it is contended, when read with the Indian High Courts Act, 1861, and the Letters Patent put it out of the power of the Indian Legislature to create any Criminal Courts which shall not be subject to the superintendence of the High Court.

The limitations imposed by section 22 on the powers there granted provide that the Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act.....or any provisions of any Act passed in this present session of Parliament or hereafter to be passed in anywise affecting Her Majesty's Indian territories or the inhabitants thereof." A few days later the Indian High Courts Act, 1861 (24 and 25 Vict. c. 104) was passed abolishing the Supreme and Sudder Courts and providing for the establishment of High Courts by Letters Patent in Bengal, Bombay and Madras, and S. 9 provides that each of the High Courts to be established under the Act shall have and exercise all such civil, criminal and other jurisdiction, original and appellate, "as Her Majesty may by such Letters Patent as aforesaid grant and direct.....and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Court in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts." S. 15 of the same Act provides that "each of the High Courts established under this Act shall have superintendence over all Courts which

(2) [1918] 3 Pat L J 537=44 I C 185.

may be subject to its appellate jurisdiction."

It was argued on behalf of the petitioner that the ppowers of superintendence conferred by S. 15 could not be taken away by an Act of the Indian Legislature, such powers being conferred by an Act passed in the same session of Parliament as the Indian Councils Act and consequently, by reason of the proviso in S. 22 of that Act, placed beyond the control of the Governor-General in Council. The Defence of India Act however does not purport to take away any existing powers of superintendence but merely to create a new Court which shall be independent of the High Court. The superintendence conferred on the High Courts by S. 15 was confined to the superintendence over those Courts which are subject to the appellate jurisdiction of the High Court, whereas the Tribunal over which superintendence is now asked for was by the very Act which created it subject to no appellate jurisdiction whatever. It is said however that by the Letters Patent the High Court at Calcutta and subsequently this High Court are each constituted a Court of Appeal from all the Criminal Courts within the Province of Bihar and Orissa and therefore the High Courts acquired powers of superintendence which could not be interfered with by any Act of the Indian Legislature. The Indian High Courts Act does not mention what Courts shall be subject to the apppellate jurisdiction of the High Court and does not any where expressly limit the legislature powers over all Courts conferred on the Governor-General in Council by the Indian Councils Act, but by S. 9 provides that "the High Court shall have such jurisdiction as Her Majesty by Letters Patent may grant and direct," and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers of the Governor-General in Council confers upon the High Courts the jurisdiction formerly exercised by the Supreme and Sudder Courts.

It would appear therefore that in so far as jurisdiction is directly conferred on the High Court by S. 9 it is subject to the legislative powers of the Indian Council, and in so far as it is left to be conferred by Letters Patent it is such as Her Majesty may thereby "grant and direct." Cl. 27 of the Letters Patent, 1865, provides that "the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence and shall exercise superintendence in such cases as are subject to appeal to the said High Court by virtue of any law now in force." What is now the Province of Bihar and Orissa was in 1865 part of the Bengal Division and if this clause stood alone, there would be considerable force in the petitioner's argument that all the Criminal Courts in those territories must be deemed to be subject to the apppellate jurisdiction of the High Court and therefore subject to its powers of superintendence, but by S. 44 of the same Letters Patent it was ordained and declared "that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council exercised at meetings for the purpose of making laws and regulations and also the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of our Reign, c. 67, and may be in all respects amended and altered thereby." No words could, in my opinion, more clearly express the intention of "directing" within the meaning of Cl. 9, Indian High Courts Act that the powers granted to the High Court by the Letters Patent were subject to the Legislative powers of the Governor-General in Council which he already possessed by virtue of S. 22, Indian Councils Act.

There is therefore nothing inconsistent either in the High Courts Act or in the Letters Patent with the exercise of these powers. It should be observed further that the Letters Patent do not purport to confer a new power on the Governor-General but merely to preserve intact existing powers. To meet this difficulty the learned counsel for the petitioner was driven to contend that Cl. 44 was ultra vires, and a passage was referred to in the judgment of Sir Richard Couch, C. J., in *Queen* v. *Gerald Meares* (3) in support of this contention. I think the meaning of that passage is merely that Cl. 44, in so far as it recognized and retained the legislative powers over all Courts already conferred on the Governor-General by Statute, was open to no objection, but if it purported to grant new powers not conferred by Statute it might create a difficulty. Having regard to the decision arrived at in that case it became unnecessary to determine this point, and the dictum referred to is

(3) [1875] 14 B L R 106.

certainly no authority for the contention that Cl. 44 is ultra vires. It seems to me that it was clearly competent to Her Majesty under the powers conferred by S. 9, High Courts Act, to direct by Her Letters Patent that the existing powers of the Indian Legislature over all Courts should remain unimpaired. It is conceded that the Indian Legislature has power to create new Courts and that it can also remove a territorial area from the appellate jurisdiction of an existing High Court, as was decided by their Lordships of the Privy Council in *Empress* v. *Burah* (4), but it is contended that it has no power to create within the limits of the territorial jurisdiction of a High Court a new Court which shall not be subject to the superintendence of the High Court. As already pointed out, the High Court's powers of superintendence are limited by the High Courts Act to Courts subject to its appellate jurisdiction [see *Darbari Panjiara* v. *Bhathi Roy* (5)].

There is no other statutory enactment granting powers of superintendence, nor is there any Statute directing what Courts shall be subject to the appellate jurisdiction of the High Court. So far as any statutory enactment is concerned, it is left to the Indian Legislature under its general powers of passing laws and regulations for all Courts to determine this question. The Letters Patent themselves, which give the High Court apppellate powers over certain other Courts, even if they be taken to be as binding on the Indian Legislature as an Act of Parliament, expressly declare that their provisions shall be subject to the powers of the Indian Legislature. How then can it be said that the Indian Legislature has no power to direct which Courts shall and which shall not be subject to the appellate jurisdiction of the High Court and incidentally to its powers of superintendence ? In my opinion the powers of the Governor-General in Council to pass the Defence of India Act, providing for the creation of new Courts of criminal jurisdiction independent of the control or superintendence of the High Court, is clearly established. In *Burah's* case (4) the question for determination was whether the administration of civil and criminal justice, within a part of the territories over which the High Court at Calcutta exercised appellate jurisdiction, could be removed by an Act of the Governor-General in Council from that jurisdiction and vested in such officers as the Lieutenant Governor might appoint. In delivering the judgment in that case Lord Selborne said:

"The question therefore is whether an exercise of the legislative power of the Governor-General in Council purporting to exclude the jurisdiction of the High Court within these particular districts is inconsistent with any of the provisions of 24 and 25 Vict. c. 104. Now it appears to their Lordships from the express terms of the Act 24 and 25 Vict. c. 104 that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general Legislative power of the Governor-General in Council as to all Courts of Justice whatever." In a later passage in the same judgment when considering the effect of S. 9, 24 and 25 Vict. c. 104, Lord Selborne says: "The authority of the Indian Legislature over the jurisdiction of the High Courts (so far at all events as the exercise of that authority might be consistent with Her Majesty's Letters Patent) is here distinctly recognized." I have already pointed out that there is no express enactment of Parliament which limits the exercise of the powers of the Indian Legislature in the direction in which they have been exercised in the present case, and I am unable to find anything in the Letters Patent themselves inconsistent with the exercise of such powers. On the contrary those powers are there distinctly saved. I may refer here briefly to the Government of India Act, 1915, and to the establishment of this High Court by His Majesty's Letters Patent of the 9th February 1916. S. 106 of the Act declares that the several High Courts are Courts of record and provides that they shall have such jurisdiction, original and appellate, and all such power and authority as are vested in them by Letters Patent and subject thereto such jurisdiction power and authority as are vested in them at the commencement of the Act. Here we have a consolidating Act repealing previous Statutes, and it is legitimate to suppose that if the Legislature in 1915 considered that any part of the Letters Patent establishing the High Court at Calcutta was ultra vires, some effect would have been given to this view in the new Act.

(4) [1879] 4 Cal 172=5 I A 178=3 Sar 834 (P C).

(5) A I R 1914 Cal 452=41 Cal 915=23 I C 883.

S. 107 replaces S. 15 of the former Act and declares that each of the High Courts shall have supperintendence over all Courts for the time being subject to its appellate jurisdiction. This seems to me to contemplate the establishment of Courts which do not fulfil the requirements of the section. S. 65 declares the powers of the Governor-General in Legislative Council. It includes inter alia power to make laws "for all persons, for all Courts and for all places and things within British India." The limitations on that power are of similar import to those contained in S. 22 of the Act of 1861, and sub-S. (3) provides that the Governor-General in Legislative Council has not power, without the previous approval of the Secretary of State in Council, to make any law empowering any Court other than a High Court to sentence to the punishment of death any of His Majesty's subjects born in Europe or the children of such subject or abolishing any High Court. The limited nature of the disability imposed by this sub-section is significant. The Fifth Schedule, which enumerates the sections of the Act which may be repealed or altered by the Governor-General in Legislative Council, includes S. 106 already referred to which deals with the jurisdiction of the High Courts.

It appears to be clear from a perusal of this Act that the powers of the Indian Legislature over the High Courts and all other Courts in British India, except where expressly limited, are affirmatively recognized. The Letters Patent by which this High Court was established do not materially differ from those of the High Court at Calcutta. Cl. 20 provides that "the High Court of Judicature at Patna shall be a Court of Appeal from the Criminal Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as were immediately before the publication of these presents subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India." Cl. 41 declares that "all the provisions of these Our Letters Patent are subject to the Legislative powers of the Governor-General in Legislative Council.....and may be in all respects amended and altered thereby." It does not appear from the Letters Patent constituting this Court and the Act of 1915 under which they were issued that this Court can claim any powers of superintendence which were denied to the High Court at Calcutta.

I have dealt thus far with the construction of the Statutes and the Letters Patent without reference to the numerous decisions which were called to our attention during the course of the argument. It would serve no useful purpose to discuss each of those cases in this judgment, as many of them threw very little light upon the matters now in controversy. There are, however, apart from the decision of the Privy Council in *Burah's Case* (4) already referred to, many decisions of the High Courts of this country where the powers of the Indian Legislature to amend or alter the clauses of the Letters Patent have been recognized and upheld. In *Runjit Singh* v. *Meherban Koer* (6) Jackson, J., sitting as a member of a Full Bench of the Calcutta High court said: "By the 44th clause, which only gives effect to Cl. 9, 24 and 25 Vict., the Letters Patent are expressly made subject in all particulars to the legislative powers of the Governor-General in Council", and decided that the Indian Legislature had power by Act 6 of 1871 to direct that appeals from Subordinate Judges and Munsifs where the subject matter was under Rs. 5,000 should lie to the District Judge and not to the High Court notwithstanding clause 16 of the Letters Patent.

In *In re James Currie* (7) it was held by Strachey, J., that the effect of Cl. 44 was to make Cl. 18 as well as the other clauses of the Letters Patent subject to the legislative powers of the Governor-General in Council and consequently that Act 5 of 1872 removing the Province of Sindh from the jurisdiction of the Bombay High Court curtailed the jurisdiction of the Judge of that High Court when sitting as Commissioner of the insolvent Court notwithstanding cl. 18 of the Letters Patent. Again in the case of *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (8) the Madras High Court had to consider the effect of S. 588, Civil P. C., then in force upon Cl. 15 of the Letters Patent, which directed that an appeal should lie to the High Court from the judgment of a single Judge of the Court. One of the learned Judges, Benson, J., dealt at length with the Acts

(6) [1877] 3 Cal 662=2 C L R 291 (F B).
(7) [1897] 21 Bom 405.
(8) [1897] 20 Mad. 407.

of 1861 and the Letters Patent and expressed an emphatic opinion that Cl. 15 of the Letters Patent was subject to the Legislative powers of the Governor-General in Council and could be amended thereby. Another case to the same effect is that of *Achaya* v. *Ratnavelu* (9) and the same view was expressed by Sir John Edge, C. J., and Tyrrell, J., in the Allahabad High Court in the case of *Banno Bibi* v. *Mehdi Husain* (10). There are other decisions of a similar nature, but those quoted are sufficient to show that the High Courts of India have been unanimous in their opinion that the clauses of the Letters Patent do not control but are controlled by the Legislative powers of the Governor-General in Council.

It was contended however that the High Court has in fact exercised powers of supperintendence in cases where it had no appellate jurisdiction. In one sense the proposition may be said to be well founded. There are three classes of cases which may be considered. In the first place, superintendence has been exercised in cases which are not subject to appeal but the superintendence is over the Court and its exercise is not confined to cases where a right of appeal lies to the High Court. Indeed it may be said that this special power of superintendence is not as a rule exercised in cases where there is an adequate remedy by other proceedings such as appeal or revision. If the Subordinate Court is one from which an appeal lies to the High Court only in certain specified cases, then that Court is subject to the appellate jurisdiction of the High Court, and that is sufficient to attract the power of superintendence conferred by S. 15, Charter Act and that power is exercised over the Subordinate Court in cases where a direct appeal does not lie [see *In the matter of John Thompson* (11)]. Next where the High Court has powers of revision over Subordinate Courts or where the power of reference to the High Court exists, this has been held to be a modified form of appeal and where it exists, the power of superintendence has been exercised over the proceedings of the Courts in question.

A third class of cases where superintendence is exercised although there is no appellate juridiction, arises where the power to superintend is conferred upon the High Court by the constituent act of the Subordinate Court. In this last class of cases the power of superintendence is indepedent of S. 15, Charter Act. A few instances may be referred to by way of illustration. In *Municipal officer, Aden* v. *Ismail Hajee* (12) a suit was instituted in the Court of the Political Resident at Aden for possession of immoveable property alleged to have been wrongfully seized by the defendant in the suit, who pleaded that he acted under the orders of the Political Resident himself. Application was made to the High Court at Bombay to transfer and try the case there, on the ground that a fair trial could not be obtained before the Political Resident in a case where his own conduct was questioned. By Cl. 13, Letters Patent, Bombay High Court, that Court was given power to remove and to try and determine as a Court of extraordinary original jurisdiction any suit falling within the jurisdiction of any Court subject to its superintendence.

It was contended that as the High Court at Bombay had no appellate jurisdiction over the Aden Court it had no powers of superintendence. The case turned not upon S. 15, Charter Act, but upon Act 2 of 1864 which regulated the administration of justice at Aden. The preamble of the Act recited that it was expedient to provide for the superintendence or revision of certain judgments and proceedings of the Resident which were subject to no superintendence or revision except in so far as they were subject to appeal to Her Majesty in Council. It then directed that no appeal should lie to the High Court at Bombay from any decision or order of the Resident, but provided for a reference thereto in a large number of case and gave the High Court power to frame rules regulating the practice and procedure of the Resident's Court. Lord Macnaghten in delivering their Lordship's judgment held that this was sufficient superintendence to comply with Cl. 13, Letters Patent. In dealing with the contention of the appellant that the powers of superintendence and transfer granted by S. 15, Charter Act, were confined to cases where there was appellate jurisdiction and that the superintendence mentioned in the Letters Patent upon which depended the power of removal should be restricted in a similar sense, Lord Macnaghten pointed out that "the power to transfer contained in the Charter Act has nothing to do with the

(9) [1886] 9 Mad. 253.
(10) [1889] 11 All 375.
(11) [1870] 6 B L R 180.
(12) [1906] 30 Bom 246=33 I A 38=8 Sar 901 (P C).

power of removal conferred by the Letters Patent and the Letters Patent make superintendence, not appellate jurisdiction, the condition of exercise of the power of removal which the High Court at Bombay has put in force."

Pirbhai Khimji v. *Bombay, Baroda and Central India Railway Co.* (13) is another case to the same effect, where the power of transferring a case from the Bombay Small Cause Court was asserted by the High Court not under the Charter Act but under Cl. 13, Letters Patent, and not on the ground that it had appellate jurisdiction but on the ground that it had certain powers of superintendence conferred by the Acts constituting the Small Cause Courts. It is quite clear that cases of this nature afford no authority for the proposition that the power of superintendence conferred by S. 15 exists where there is no appellate jurisdiction. This view was clearly expressed by Mookerjee and Beachcroft, JJ., in *Darbari Panjiara* v. *Bhati Roy* (5). Cases where the High Court has exercised superintendence over the proceedings of Magistrates acting under S. 145, Criminal P. C., were also relied on by the petitioner. These cases afford instances of both the first and second of the three classes of cases above referred to. Appeals to the High Court are provided by the Criminal Procedure Code from the Sessions Judge or Additional Sessions Judge and to a more limited extent from the Presidency Magistrate, but not from the Courts of inferior Magistrates.

The High Court however has by S. 435 powers of revision over the proceedings of any inferior Criminal Court within the local limits of its jurisdiction, and to this extent such inferior Courts are subject to a modified form of appeal to the High Court. And although the proceedings of Magistrates acting under S. 145 and certain other sections are exempted from the revisional powers of the High Court conferred by the section 435, nevertheless the High Court has exercised the power of superintendence over the proceedings of the inferior Courts purporting to act under the exempted section, the Court itself being in the sense indicated subject to the appellate jurisdiction of the High Court. This exercise of jurisdiction under the powers given by S. 15, Charter Act, in my opinion, may be justified on the grounds stated and does not militate against the general proposition that the section confers the right of superintendence only over Courts subject to the appellate jurisdiction of the High Court.

An examination of the cases in which the High Court has interfered where orders have been passed under S. 145 and the other excepted sections shews that the right of interference is only exercised where the orders made were in fact made without jurisdiction or when the Subordinate Court had refused to exercise its jurisdiction. In such cases it has been held that the orders were not in fact made under those sections at all and the mere fact that they purported to be made in compliance therewith does not make them so. The restrictions imposed by S. 435 (3) in such cases do not apply. In *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (14) the judgment of Prinsep and Ameer Ali, JJ., shews that in the opinion of these learned Judges the powers of the Indian Legislature were beyond question, but it was held that the effect of S. 435 was not entirely to deprive the High Court of its jurisdiction over orders purporting to be made under S. 145. That case was decided in 1898 when the present Criminal Procedure Code had just come into force, but S. 435 was expressed in the same terms as the corresponding section of the Code of 1882, and following earlier cases it was held that if the order challenged were without jurisdiction, the mere fact of the order purporting to be made under one of the excepted sections would not bring it within these sections so as to debar the exercise of powers under S. 15, Charter Act.

In *Ananda Chandra Bhuttacharjee* v. *Carr Stephen* (15), decided under the Code of 1882, a similar view was expressed by Sir W. Comer Petheram, C. J., who said: "The mere statement that an order is made under S. 144 (one of the excepted sections), if it is not such an order as is contemplated by the section and could not be made under it, does not make it an order under that section and consequently any Court having jurisdiction to review orders under S. 435 would not be prevented from doing so by the proviso to that section, because the order under review, though headed under S. 144, was not in fact made under that section at all." In the former of the two cases just referred to, the order was not interfered with as it was held to

(13) [1871] 8 B H C R O C J 59.

(14) [1899] 26 Cal 188.
(15) [1892] 19 Cal 127.

have been properly made under S. 145, but the right of interference asserted and upheld in that case was based upon S. 15, Charter Act. In the latter case the right to interfere was asserted both under S. 435 of the Code which gave powers of revision and under S. 15, Charter Act, but in neither case nor indeed in any of the cases called to our notice, where orders of the class now under consideration were questioned, does it clearly appear by what chain of reasoning the inferior Court was assumed to be subject to the appellate jurisdiction of the High Court. I have already expressed my opinion that the inferior Court being in some respects subject to the powers of revision by the High Court, there was a modified right of appeal from that Court to the High Court. But there is another view by which the same result may be arrived at. This is the view urged by the learned counsel for the petitioner to which I referred in an earlier part of this judgment. By Cl. 20, Letters Patent, this High Court is constituted a Court of Appeal from the Criminal Courts of the Province. S. 6, Criminal P. C., enumerates the five classes of Criminal Courts in British India in addition to the High Courts and the Courts constituted under any law other than the Code for the time being in force.

The High Court can therefore exercise all the power incident to appellate jurisdiction including superintendence over those Courts, except in so far as that jurisdiction is excluded by competent legislative authority. The fact that some of the attributes of appellate jurisdiction are removed does not remove the others and unless the Court is expressly declared to be entirely removed from the appellate jurisdiction of the High Court, the power of superintendence at least remains. This is the contention put forward on behalf of the petitioner. If it be correct it would justify the High Courts in assuming that their powers of superintendence under the Charter Act can be exercised in the cases last considered. I prefer to express no opinion on this point, for it is clear to my mind that there is a vast difference between a case where a residuum of appellate jurisdiction remains and a case like the present where the Court never was from its inception subject to any kind of appellate jurisdiction whatever. In the one case the appellate powers conferred by the Letters Patent are not entirely excluded. In the other case they never existed and unless it is to be held that the powers granted by Letters Patent cannot be altered or re-amended by the Indian Legislature, there never was from the very first any appellate jurisdiction or jurisdiction of any sort which the High Court could exercise in the present case.

It is instructive to consider the view taken of S. 15 of the Charter Act when it first came before the High Court for consideration. *Bhyrub Chunder* v. *Shama Soonderee Debea* (16) was one of the first cases, if not the first in which this section was considered. It came before the High Court at Calcutta in 1866 [*Bhyrub Chunder* v. *Shama Soonderee Debea* (16)]. It was a rent suit in which the order of the Deputy Collector had been reversed on appeal to the Collector. Application was then made to the High Court to set aside the order of the Collector under its powers of superintendence, on the ground that under Act 10 of 1859 the appeal lay not to the Collector but to the Zillah Judge and the former had, therefore, acted without jurisdiction. The Court consisting of Norman and Jackson, JJ., set aside the Collector's order, holding that they had jurisdiction to interfere on the ground that the Collector's Court was one over which at the time of the passing of the Charter Act the Sudder Court possessed appellate jurisdiction which the High Court inherited. This was followed in 1867 by the case of *Gopal Singh* v. *Court of Wards* (17). That was a case in which a summary decree for rent had been obtained in 1851 under Regulation 6 of 1799 against the petitioner's father. After various unsuccessful attempts to execute the decree and after the death of his father fresh execution proceedings were commenced against the petitioner as heir in 1866 in respect of the same debt and he was arrested and lodged in prison. Had the decree been obtained under the provisions of Act 10 of 1859, there would have been no doubt as to the jurisdiction of the High Court but under the law existing in 1851 when the decree was obtained, the Collector was not subject to the appellate jurisdiction of the Sudder Court. The case was admittedly one calling for interference if the High Court had power to entertain it, but the majority of the Court consisting of Norman, Seton-Karr and Jackson, JJ., refused to interfere under S. 15, Charter Act, solely on the ground that the Court over which superintendence was claimed

(16) [1866] 6 W R Act X Rulings 68.
(17) [1867] 7 W R 430.

was not subject to the appellate jurisdiction of the High Court. The majority of the Court in that case appear to have resisted in an exemplary manner the temptation to make bad law in a hard case notwithstanding the dissent of one of their number.

It may perhaps be possible here and there amongst the voluminous reports of cases decided by the various High Courts to find some instance of the exercise of superintendence which might be difficult to justify on the ground of appellate jurisdiction, but I am satisfied that the result of considered opinion is that the power of superintendence granted by S. 15, 24 and 25 Vict. c. 104, depends upon appellate jurisdiction in one or other of the forms already indicated. I am also satisfied that it is within the legislative powers of the Governor-General in Council to amend or alter the Letters Patent and to direct that a particular Court shall not be subject to the appellate jurisdiction of the High Court, thereby removing a condition which is essential to the exercise of the power of superintendence granted by the Charter Act.

Before concluding this judgment I think it is desirable to say a word concerning one of the points raised in the petition, although no argument in support of it was addressed to us on behalf of the petitioner. The grounds upon which we are asked to interfere are contained in the petition and are set out in the earlier part of this judgment. The third ground alleges that the trial was not under the provisions of the Code of Criminal Procedure but under certain rules framed by the Local Government, and that the same are ultra vires. These rules were not discussed at the hearing, but were put in by the learned Advocate-General in order to complete the record. They are contained in Notification No. 2392-C issued by the Lieutenant-Governor of Bihar and Orissa in Council, dated 27th September 1915. The Notification prescribes rules of procedure for trial by Commissioners appointed under the Act. The rules modify in some respects the procedure provided by the Code. On reading these rules I am unable to find that they exceed in any particular the powers conferred on the Local Government by the Defence of India Act. That the Lieutenant-Governor in Council has power to alter or amend the Criminal Procedure Code can hardly be questioned and as the rules prescribed by the Local Government are in my opinion clearly authorised by the Defence of India Act, I find that the rules in question are not ultra vires but valid and binding. I would therefore reject this petition on the ground that this Court has no jurisdiction to superintend the proceedings of the Commissioners appointed under the Defence of India Act.

Mullick, J.—I agree with the learned Chief Justice that we have no power to interfere. I think it is necessary at the outset to consider what is meant by jurisdiction by the High Courts Act of 1861 and in the Letters Patent granted in 1862 and 1865 to the Calcutta High Court. Jurisdiction in its large sense is the right to determine some jural relation between the parties; in its narrower sense it may mean the power to do a certain thing after the Court has taken cognisance. In the former sense jurisdiction may be classified with reference to (1) parties, (2) subject-matter, (3) locality, and (4) pecuniary valuation. With reference to to each of these heads the Court may exercise original and appellate jurisdiction, ordinary or extraordinary, as the case may be. The Supreme Court which was constituted by Act of Parliament had no appellate jurisdiction. It had a local original jurisdiction with reference to subject-matter, while the Sudder Dewani and Sudder Nizamat Adalats, which were the Company's Courts and were established by the Act of the Indian Legislature had a local and general appellate jurisdiction over the Company's Court.

It is, I think, quite clear that the jurisdiction conferred upon the High Courts by the High Courts Act was jurisdiction in the wider sense. In one view appeal, revision, reference and superintendence are all different forms of the exercise of appellate jurisdiction [*Chappan* v. *Moidin Kutti* (18) and *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (19)]. In another view each of these is a different head of jurisdiction. So it has been held that revisional jurisdiction is not necessarily a part of appellate jurisdiction, for a Court which has no appellate jurisdiction over another may still exercise revisional jurisdiction over it [*Sarat Ch. Singh* v. *Brojo Lal Mukerji* (20)]. In my opinion revision and superintendence are incidents of apppellate juris-

(18) [1899] 22 Mad 68 (F B).
(19) A I R 1914 Cal 288=41 Cal 322=2 I C 977.
(20) [1903] 30 Cal 986.

diction, which term is used in this wide sense in the High Court Act.

Learned counsel on behalf of the petitioner goes further and contends that the appellate jurisdiction of the High Court of Patna on the criminal side as defined in cl.20 of the Letters Patent, extends over all Criminal Courts within the Province independently of the right of appeal, revision, reference or superintendence. It will be necessary to examine the contention more fully at a later stage. Let us next examine what superintendence means in S.15, High Courts Act. Under that section the High Court has superintendence over all Courts, which may be subject to its appellate jurisdiction. This was a new jurisdiction so far as the Supreme Court was concerned, but not so with regard to the Suddar Adalats which by enactment were Courts of general superintendence over all inferior Courts, *Governor of Bengal* v. *Moti Lal Ghosh* (21). This jurisdiction was not ordinarily intended to take the place of appeal or revision. It was intended that the High Court should ordinarily exercise this jurisdiction only when the inferior Court had wrongly declined jurisdiction or exceeded its jurisdiction. In *Shiva Nathaji* v. *Joma Kashinath* (22) the jurisdiction is thus described, "The superintending function is to compel the exercise of judicial authority on the subject and not beyond it; to define the subject by the elements composing it by reference to the prescribed or intended external conditions and to exact obedience to the law of procedure in gathering the materials for adjudication and in giving effect to them. It was no part of that function to substitute the opinion of the superintending Court for that of the Courts superintended in matters assigned by the Legislature to the cognisance of the latter. What it can exact is a real endeavour in good faith to apply the law."

But although these rules are of general application in cases of ordinary character, there is a small residue of jurisdiction which the Courts left undefined. So the Court has interfered (1) where an inferior Court has declined to inquire into the genuineness of an assignment, *Greesh Chunder Lahooree* v. *Kasheessuree Debia* (23), (2) where a Court has declined to exercise its power of restitution, *Gobind Coomar Chowdhry* v. *Kisto Coomar Chowdhry* (24), (3) where a Collector acting as a rent Court has made a wrong order transferring a decree for execution to another Court: *Nilmony Singh Deo* v. *Taranath Mukerjee* (25). The case of *Parmessar Singh* v. *Kailaspati* (26) recently decided in this Court does not seem to me to conflict with the above cases. It merely lays down what class of errors the High Court will ordinarly correct with reference to orders made under S. 145, Criminal P. C. But the general superintendence conferred by S. 15, High Courts Act, is different from the superintendence spoken in cls. 13 and 27, Letters Patent, 1865. Thus in *Pirbhai Khimji* v. *B. B. & C. I. Ry. Co.* (13) it was held that although the Bombay High Court might not have appellate jurisdiction in its strict sense over the Bombay Presidency Small Cause Court, yet as it had a limited superintendence, it was sufficent to give it power to transfer suits under the extraordinary original jurisdiction conferred by S. 13, Letters Patent, Bombay High Court. To like effect is the decision of Lord Macnaghten in *Municipal Officer Aden* v. *Ismail Hajee* (12) in regard to the right of transfer of a suit from the Court of the Resident of Muscat. It was there held that the power of transfer within the meaning of cl. 13 did not depend on appellate jurisdiction as did the power of superintendence under S. 15, High Courts Act. A limited power of superintendence to make rules for regulating practice was held sufficient to give jurisdiction under cl. 13, Letters Patent. The question before us is whether this general superintendence can be exercised by the High Court at Patna over the Tribunal by whom the petitioner was convicted.

This Court has already decided that the Tribunal is a Court which the Indian Legislature was competent to create by the Defence of India Act, 1915. It was clearly a Criminal Court. It was acting judicially and the right of superintendence extends over all Courts acting judicially, provided the other conditions of S. 15, High Courts Act, are satisfied. So it has been held that the High Court has superintendence over a Collector, who is a Revenue officer, when he refuses to refer a case under S. 18, Land Acquisition Act, *Administrator-General of Bengal*

(21) A I R 1914 Cal 69=41 Cal 173=20 I C 81 (S B).
(22) [1883] 7 Bom 341 (F B).
(23) [1867] 8 W R 26.
(24) [1866] 7 W R 520.
(25) [1883] 9 Cal 295=9 I A 174=4 Sar 392 (P C).
(26) [1916] 1 P L J 336=35 I C 801.

v. *Land Acquisition Collector* (27) and again where a Settlement Officer who is ordinarily a Revenue Officer has directed while acting judicially the prosecution of a person for an offence against public justice, it has been ruled that he is a Court subject to the superintendence of the High Court, *Har Prasad Das* v. *Emperor* (28). Therefore this High Court has superintendence, unless it can be shown that the Tribunal is not subject to the Court's appellate jurisdiction.

The learned Advocate-General contends that where there is no power of appeal, revision or reference, there can be no appellate jurisdiction. Parsons, J., in *In re Rattansee Purshottum* (29) went further and held that even the power to entertain references and to exercise original criminal jurisdiction in certain circumstances did not give appellate jurisdiction so as to attract the operation of S. 15, Charter Act. On the other hand, it has been held in the Calcutta High Court that reference is a modified form of appeal. The learned Advocate-General does not press the view of Parsons, J., but admits that a Court is subject to appellate jurisdiction if there is a right of appeal, revision or reference from it, howsoever limited in extent. Learned Counsel for the petitioner would extend the jurisdiction still further and urges that under cl. 27, Letters Patent, Calcutta High Court, which defines its criminal appellate jurisdiction, the High Court has appellate jurisdiction over every Criminal Court within the Province regardless of the right of appeal, revision or reference. In my opinion this last view is correct. The clause does not confer the right of appeal; it leaves the right of appeal to be controlled by the Legislature; it is an enabling provision which gives the Court jurisdiction to try such appeals as the Legislature may direct it to try. This was the sense in which the corresponding clause regarding civil appellate jurisdiction in the Letters Patent, 1865, Calcutta High Court, was construed by the learned Judges in *Runjit Singh* v. *Meherban Koer* (6).

It is true that S. 15, High Court Act, does not define appellate jurisdiction though it might have done so, but the object of the Act was that the Crown should by Letters Patent grant jurisdiction and direct the exercise of powers and, in my opinion the intention of the Letters Patent was that criminal appellate jurisdiction should extend over (1) all Criminal Courts within the province, (2) all other Courts (namely, Courts outside the Province or Courts other than Criminal Courts) subject to its superintendence. In part therefore that jurisdiction was founded on a territorial basis. This being so, has the Government of India enacted that the Court under consideration is not subject to the superintendence of the High Court; or that it is not subject to the High Court's appellate jurisdiction; if so is such legislation ultra vires in either respect? In my opinion the Defence of India Act does enact expressly that the High Court shall have neither superintendence, nor appellate jurisdiction. I am also of opinion that the enactment was within the powers of the Legislature.

It is contended on behalf of the petitioner that the power of superintendence is similar to the power of interference by writ of certiorari and that the Court will not assume that the power is taken away without an express Statute to that effect, *Rex* v. *Moreley* (30). The answer to this is that here there is a Statute which by its eighth section clearly enacts that no Court shall have any jurisdiction of any kind in respect of any proceedings under this Act, in other words, the exclusion of jurisdiction is express. It also seems clear that the trial of the petitioner was the proceeding of a Court constituted under the Act, and it is not seriously disputed that the proceeding was a proceeding under the Act. The only substantial question is whether the Legislature in India acted ultra vires in enacting S. 8 of the Act. It is admitted that the legality of the Defence of India Act must be tested not by the Government of India Act, 1915, but by the Indian Councils Act, 1861. We must see therefore whether S. 22 of this last mentioned Act authorises the Government of India to legislate so as to affect (1) S. 15, High Courts Act, 1861, or (2) the Letters Patent granted to the Calcutta High Court in 1865.

Now S. 9, High Courts Act, 1861 (24 and 25 Vict. c. 104) provides that the High Court to be established at Fort William in Bengal shall have such civil, criminal, admiralty, and vice-admiralty, intestate and matrimonial jurisdiction, original and appellate, as Her Majesty may by Letters Patent grant and shall exercise such powers and

(27) [1908] 12 C W N 241.
(28) [1913] 40 Cal 477=19 I C 197.
(29) [1900] 24 Bom 471.
(30) [1760] 2 Burr 1040.

authority in relation to the administration of justice in the Presidency as Her Majesty may direct, subject to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed by the Letters Patent. In the second part of the section it is provided that unless the Letters Patent have otherwise directed in the matter of jurisdiction and exercise of power and authority, the new High Court is to have all the power and authority vested in the Supreme Court, Sudder Dewani Adalat and the Sudder Nizamat Adalat at Calcutta at the time of the abolition of those Courts. This second part also enacts that subject to the Legislative powers of the Governor-General in Council in relation to the matters aforesaid, that is to say, jurisdiction, power and authority in the administration of justice, the High Court is to have and to exercise the jurisdiction, power and authority of the abolished Courts. It is contended that the Legislative powers of the Governor-General are saved only in respect of such powers as the abolished Courts had, and not as to any new powers that have been conferred by the Letters Patent upon the High Court.

It is further argued that the power of superintendence under S. 15 of the Act was a new power and therefore no Act of the Governor-General in Council could in any way, whether directly or indirectly, affect the Court's power to superintend the proceedings of the Tribunal now in question. Now although in ***Queen* v. *Gerald Meares*** **(3) Couch,** C. J., was of opinion that the legislative powers of the Governor-General were limited to what has been called the inherited powers of the High Courts and although the same view was taken by Markby, J., in *Feda Hossein, In the matter of* (31), the weight of authority is, I think, against this view. In *Runjit Singh* v. *Meherban Koer* (6) their Lordships of the Calcutta High Court were of opinion that Cl. 44 of Letters Patent of 1865 only gives effect to Cl. 9, High Courts Act, 1861 and that the Letters Patent are expressly made subject in all particulars to the Legislative powers of the Governor-General in Council. To like effect is the decision of their Lordships of the Madras High Court in *Achaya* v. *Ratnavelu* (9) and in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (8) and in *Chappan* v. *Moidin Kutti* (18) which was approved by their Lordships of the Calcutta High Court in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (19). To like effect also is the decision of their Lordships of the Bombay Court, *James Currie, In re* (7). Finally if my view of the decision be correct, the matter seems concluded by the judgment of their Lordships of the Privy Council in *Empress* v. *Burah* (4).

With the greatest respect to the learned Judges of the Calcutta High Court who were of opinion that the powers of the Governor-General in Council were saved only in respect of the inherited powers, I do not think this result follows upon the grammatical construction of S. 9. Such a restriction would seem to be unreasonable and it could not have been intended that while the Government of India was a Legislature with plenary powers to alter or modify every jurisdiction or authority which was formerly exercised by the abolished Courts and re-granted by the Letters Patent, a limitation could have been placed upon their powers in respect of an infinitesimal part of the Court's jurisdiction and authority. In a sense every jurisdiction and authority conferred by the Letters Patent upon the High Court was a new jurisdiction, for the Court was a new Court. It could not have been the intention of Parliament that in order to examine the validity of an act of the Indian Legislature affecting the High Court's jurisdiction an inquiry should be set on foot in every case as to whether the jurisdiction and power affected by the Legislature was old or new.

It was said by Markby, J., in *Feda Hossein, In the matter of* (31) that Ss. 11 and 13, High Courts Act, 1861 show that the intention of Parliament was to put a limitation on the authority of the Governor-General in Council in regard to the matters dealt with in S. 9. With great respect I am unable to follow the learned Judge's argument. S. 9 enacts that the Indian Legislature shall be competent to modify the jurisdiction and powers conferred by the Letters Patent upon the Court as a whole. S. 11 enacts that the previous legislation relating to the Judges of the abolished Courts will be applicable as far as possible to the Judges of the new Court. This had reference to matters not covered by S. 9 and therefore it was necessary to give a direction that the legislative power of the Government of India was saved in these matters. S. 13 created a new power in the High Court, namely, that of constituting by its rules

(31) [1875] 1 Cal 431.

Benches for the exercise of original and appellate jurisdiction. This also was not a matter covered by S. 9, which related only to the jurisdiction and powers of the whole Court therefore in respect of this new power it was necessary to save the powers of the Government of India also. In my view therefore the Indian Legislature, though it had no power to amend or modify or repeal S. 15, High Courts Act, 1861, had power to affect the operation of that section by depriving the Court of superintendence and appellate jurisdiction in regard to a particular inferior Court.

The view is supported by the legislation concerning the Presidency Small Cause Courts. By S. 6, Presidency Small Cause Courts Act 1882, it was enacted that the Small Cause Court shall be deemed to be a Court subject to the superintendence of the High Court of Judicature at Fort William, within the meaning of the Letters Patent dated the 28th day of December 1865 and within the meaning of Civil P. C., and the High Court shall have in respect of the Small Cause Court the same powers as it had under the 24 & 25 Vict. S. 15, in respect of Courts subject to its appellate jurisdiction. As was observed by Jenkins, C. J., in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (19), the effect of this enactment was to confer the power of superintendence upon the High Court in respect of the Small Cause Court, as also appellate jurisdiction within the meaning of the Letters Patent. In the view I take it might perhaps be said that the section merely affirmed for the sake of greater caution a pre-existing power. It would thus appear that the High Court has superintendence where it has appellate jurisdiction and it has appellate jurisdiction where it has superintendence. If the Legislature can confer superintendence so as to attract the operation of S. 15, High Courts Act, then I see no reason why it cannot take away the same superintendence either directly by express words or indirectly by cutting down the Court's appellate jurisdiction.

But even if it be admitted that the legislative powers of the Government of India are limited to interference with only the inherited powers, it seems to me that the power of superintendence being inherited from the Sudder Nizamat Adalat, S. 8, Defence of India Act was validly enacted. It is unnecessary in the view I take to pursue this view of the case further than by drawing attention to the constructions of the Sudder Nizamat Adalat 1806-1847, which repeatedly assert the right of general superintendence on the part of a superior Court over an inferior Court not only in administrative but judicial matters. Thus in Construction No. 722, dated 12th October 1832 the Court wrote to the Registrar of the Nizamat Adalat of the Western Provinces as follows: "the Magistrate is authorized under the general powers vested in him by the regulations as a superintending authority over his assistant to revise proceedings of the latter without an appeal". So again by No. 730 dated 2nd November 1832, the Court observed that the Commissioner was competent by the general powers vested in him to revise the Magistrate's sentence or order and to alter or amend it if it was illegal. Although since the High Court has preferred to base its right of superintendence on section 15 of the Act and Subordinate Courts no longer claim superintendence over the judicial acts of inferior Courts, the above constructions of the Sudder Nizamat Adalat show that the power of superintendence was well recognised even before the High Courts Act came into operation.

In my opinion, therefore, S. 15, High Courts Act, merely re-states the existence of an old power the exercise of which is liable to control by the Indian Legislature. In the alternative I hold that the Indian Legislature had power under S. 9 of the Act, and independently of Cl. 44, Letters Patent, 1865, to legislate not only in respect of the inherited powers but to modify the Letters Patent in all matters, and that by controlling the provisions of the Letters Patent as to appellate jurisdiction the Legislature can affect S. 15 of the Act. In pressing the opposite view the line of argument adopted by learned Counsel has been as follows:

(1) S. 9 High Courts Act gives the Indian Legislature authority to interfere with inherited powers and not with the Letters Patent.

(2) Cl. 44, Letters Patent, which is the only authority which gives the Indian Legislature power to modify the Letters Patent, is wholly ultra vires because (a) the Letters Patent form part of the Act, and (b) Her Majesty being herself a delegate cannot delegate her powers to the Government of India; (3) if cl. 44 is not wholly ultra vires it is intra varies only as to the inherited ppowers; (4) the Indian Le-

gislature has no power to modify S. 15, High Courts Act.

I have already expressed my opinion as to the powers of the Indian Legislature in respect of Ss. 9 and 15 of the Act. I propose next to examine the contention that the Letters Patent form part of the Act. It is argued that the Letters Patent are rules possessing the force of statutory authority and that they are intended to supplement the Act, though they may not be actually a part of the Act. In my opinion it is quite clear that the Letters Patent are not part of the Act. Notwithstanding the dictum of Franks, J., in *Beebee Muttra,* In the goods of (32), Couch, C. J., in *Queen* v. *Gerald Meares* (3) was clearly of opinion that the Letters Patent were not part of the Act. Russel, C. J., declined to accept the view of Franks, J., and we must take it that so far as the Calcutta High Court is concerned, it has been definitely decided that the Letters Patent do not form part of the Act and that even if the legislative powers of the Governor-General are limited to the latter part of S. 9, the jurisdiction of the Governor-General to modify and alter the jurisdiction of the High Court vested in him by the Letters Patent remains free and unfettered, *Madhub Chunder Poramanick* v. *Raj Coomar Doss* (33). This power of the Governor-General is based upon S. 22, Indian Councils Act, 1861. It does not arise from Cl. 44, Letters Patent, which merely states the law as it stood and reiterates for the sake of greater caution the power of the Governor-General to modify the terms of the Letters Patent, if he so chooses. Then as regards the other objection to cl. 44, I am not impressed by the argument that Her Majesty being a delegate of the Imperial Parliament in the matter of the Letters Patent could not herself delegate to the Government of India the power of defining the jurisdiction of the High Court. Her Majesty was not in any sense a delegate. She had plenary powers to grant jurisdiction and to make rules for its exercise. S. 22, Government of India Act, 1861, gave the Government of India power to modify those rules, provided that the Government of India did not affect or modify any Imperial Act passed in or since 1861. I am of opinion therefore that Cl. 44 was not in any respect ultra vires. It follows therefore that it was open to the Government of India to modify the Letters Patent and to declare that the Tribunal under consideration was not subject to the appellate jurisdiction of the High Court.

If the power of superintendence is a new power which the Legislature in India cannot take away, yet that Legislature may by removing a Court from the High Court's appellate jurisdiction exclude the Court's superintendence. As to the meaning of appellate jurisdiction I have already expressed my opinion. As I have already said, the learned Advocate General's contention is that there can be no appellate jurisdiction where there is no appeal, reference or revision. Although Ss. 15 and 16, High Courts Act, do not expressly say that the appellate jurisdiction may refer to a local or territorial jurisdiction, I think having regard to the terms of S. 9 we must look to the Letters Patent for the meaning of the term. Cl. 27, Letters Patent, 1865, gives appellate jurisdiction to the High Court (a) over all Criminal Courts of the Bengal Division and (b) over all Courts subject to its superintendence. The clause is wider than the corresponding clause of 1862, in which criminal appellate jurisdiction over Courts outside the Bengal Division was based on right of appeal to the Sudder Nizamat Adalat. The Tribunal under consideration being a Criminal Court in the Bengal Division, the High Court is a Court of Appeal from it. In the view that I have already expressed above this power of entertaining appeals subject to the provisions of the Legislature is sufficient to confer appellate jurisdiction. Can the Legislature then remove a Court from the High Court's appellate jurisdiction? I think it can.

It has been held in *Baleshwar Bagarti* v. *Bhagirathi Dass* (34) that the Governor-General has authority under 28 and 29 Vict. c. 15 to transfer territory from the Central Provinces, which are not subordinate to a High Court, to the jurisdiction of the Calcutta High Court. It has also been held that in the Santal Pargannas by reasons of Act 37 of 1855 the Court of the Sub-Divisional Officer is not subject to the appellate jurisdiction of the High Court, the Commissioner of the Division being the High Court for that area, *Darbari Panjiara* v. *Bhatti Roy* (5). Also that under S. 5, Santal Pargannas Regulation, 1872, while suits over Rs. 1,000 in value are subject to the superintendence of the High Court [*Sardari Sha* v.

(32) Mort Montr. 191.
(33) [1875] 14 B L R 76.
(34) [1908] 35 Cal 701.

Hukum Chand (35)], suits under that amount are excluded from the jurisdiction of the Courts established under the Bengal Civil Courts and therefore also of the High Court, *Maha Prasad Singh* v. *Ramani Mohan Singh* (36). The case of *Empress* v. *Burah* (4) also fully recognises the Indian Legislature's power to affect the High Court's appellate jurisdiction. I think therefore that the Legislature can affect the High Court's appellate jurisdiction by adding or removing territory or, while leaving the territoral limits unchanged, by enacting that the High Court shall have no such jurisdiction over a particular Court.

It is also to be noticed that the Letters Patent of 1862 contains no clause corresponding to Cl. 44, Letters Patent, 1865, and the inference I draw from this omission is that the power of the Governor-General to legislate in respect of the provisions of the Letters Patent was recognised in 1865 merely by way of greater caution. It may be contended that it could not have been intended by Parliament that while S. 9 gave no power to amend S. 15, the Government of India could by modifying the appellate jurisdiction of the High Court indirectly bring about such an amendment. In my opinion S. 22, Indian Councils Act, 1861, is not a bar to such a course because such legislation would not affect S. 15, High Courts Act. The power of superintendence is not taken away in the abstract; it is only excluded regarding a particular Court Moreover, such indirect attacks on a Court's jurisdiction have not been unknown.

Take for example the case of the Insolvency Court created by Parliament. The Court is a Tribunal independent of the High Court but the Judges of which are appointed from among the Judges of the High Court and the jurisdiction of which is affected by the rules which bind the jurisdiction of the Judges of the High Court. So it has been held that although the Insolvency Court, under the Act of Parliament by which it was constituted, has jurisdiction outside the Bengal Division, the Judges of that Court having no jurisdiction by the Letters Patent beyond the limits of that division are unable to entertain an application from a person resident beyond that jurisdiction, *James Currie, In re* (7). To sum up, therefore, the position appears to me to be this:—(1) whenever any Court within the territories defined in S. 27, Letters Patent of 1865 acted judicially, the High Court had superintendence under S. 15 High Courts Act, 1891, independently of any right to interfere in appeal, revision or on reference. (2) The power of superintendence being an inherited power, the Indian Legislature had by reason of S. 9, High Courts Act, power to modify or amend section 15. (3) If the power was not an inherited power, then the Indian Legislature had authority under S. 9, High Courts Act, read with S. 22, Indian Councils Act, 1861, to modify the Letters Patent as regards every jurisdiction and power conferred by it and therefore also as regards the appellate jurisdiction of the High Court and thus indirectly to control the operation of S. 15, High Courts Act. (4) Clause 44 of the Letters Patent was not ultra vires in any respect; but apart from clause 44 the Indian Legislature had authority to modify the Letters Patent. The rule is that I find that S. 8 of the Defence of India Act was validly enacted and this High Court has no power to interfere.

Ali Imam, J.—The petitioner Sheo Nandan Singh having been convicted under S. 395, Penal Code, by a Tribunal composed of three Commissioners appointed under the Defence of India (Criminal Law Amendment) Act, moved this Court on the 18th February last, when the following order was passed:—

"Let notice be served upon the Government Advocate to show cause why this Court should not interfere under its power of appellate or revisional jurisdiction or its power or superintendence under S. 107 of the Government of India Act".

The vital question in the disposal of the petition, therefore, is whether this Court has any power of interference, be it appellate, revisional, or of superintendence. Section 8, clause (1), Defence of India Act is as follows:

"Notwithstanding the provisions of the Criminal P. C., 1898, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of Commissioners appointed under this Act and no Court shall have authority to revise any such order or sentence, or to transfer any case from such Commissioners, or to make any order under S. 491, Criminal P. C., 1898, or have any jurisdiction of any kind in respect of any proceed-

(35) A I R 1914 Cal 607=41 Cal 876=22 I C 848.
(36) A I R 1914 P C 140=42 Cal 116=41 I A 197=25 I C 451 (P C).

ings under this Act." A perusal of this section shows that the following powers have been expressly excluded from all Courts in India with reference to Commissioners appointed under the Act: (1) to hear an appeal, (2) to exercise any powers of revision, (3) to transfer any case, (4) to make any directions of the nature of habeas corpus and (5) to have any jurisdiction of any kind in respect of any proceedings under this Act.

It is contended for the petitioner that exclusion of interference under this section, though extensive, is not exhaustive. The words "or have any jurisdiction of any kind in respect of any proceedings under this Act" have been the subject of much discussion in the hearing of this Rule. A possible construction of these words has been suggested to be in the nature of ejusdem generis and that the words under notice should be construed to limit the exclusion to powers of such character as are enumerated in the rest of the section. This might have been a possible view if the concluding passage in the section were less unambiguous than it is. The use of the word "any" in the three places in this passage governing jurisdiction and character of jurisdiction with reference to all proceedings under the Act leaves no room to doubt that the framers of this Act intended the section and have in fact so worded it as to be exhaustive. The meaning of the section is to be gathered from its language, which is also evident from the special character of Act 4 of 1915 which provides for a special machinery to secure public safety and the detence of British India by the more speedy trial of certain offences. In dealing with the section it is not relevant to the issue to dwelt upon the policy that promoted this legislation.

I am here concerned with interpreting the letter of the law: and in construing the Act as a whole it is impossible for me to hold that S.8, Defence of India Act (4 of 1915) does not exclude with reference to the Commissioners all and every kind of jurisdiction that the Court exercises over the Criminal Courts in the Province of Bihar and Orissa. I am, therefore, of opinion that the words of exclusion contained in this section embrace not only the appellate and revisional jurisdiction of this Court over the Commissioners but also power of superintendence, which is one of the ways in which this Court exercises its jurisdiction over inferior Courts. It has been contended for the petitioner that if the Governor-General of India in Legislative Council intended to take away the power of superintendence from the High Court, the word "superintendence" would have been expressly used in framing the exclusion contained in the section. Reliance has been placed for this contention on *Rex* v. *Moreley* (30), *R. v. Jukes* (37) and *R. v. Plowright* (38). As I understand these cases, it appears to me that the negation of the power to issue a writ of *certiorari* must be in express terms and not necessarily by the use of any particular word or phraseology. It must be admitted that the power in question is for the benefit of the subject and unless and until the negation is plain and unambiguous, it must be held to continue to exist. As I have already held the language of S. 8, Defence of India Act, is so clear and explicit in exlcusion of the powers of interference that it must be held to negative every kind of jurisdiction, be it appellate, revisional or of superintendence.

I must therefore hold that so long as the Act is not ultra vires of the legislative powers of the Governor-General of India in Council, conferred upon him by Parliamentary Statutes or by some authority that has the same force as an Act of Parliament, S. 8, Defence of India Act, does deprive this Court of the powers of superintendence over the Comimssioners. The next contention for the petitioner is that even if it be conceded that S. 8, Defence of India Act, 1915, is exhaustive, it was not competent for the Legislative Council of the Governor-General of India to pass such an Act. For this contention reliance was placed on S. 22, Indian Councils Act 1861, Ss. 9 and 15, High Courts Act of the same year and on Cl. 27 of the Letters Patent of 1865 issued to the Calcutta High Court. It may be mentioned here that at the time the Defence of India Act 1915, was passed, the Letters Patent of this Court had not come into existence and that for the present case the Calcutta Letters Patent have to be referred to.

It is pressed upon our consideration that the Indian Legislature is not a Sovereign authority and being subject to the control of the King in Parliament, suffers from constitutional incapacity to pass any legislature which is in contravention of the limitations

(37) [1800] 8 T R. 542.
(38) [1686] 3 Mod 94.

imposed upon it by Parliamentary Statutes. It is not denied that the Act of the Imperial Parliament which created the Indian Legislature has placed certain restrictions on its powers, nor can it be disputed that within such statutory limitations the powers of the Governor-General of India in Council are supreme. The question then is whether the Indian Legislature in enacting S. 8, Defence of India Act, has transgressed the limits imposed upon it. S. 22, Indian Councils Act, 1861, 24 and 25 Vict. c. 67, confers extensive legislature powers on the Governor-General of India in Council, provided that among other limitations mentioned therein any provisions of any Act passed in the Session of Parliament in which the Councils Act was passed or any Act passed thereafter be not contravened.

The Indian High Courts Act of 1861 (24 and 25 Vict. c. 104) was passed in the same session of Parliament and it is rightly contended that the powers of the Governor-General of India in Council conferred by the Indian Councils Act, 1861, however extensive, cannot contravene the statutory provisions contained in the High Courts Act, 1861. Two sections of the last Act have been relied upon by Mr. Manuk for the proposition that the Defence of India Act,1915 is inconsistent with the provisions of the Indian High Courts Act. These sections are, as mentioned above, 9 and 15. I will deal with the latter first. It provides that each High Court established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction. S. 107, Government of India Act (5 and 6 Geo. V) in substance makes a similar provision. On the construction of S. 15, Indian High Courts Act, 1861 or S. 107, Government of India Act, 1915, there is no difference of opinion, and the plain meaning of the sections is that a Court which is subject to the appellate jurisdiction of a High Court is a Court over which that High Court has superintendence. In other words, the power of superintendence is co-existent with appellate jurisdiction. but what is meant by appellate jurisdiction is not expressed in either of these sections. This leads to the construction of S. 9, Indian High Courts Act, 1861. Much controversy has raged round the meaning and purport of this section, which runs as follows:

"Each High Court to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majasty may by such Letters Patent as aforesaid grant and direct, subject however to such directions and limitations as to exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby: and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts."

It is contended for the petitioner that this section is divisible into two distinct and separate parts and that the first part deals with the creation of High Courts with jurisdiction of various kinds which may be granted and the exercise of which may be directed by Letters Patent. Under the second part, it is contended, the newly created Courts were to exercise jurisdiction that was vested in the Courts that were abolished by the Act and that with reference to such jurisdiction alone the powers of the Governor-General of India in Council were saved. Shortly put, the argument is that the old powers could be interfered with by the Governor-General in Council but not the new powers that were to be conferred by Letters Patent only. In other words, it is argued that jurisdiction conferred by the Letters Patent would be jurisdiction under the first part of the section and thus beyond the legislative control of the Governor-General of India in Council. It may be noticed here that the section itself does not say what appellate jurisdiction means, but evidently the determination of such jurisdiction has been left to the Letters Patent. It is therefore contended for the petitioners that the grant of appellate jurisdiction by Letters Patent would also determine the right of this Court to exercise superintendence over Courts subject to such jurisdiction. On the other hand, the learned Advocate-General who opposes the Rule contends that though the first part of the section deals with the establishment of High Courts and leaves

the grant of jurisdiction and direction of its exercise to the Letters Patent, nevertheless this is done without prejudice to the legislative powers of the Governor-General of India in Council subject to the provisions of the Letters Patent under which the High Court was established. The learned Advocate-General contends that the construction put upon this section by Mr. Manuk on behalf of the petitioner is a construction which is inconsistent with the decision of the Judicial Committee in the case of *Empress* v. *Burah* (4). Lord-Selborne who delivered the judgment of the Committee expressed their decision in these words:

"Sections 9, 24 and 25 Vict. c. 104, expressly says that each of the High Courts shall within its own Presidency have such civil, criminal and other jurisdiction "as Her Majesty may by her Letters Patent grant and direct" and "save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council" the High Court in each Presidency shall have all the jurisdiction of the former Suppreme and Sudder Courts abolished by S. 8. The authority of the Indian Legislature over jurisdiction of the High Courts (so far as at all events such exercise by that authority might be consistent with Her Majasty's Letters Patent) is here distinctly recognised." In another place in the same judgment there is the following passage: "Now it appears to their Lordships from the express terms of the Act 24 and 25 Vict. c. 104 that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-Geral in Council as to "all Courts of Justice whatever." "

Mr. Manuk contends that the Judicial Committee, when deciding the case of *Empress* v. *Burah* (4), were construing S. 9, Indian High Courts Act, 1861 for the purpose of finding out whether the Governor-General in Council could remove any territories from the jurisdiction of a High Court and that the Committee was not giving its decision on the question whether the Governor-General in Council could, within the territorial jurisdiction of a High Court, deny its powers of superintendence over a Criminal Court erected within such jurisdiction. I do not think that their Lordships of the Judicial Committee were construing S. 9 of the Act on the facts of that case alone. It appears to me that the construction placed upon this section by their Lordships covers the important constitutional issue raised by Mr. Manuk, and that is whether any jurisdiction exercised by a High Court is subject to the legislative control of the Governor-General in Council consistently with the provisions of the Letters Patent.

I am therefore constrained to hold that the legislative powers of the Governor-General in Council are saved by S. 9 of this Statute, with the reservation that they should not be in contravention of the Letters Patent. In this view of the law the Defence of India Act, I hold, is not ultra vires of the legislative powers of the Governor-General in Council, unless it is shown that the provisions of the Defence of India Act are in contravention of the Letters Patent. With a view to find out whether such a contravention has occurred, it is necessary to examine the provisions contained in the Letters Patent of 1865 granted to the Calcutta High Court, which was in force in Bihar and Orissa at the time the Defence of India Act of 1915 was passed. Mr. Manuk's contention is that cl. 27, Letters Patent, defines the appellate jurisdiction of the High Court and that if his construction of that clause is correct, then the right of superintendence over a Criminal Court situated within the territorial jurisdiction of this Court would be established. It is not denied that the Commissioners sitting at Gaya convicted the petitioner in their judicial capacity and formed a Criminal Court within the territorial jurisdiction of this Court. Mr. Manuk's argument is that under Cl. 27, Letters Patent the Commissioners were subject to the appellate jurisdiction of this Court and that therefore under S. 15, High Courts Act, 1861 the powers of superintendence would exist and further that as these powers are derived from Parliamentary Statutes the Defence of India Act could not extinguish them. Cl. 27, Calcutta Letters Patent, 1865 runs as follows: "And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence and shall exercise ap-

pellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force."

Mr. Manuk argues that the words "Court of Appeal" in this clause must be read in a more comprehensive sense than they apparently imply and should be held to mean a Court exercising powers of appeal, revision or of superintendence. He contends that his construction of the clause is borne out by instances where this Court has exercised its powers of superintendence over Courts from which no appeal lay. For this contention he relies on a Full Bench decision of this Court given in the case of *Parmessar Singh* v. *Kailashpati* (26). The question in this case was whether the High Court at Patna had jurisdiction under S. 107, Government of India Act, 1915 to exercise its power of superintendence, in a case decided by a Magistrate under S. 145, Criminal P. C. It is admitted that under the provisions of the Code there is neither an appeal nor a revision in cases decided under S. 145 of that Code, yet the decision in *Parmessar Singh's* case (26), following similar decisions of various High Courts, was that the power of this Court to superintend existed though there was neither an appeal nor a revision from a decision under S. 145. The learned Advocate-General, on the other hand, in the earlier stages of his address on the construction of cl. 27, Letters Patent, invited us to hold that superintendence existed over Courts decisions of which were subject to appeal to the High Court, and not to revision. This however left the point at issue in the apparent difficulty of reconciling his argument with the decision in the Full Bench case, for that was a case decided by a Magistrate from whose Court no appeal lay to the High Court. The learned Advocate-General, realising this difficulty, modified his argument by conceding that the words "Court of Appeal" would mean a Court that would exercise appellate or revisional jurisdiction, but not the power of superintendence.

In the modified argument the decision given in *Parmessar Singh's* case (26) was supported by the contention that although there was no appeal or revision from a decision given under S. 145, Criminal P. C.,- yet the decision was given by a Court that in the exercise of its functions generally was subject to the revisional jurisdiction of the High Court. I agree with the view that the words "Court of Appeal" in cl. 27, Letters Patent should be construed in a more conprehensive sense including the powers of revision. I am therefore of opinion that the words "Court of Appeal" in cl. 27, Letters Patent mean a Court that does not only entertain appeals but also revision. In this view of cl. 27, Letters Patent superintendence over the Commissioners appointed under the Defence of India Act would be possible only if the Commissioners formed a Court from whose decision an appeal or revision lay to this Court. Mr. Manuk contends that Cl. 27 itself ordains that from Criminal Courts in the Province the High Court shall be a "Court of Appeal", which means a Court that would entertain appeals or revisions from the decisions of such Criminal Courts and that therefore this Court is a "Court of Appeal" from any order or sentence of the Commissioners appointed under the Defence of India Act. In other words, Mr. Manuk argues that this Court is a Court to whose appellate jurisdiction the Commissioners are subject and therefore the powers of superintendence over their proceedings under S. 15, High Courts Act are conclusively established. There would seem to be considerable force in this argument, for if the Commissioners formed a Criminal Court within the territorial jerisdiction of the High Court, they would under cl. 27, Letters Patent unquestionably become subject to its appellate jurisdiction and the power of superintendence would follow. If the matter stood there, the power of the Governor-General in Council to affect the superintendence of the High Court over these Commissioners would be ultra vires under S. 9, High Courts Act, as these powers are subject to the provisions of the Letters Patent. But S. 44, Letters Patent, is a complete answer to such an argument, which provides as follows: "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council exercised at meetings for the purpose of making laws and Regulations and also of the Governor-General in cases of emergencies under the provisions of an Act of 24th and 25th years of Our Reigl, c. 67 and may be in all resppects amended and altered thereby."

This clause confers upon the Governor-General in Council full and complete power to make any amendment or alteration in respect of all the provi-

sions of the Letters Patent; if so, there is nothing to prevent the Indian Legislature from removing any Criminal Court mentioned in Cl. 27, Letters Patent, from the appellate or revisional jurisdiction of the High Court. S. 8, Defence of India Act, expressly removes the Commissioners appointed under that Act from the appellate and revisional jurisdiction of this Court. It would therefore follow that with reference to them the High Court cannot exercise any sort of appellate jurisdiction. In consequence the jurisdiction of the High Court to exercise superintendence would cease. It has been contended by Mr. Manuk that the Letters Patent of 1865 issued to the Calcutta High Court under the High Courts Act is an instrument produced in the exercise of powers delegated to the Crown by Parliament and that when the Crown had only a delegated authority, it could not make a futher delegation under clause 44 of the Letters Patent. I do not think the maxim *delegatus non potest delegere* has any application to clause 44. S. 9 of the High Courts Act, of 1861 confers the widest possible powers on the Crown in the matter of granting jurisdiction to and direction of its exercise by the High Courts. The powers of the Crown in this respect are in fact as wide as of Parliment itself. It is, therefore, intra vires under S. 9, High Courts Act, for the Crown to direct that all the provisions of the Letters Patent should be subject to the legislative powers of the Governor-General in Council.

This view is supported by the decision given by the Judicial Committee in the case of *Empress* v. *Burah* (4) to which reference has been made Their Lordships relied upon this particular clause as a clause which clothes the Governor-General in Council with authority to vary and modify the provisions of the Letters Patent. I therefore hold that under clause 44 of the Letters Patent of 1865 issued to the Calcutta High Court the powers of the Governor-General to alter and amend all the provisions of the Letters Patent are saved. In the course of the argument an analogy was drawn between the powers of the King's Bench Division to issue a writ of certiorari and the powers of superintendence vested in the High Court. Reliance was placed on a large number of decisions of the Indian Courts, and it was contended that there was inherent jurisdiction in this Court to exercise its power of superintendence over Criminal Courts situated within its territorial jurisdiction. I am willing to concede that in the absence of any express legislative negation of the powers of superintendence vested in this Court the argument might receive consideration, but as I have held above, there is in S. 8, Defence of India Act, 1915, an express provision taking away all jurisdiction from this Court over the Commissoners appointed under that Act. In this view of the case I consider it unnecessary to examine a number of enactments passed by the Governor-General in Council, by which within the territorial jurisdiction of a High Court Judicial Tribunals were set up wholly independent of the High Court and over which it could execrise no jurisdiction of any kind. These instances are quoted by the learned Advocate-General to support the proposition that the Governor-General in Council did not enter upon a new departure in enacting S. 8 of the Defence of India Act. I have no hesitation in holding that subject to the provisions of the Letters Patent, the powers of the Governor-General in Council are saved under S. 9, High Courts Act, 1861. I have also no hesitation in holding that with reference to the provisions of the Letters Patent themselves these powers are further saved by clause 44 of the Letters Patent of 1865. The authority of the Judicial Committee contained in the decision given in *Burah's* case (4) is conclusive on both these points.

In the circumstances I am of opinion that this Court cannot interfere with the order of conviction and sentence passed on the petitioner by the Commissioners. The petition must therefore, be rejected.

Dawson-Miller, C. J.—I have mentioned the reason why I dealt with this question, because I thought it might be said hereafter that this was a matter which went beyond the merits, that is to say, a matter which went to our jurisdiction, to our right to interfere. But so far as the rules under which the Tribunal acted are concerned, it seems to me that they were acting within the powers granted by the Defence of India Act, and, therefore, there is no ground for asking us to exercise our jurisdiction by reason of the fact that the Court was not a Tribunal acting under the powers granted by that Act. That is the only reason why I dealt with that point. At the same time, as Mr. Manuk has asked me, I want to make it quite clear that the merits were not dealt

with before us at the trial because first of all we had to be satisfied that we had jurisdiction to act.

V.S./R.K. *Petition rejected.*

A. I. R. 1918 Patna 125

CHAMIER, C. J. AND ROE, J.

Golab Chand Ray—Appellant.

v.

Feda Hussain—Respondent.

Letters Patent Appeal No. 65 of 1917, Decided on 3rd August 1917, against decree of Chapman, J., D/- 21st March 1917.

Bengal Tenancy Act (8 of 1885), S. 174—Sale set aside—Suit for declaration is maintainable.

Where a sale in execution of a rent decree is set aside under S. 174 the purchaser is entitled to bring a suit for a declaration that the defendant had no right to make the deposit. [P 125 C 2]

Mahomed Mustafa Khan—for Appellant.

Mahomed Hasan Jan—for Respondent.

Chamier, C. J.—In execution of a decree for arrears of rent obtained by one Umdan Bibi against Nazrul Hossain and others certain property was put up for sale on 9th March 1914, and was purchased by the appellant. A few days before the date fixed for the confirmation of the sale the respondent's father Baijnath Rai, alleging that he had purchased the property at an execution sale held after the sale of 9th March 1914, deposited the amount due to Umdan Bibi. The Munsif thereupon set aside the sale, purporting to act under S. 174, B. T. Act. The appellant objected but his objection was overruled. He then brought the present suit for a declaration that Baijnath had no right to deposit the money and had acquired no title to the property. The Munsif gave him a decree which was affirmed by the District Judge. On second appeal a learned Judge of this Court dismissed the suit, holding that it was not maintainable. The learned Judge referred to the decision in *Kabilaso Koer* v. *Raghu Nath Sakan Singh* (1). That was a case in which a judgment-debtor sued to set aside a sale. Her suit was barred by S. 244, Civil P. C., notwithstanding the fact that the auction-purchaser was interested in the matter and was a party to the case: see *Prosunna Kumar Sanyal* v. *Kali Das Sanyal* (2).

Section 174, B. T. Act, corresponds to S. 310A of Civil P. C., 1882 (O. 21, R. 89 of the present Code). Under the Code of 1882 it was well settled that the auction-purchaser was entitled to sue to set aside an order under S. 311 setting aside or refusing to confirm a sale [see *Azim-ud-din* v. *Baldeo* (3), *Mathuradas* v. *Panahlal* (4), *Shiam Behari Lal* v. *Rup Kishore* (5), and the notes of Messrs. Woodroffe and Amir Ali to O. 21, R. 92]. It follows that a similar suit could have been maintained under S. 310A. There does not appear to be any reported Calcutta case directly in point. This may be due to the fact that erronous orders of the kind now in question were generally taken up to the High Court on the revision side. But the reasoning on which the Allahabad and Bombay cases rest was accepted by the Calcutta High Court in many cases. Under the Code of 1882 the only ground for negativing the right to bring a suit to confirm or set aside an execution sale, after an order had been passed on the subject by the Court executing the decree, was that the suit was barred by S. 244 [see *Prosunna Kumar Sanyal* v. *Kali Das Sanyal* (2)]. A suit like the one now before us could not have been held to be barred by S. 244. Before 1908, so far as I know, no Court ever doubted that a suit of this kind would lie. It is within my knowledge that many such suits were brought.

The Code of 1908 allows an appeal by a person aggrieved by an order under O. 21, R. 92, and bars a suit like the one now before us. [See O. 21, R. 92 (3), which prohibits a suit by a person against whom an order is passed under O. 21, Rr. 89 and 90 or 91]. But no such provision has been inserted in the Bengal Tenancy Act and it is impossible to hold that an order passed under S. 174 of that Act is an order passed under O. 21, R. 89, and attracts the operation of O. 21, R. 92 (3). The omission is, I think, unfortunate but with that we are not concerned. I would allow this appeal and dismiss the appeal to this Court with costs of both hearings.

Roe, J.—I agree. I have sought in vain for any bar to the suit. Under S. 9, Civil P. C., the Courts had jurisdiction to try the suit and on the merits were required to give a decree.

V.S./R.K. *Appeal allowed.*

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(1) [1891] 18 Cal 481.
(2) [1892] 19 Cal 683=19 I A 166=6 Sar 209 (P C).
(3) [1881] 3 All 554.
(4) [1895] 19 Bom. 216.
(5) [1898] 20 All. 379.

A. I. R. 1918 Patna 126

ATKINSON AND MANUK, JJ.

Bank of Bengal—Petitioner.

v.

Sarat Chandra Mitra—Respondent.

Civil Revn. No. 187 of 1918, Decided on 5th December 1918, from order of 1st Class Sub-Judge, Patna, D/- 1st June 1918.

(a) Jurisdiction—Territorial limits.

The jurisdiction of a Court is circumscribed by and co-extensive with its territorial limits. [P 127 C 2]

(b) Execution—Property to be executed outside original Court's jurisdiction and in hands of third person not amenable to executing Court—Decree must be transferred to Court within whose jurisdiction property is.

Where property sought to be attached is bona fide without the jurisdiction of the original Court whose decree is sought to be enforced and is in the hands of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court, the decree of the executing Court must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. [P 127 C 2]

(c) Corporation—Several branches in distinct jurisdictions—Corporation can be sued in any such jurisdiction for enforcement of right in respect of which cause of action exists within limits of each independent jurisdiction.

A corporation may be said to reside wherever it carries on its business, irrespective of the location of its head office, and if a corporation such as a Bank has branch offices in fifty separate and distinct jurisdictions, it can and may be sued in any one of such jurisdictions for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction. [P 128 C 1]

(d) Execution—Judgment-debtor's property in third person's hands—Jurisdiction of Court to attach is co-extensive with judgment-debtor's right to sue for recovery.

The jurisdiction of an executing Court to attach movcable property belonging to a judgment-debtor in the hands of another or under his control or a debt due by him is correlative and co-extensive with the right which the judgment-debtor himself would have had to sue for the recovery of his property or his debt as against his debtor or trustee. [P 128 C 2]

(e) Execution—Jurisdiction—Bank having residence and carrying on business within jurisdiction of Patna Court—Government Promissory notes in physical custody of head office at Calcutta—Patna Court has jurisdiction to attach them and interest accruing under them.

One *R* entered into the service of the Patna Branch of the Bank of Bengal, and as security for his fidelity to the Bank deposited with the Bank Government promissory notes of the value of Rs. 20,000. The promissory notes were sent from Patna to Calcutta and were kept in the custody of the head office of the Bank. A creditor of *R* attached the Government promissory notes and the interest accruing due under them in execution of a decree passed by the Subordinate Judge at Patna.

Held: that inasmuch as the Bank had a residence within the jurisdiction of the Patna Court and carried on business therein, that Court had jurisdiction to attach both the Government promissory notes and the interest accruing under them, notwithstanding the fact that the notes were in the physical custody of the head office of the Bank at Calcutta. [P 129 C 1]

Hasan Imam, Sultan Ahmad, Siva Narain Bose—for Petitioners.

Khurshaid Hasnain, Susil Madhab Mullick, Bankim Chandra De and *Narendra Nath Sen*—for Opposite party.

Atkinson, J.—This application comes before us in revision from an order made by the learned First Subordinate Judge of Patna, dated 1st June 1918. It is necessary to shortly set out the facts of the case before we consider the legal questions arising for our determination. One Sarat Chandra Mittra obtained a decree for Rs. 2,000 against Raghunath Prasad; and the decree-holder, Sarat Chandra Mittra, seeks now to attach certain property alleged to be the propety of Raghunath Prasad in the hands of the Bank of Bengal.

In the year 1910 Raghunath Prasad was taken into the service of the Bank of Bengal as a Treasurer; his duties were restricted to acting as Treasurer in the Patna Branch of the Bank of Bengal. Prior to Raghunath Prasad's entry into the service of the Bank, the Bank required that he should enter into a fidelity bond for the due and faithful performance of his duties; and required security in cash for the sum of Rupees 20,000 and a mortgage on immovable property to the extent of Rupees 30,000. In pursuance of this arrangement Raghunath Prasad deposited with the Bank of Bengal Government promissory notes for the sum of Rupees 20,000 and a mortgage-deed on property situate at Arrah for Rs. 30,000. The terms of the contract made between the parties, that is to say, Raghunath Prasad on the one hand and the Bank of Bengal on the other, are embodied in the security bond, dated 23rd May 1910.

The Bank of Bengal contend that Raghunath Prasad has not faithfully discharged his duties within the terms of the bond, and that he has been guilty of default and breach of duty; and that he has involved the Bank in substantial loss and damage, and that they are therefore in the events that have happened, entitled under the provisions of cls. 8 and 9 of the bond itself to realise the security deposited with them to cover their loss; and that

they are also entitled to retain so much of the interest as has accrued thereon since suspension by way of collateral security, in the event of 'Government securities deposited with the Bank proving insufficient, to cover the Bank's total loss. The judgment-creditor, Sarat Chandra Mitra, in the suit in which he obtained his decree before the First Subordinate Judge of Patna, instituted an application seeking to attach in execution of his decree the Rs. 20,000 Government promissory notes deposited as security with the Bank; and also to attach so much of the interest as may have accrued on the Rs. 20,000 and now admittedly in the Bank's hands. The learned Subordinate Judge decided that the Government promissory notes lodged by Raghunath Prasad with the Bank were attachable subject to the Bank's lien. He also held that the accrued interest in the hands of the Bank was attachable; and that interest did not form part of the Bank's security to cover any loss or damage that the Bank might have sustained owing to any default or breach of duty committed by Raghunath Prasad acting in his office as Treasurer of the Patna Branch of the Bank of Bengal.

On the hearing of the aforesaid application for attachment the Bank of Bengal intervened, and they claimed before the learned Subordinate Judge that he had no jurisdiction whatsoever to attach the Government paper money in the custody of the Bank and deposited with them by way of security, nor was the learned Judge entitled to attach the interest in their hands which formed collateral security against any loss they might incur by reason of any defalcations on the part of Raghunath Prasad. The learned Judge decided against the contention of the Bank and held that the main security and the interest are liable to attachment; and on 8th June the learned Judge issued a precept against the Bank which expressly prohibited the Bank from disposing of the interest accrued and in their hands, and from realizing the Government promissory notes deposited with the Bank by Raghunath Prasad. The Bank of Bengal was prohibited and restrained by a further order, dated 16th July 1917 from parting with, or disposing of, the said property in their possession to any other person.

The contention of the Bank, as argued before us, is that the property sought to be attached is outside the jurisdiction of the Patna Subordinate Court; and, therefore, not subject to attachment; and further that it was an excess of jurisdiction on the part of the Patna Subordinate Court to seek to attach property in the hands of a party residing permanently beyond and without the jurisdiction of such Court; and that thus the First Subordinate Judge of Patna had no jurisdiction to attach either of the denominations of property in question.

Speaking generally, it is an accepted principle of international jurisprudence that the jurisdiction of a Court in enforcing execution of its decrees is restricted by its territorial limitations. That is to say the jurisdiction of a Court is circumscribed by and co-extensive with its territorial limits. Thus a Court desiring to seize or attach the property of a judgment-debtor outside its jurisdiction, and where such property is in the hands of, or custody of another, also outside the jurisdiction such property sought to be attached in aid of the executing Court can only be reached by a regular method of procedure which has been prescribed by the rules of Civil Procedure Code, and similar codes which prevail in all countries, viz., the decree of the executing Court must be transferred to the local limits of the jurisdiction of the external Court within which the property sought to be attached is for the time being. This rule of law only applies when the two following facts concur: (1) when the property sought to be attaced is bona fide without the jurisdiction of the original Court whose decree is sought to be enforced, and (2) when the property sought to be attached is in the hands of a third party not amenable to or permanently residing within the jurisdiction of the executing Court.

I say property bona fide without the jurisdiction of the original Court, because I conceive that the above rule of law would not apply if property was fraudulently or surreptitiously removed from one jurisdiction to another for the purpose of defeating the right, authority and power of the executing Court in the execution of its decrees. In such a case a proceeding could be brought against persons within the jurisdiction from which the property was removed, which would in its operation and effect secure the recovery of the property attempted to be made away with and placed outside the jurisdiction of the original Court merely to defeat its jurisdiction and the execution of its decrees. An exception to the general principle may exist with refer-

ence to the jurisdiction of a Court to sell land outside the territorial limits of its jurisdiction in pursuance of a mortgage decree, provided some portion of the mortgaged property is within the jurisdiction of the original Court which grants the decree.

The law thus stated is in harmony and accord with the same principles laid down in the learned judgment of the Judges of the Calcutta High Court in the case reported as *Begg, Dunlop & Co.* v. *Jagannath* (1) and in which case all the authorities are reviewed with the greatest care, and with the principles of law as authoritatively laid down by that decision we respectfully concur. The fundamental distinction between the case reported as *Begg, Dunlop & Co.* v. *Jagannath* (1) and the present case is that in the former the garnishee or debtor of the judgment-debtor, whose debt was sought to be attached, was a firm carrying on business in Calcutta, and only in Calcutta, and that the debt that was due to the judgment-debtor was payable in Calcutta, and nowhere else; and thus it was held that the Court had no jurisdiction to attach a debt payable to the judgment-debtor outside its jurisdiction by a person not amenable to its jurisdiction. In this case we have a great banking corporation, having its head-office at Calcutta with subordinate branches throughout the rest of India, where it carries on its banking business. In Patna itself, within the jurisdiction of the Court of the First Subordinate Judge of Patna, the Bank of Bengal have a local branch where they carry on their trade or business of banking and with reference to which the contract that was made between the Bank and Raghunath Prasad was solely conversant. A corporation may be said to reside whereever it carries on its business, irrespective of the location of its head office, and if a corporation such as a Bank has branch offices in fifty separate and distinct jurisdictions, it can and may be sued in any one of such jurisdictions for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction.

The test to be applied in such cases is to be found accurately stated at p. 116, 39 *Calcutta* [*Begg, Dunlop & Co.* v. *Jagannath* (1)] already referred to above. The learned Judges there say: the test to be applied is whether the judgement-debtor, as creditor, could have sued the garnishee as his debtor in the Court in which the execution proceedings were commenced. In this case I put the specific question to learn-counsel appearing on behalf of the appellants and the respondent. Could Raghunath Prasad have sued the Bank in Patna for default in paying to him the interest due on the Government securities lodged with the Bank had there been no default to justify its suspension? and the answer was in the affirmative. I apprehend no other answer could in law and fact have been given; because it is clear to demonstration that in the contigency put, the right to sue the Bank in Patna would have undoubtedly existed at the suit of Raghunath Prasad.

Take another illustration to test the question of jurisdiction. Assuming the contract of service to have come to an end without any default on the part of Raghunath Prasad; and the Bank refused for no good and sufficient cause to return to Raghunath Prasad the Government securities held by them, could Raghunath Prasad have sued the Bank at Patna for the return and recovery of the securities retained by them? Of course he could. Mr. Hasan Imam in the earlier portion of his argument contended that Raghunath Prasad would have been forced to go to Calcutta to demand payment of each instalment of the interest as it fell due on the securities held by the Bank, in pursuance of cl. 9 of the security bond. This argument is, in our opinion, untenable; and I think it may fairly be said that Mr. Hasan Imam abandoned this contention in the latter portion of his argument addressed to us. Applying these recognized tests, it may be generally stated, as a broad and general proposition, that the jurisdiction of an executing Court to attach moveable property belonging to a judgment-debtor in the hands of another or under his control, or a debt due by him is correlative and co-extensive with the right which the judgment-debtor himself would have had to sue for the recovery of his property or his debt as against his debtor or trustee.

In the present case the mere removal of the securities by the Bank to the Head Office at Calcutta and their retention there by the Treasurer or Secretary of the Bank for the time being by consent of the parties, would not defeat the jurisdiction of the Subordinate Court at Patna to attach such securities at the suit of a judgment-creditor of Raghunath Prasad, subject to the

(1) [1911] 39 Cal 104=11 I C 417.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

lien of the Bank. The removal of the securities to Calcutta was merely a precautionary act for the better custody of the Government securities committed to the Bank's charge; and upon which they undoubtedly had and claimed to exercise a lien. Though the security notes deposited with the Bank were physically at the Head Office of the Bank in Calcutta, in the eye of the law they were constructively within the jurisdiction of the Patna Courts for the purpose of attachment, inasmuch as the Bank had a residence within the jurisdiction of the Patna Subordinate Court and carried on their business therein.

Thus it appears to us that the securities held by the Bank under cl. 8 of the security bond, dated 23rd May 1910, are attachable at the instance of Sarat Chandra Mitra by the Court of the First Subordinate Judge of Patna; but subject to the lien of the Bank thereon. No order however is capable of being maintained which would limit, restrict or prohibit the due and reasonable exercise by the Bank of its right to enforce its lien upon the securities deposited with it as and when occasion might arise. The learned Judge by his precept of the 8th June and his order of 16th July 1917 has gone too far. I would refer to the precept of the 8th June, which prohibits and restricts the Bank from disposing of the security deposited with them. The order of the 8th June was followed by an order of the 16th July, which was still more prohibitive and mandatory in its terms. Neither of these orders can stand. The learned Judge in the judgment which he delivered on the 1st June made a very proper declaration in the view we take of the law applicable to the facts of this case. He merely stated in the course of his judgment that so far as the security itself was concerned, that is the Government paper security, it was attachable subject to the lien of the Bank. In other words all that in effect is attachable at the suit of the judgment-creditor of Raghunath Prasad, Sarat C. Mitra, is whatever residue of the capital moneys representing the security deposited with the Bank may be available, after the Bank's claim in respect of the loss or damage that they have sustained by reason of the default and infidelity of Raghunath Prasad has been completely satisfied. But in the exercise of the Bank's right of lien it is not competent for the Subordinate Court at Patna to restrict the Bank in the due exercise of their rights with regard to the enforcement of their lien and the realization of the securities upon which that lien is based. Therefore the order of the learned Judge, dated 16th July 1917, is wrong in form. It goes too far; and he cannot, in our opinion, enjoin or prohibit the Bank by his order from realizing their security; if the securities are in fact capable of being realized by the Bank. This disposes of the first contention addressed to us.

Mr. Hasan Imam's main argument was based upon the fact that the security deed contemplated that the Government promissory notes tendered as security were to be handed over to the Secretary or Treasurer of the Bank at Calcutta and retained by him there, and that thus it was property outside the jurisdiction not liable to attachment. With that view we cannot agree, and for the reasons I have already stated, inasmuch as the Bank carries on its trade or business at Patna, and has a residence or place of business in Patna; and, therefore, even though the physical possession of the securities may be with the Bank at Calcutta, constructively in the eye of the law the Bank is within the jurisdiction of the Patna Court and the property which they hold is liable to attachment subject to their lien. The other question that arises for determination is whether the interest payable on the securities deposited and now accumulated in the hands of the Bank, since suspension of its payment, is attachable. Cl. 9 of the security deed has created for us some difficulty as to its true interpretation and construction. The clause is by no means clear or free from doubt. The drafting of this clause leaves much to be desired in the art of proper conveyancing. The difficulty created by Cl. 9 is the omission to state precisely and expressly what the parties to the security bond obviously intended that the deed should express.

By Cl. 9, Raghunath Prasad, so long as he observed good faith and acted with fidelity towards his employers, would have been entitled to receive the accruing interest upon the securities deposited with the Bank when it fell due. Cl. 9 gives the Bank a power of suspending the payment of the interest to Raghunath Prasad in the event of loss or damage accruing to the Bank by reason of the want of fidelity on the part of Raghunath Prasad in the due discharge of his duties. The interest payable to Raghunath Prasad was to be paid or credited to him so long as good faith was observed. When the Bank sustained damage then the right

of suspension accrued. What was the object of giving the Bank the power to suspend payment of interest? We think, considering the scope and tenor of the deed, and bearing in mind its object and design, that it must have been the intention of the parties to the deed to provide that the Bank's right to suspend payment of the interest, when default occurred, coupled with it the right to retain the accumulated interest and such as might accrue after suspension; and that thus it was clearly intended and the true meaning of the fidelity bond is that the interest so accumulated and accruing should from a fund, as collateral security, in the event of the main security proving insufficient to discharge the total loss or damage sustained by the Bank; otherwise Cl. 9 would be meaningless.

Why should the Bank have the power to suspend payment and yet retain the accumulated and accruing interest in their hands, but in respect of which they were to have no claim? We have carefully considered the argument addressed to us contra on behalf of the respondent; but with that argument we cannot agree. Thus we think that in this case having regard to the form, scope and phraseology of the security bond itself, the Bank is entitled to retain the interest accumulating and accruing after suspention as collateral security for the main debt. The interest in the Bank's hands is, in our opinion, liable to attachment; but attachable subject to the lien of the Bank. The judgment-creditor will therefore only be able to attach, to satisfy his decree, whatever residue may remain over either of the principal security or of the interest that has accrued or may accrue thereon afther the Bank's total loss has been satisfied.

The difficulty in this case has been created by the action of the Bank itself. Mr. Hasan Imam contends that it would have been open to the Bank to say that they themselves were satisfied that a loss had been sustained and to have realised forthwith out of the securities at their disposal a sufficient sum to cover their loss; leaving it to Raghunath Prasad to sue them for an account or to challenge the validity of their claim to realize the security deposited with the Bank. However the Bank did not adopt the course suggested; and up to the present time owing to the action of the Bank the amount of the loss or damage sustained by them at the hands of Raghunath Prasad has not been ascertained. The Bank could have elected to have acted in the manner indicated; but they preferred to assert their right to sue Raghunath Prasad and claim a declaration of their right to realize and declaration of their right to realize and accumulated thereon in satisfaction of their loss. For these reasons, we think, the order of the learned Judge in substance was right; but in form it was wrong. The order of the learned Judge must therefore be modified to this extent, that the respective properties comprised in and appropriated by cls. 8 and 9 of the security bond of 23rd May 1910 will be attached subject to the Bank's general right of lien in respect of both such properties; and the order of 16th July 1917 and the precept of 8th June 1917 prohibiting or injuncting the Bank in the exercise of the enforcement of their right of lien as against such properties are hereby set aside and are declared to be inoperative and illegal.

Therefore this application made in civil revision to us by the Bank has failed. The entire difficulty that has arisen in this case has been occasioned by the Bank's own mistake and in disregard of their apparent and legal rights; therefore we direct that the Bank of Bengal do pay the sum of five gold mohurs to the respondent as and for the costs of the hearing of this application. The application of the Bank of Bengal is dismissed; and we order that the respective denominations of property specified in cls. 8 and 9 of the fidelity bond, dated 23rd May 1910, are liable to attachment without restriction or prohibition upon the Bank's general right of lien in respect thereof; and that in so far as the precept of the 8th June 1917 and the order of 16th July 1917 purport to limit and fetter the Bank in the assertion and exercise of their general right of lien upon the aforesaid securities, the same are illegal, void and without force and effect; and that the only property available for attachment at the instance of Sarat C. Mitra is the residue, if any available, of the respective properties mentioned and set forth in cls. 8 and 9 of the security bond after the claim of the Bank has been fully satisfied and discharged.

Manuk, J. — I entirely agree with the judgment of my learned brother and have nothing to add.

V.S./R.K. *Application dismissed.*

A. I. R. 1918 Patna 131

CHAPMAN AND ATKINSON, JJ.

Bankey Behari and *another*—Petitioners.

v.

Ram Bahadur and *others*—Opposite Parties.

Civil Revn. No. 263 of 1917, Decided on 5th February 1918, from order of Sub-Judge, Shahabad.

(a) Court-fee—Suit to set aside decree—Plaintiff entitled to portion of property affected by decree—Court-fee is payable on value of plaintiff's share.

Plaintiff brought a suit to set aside a compromise decree obtained on the basis of a mortgage. He was entitled to a portion only of the property affected by the compromise decree:

Held: that court-fee was payable on the value of the share of the plaintiff, and not on the value of the whole of the property affected by the decree. [P 132 C 1]

(b) Practice—High Court—Record sent for and obvious error appearing on record—High Court should dispose of matters even at interlocutory stage—Civil P. C., S. 115.

Where the record of a case has been sent for by the High Court and there appears on the record an obvious error, it is right and proper that the High Court should dispose of the matter even at an interlocutory stage and thus save the parties to the litigation unnecessary expenses and undue delay. [P 131 C 2]

Sushil Madhab Mullick and *Abani Bhusen Mukherji*—for Petitioners.

Kulwant Sahai and *Tirbhuban Nath Sahay*—for Opposite Parties.

Atkinson, J.—The plaintiff instituted the present suit against the defendants seeking to set aside a mortgage decree which has been obtained on 2nd of August 1915. The original mortgage was made by the father and grandfather of the plaintiffs in favour of the father of the defendants. The original mortgage was for a sum of Rs. 11,264 and the mortgage decree by way of compromise was for Rs. 12,200. The plaintiffs had not been born on the date of the execution of the mortgage-bond in 1905; but they were born when the decree by way of compromise was obtained. The plaintiffs bring this suit seeking to set aside the decree of 2nd August 1915; and the question which arises for our determination is: what is the proper sum for Court-fees payable on the plaint in this suit. The action is not one for a mere declaration; but for a declaration coupled with certain consequential reliefs which are specifically mentioned in the plaint. The plaintiffs contend that they are only liable to be charged Court-fees upon the value of their share of the property; and not upon the entire value of the whole property affected by the compromise decree. They contend that the value of the entire property is Rupees 2,000 and that their share is two-thirds of Rs. 2,000. The learned Subordinate Judge has held that the plaintiffs are liable to pay a Court-fee on the total amount of the compromise decree sought to be set aside, on the ground that if the decree is set aside the plaintiffs will be benefited to the extent of the total value of the decree, and that therefore the proper Court-fee payable by them should be assessed upon the total amount of the decree.

Mr. Kulwant Sahay who appears on behalf of the defendants has raised two points for our consideration. The first is a mere technical point by which the learned vakil submits that this Court ought not to interfere with the order of the Judge at this stage of the proceedings in revision; that the suit has not been disposed of; and that the proper procedure under the law would have been that the plaint should in the first instance be rejected by reason of the default of payment of the court-fees ordered by the Court; and that when the plaint was so rejected, it would be open to the plaintiffs to come to this Court in appeal from the order rejecting the plaint. There may be a good deal to be said in favour of Mr. Kulwant Sahay's contention with regard to the regularity of procedure; but this Court has, as a matter of fact, interfered in interlocutory matters like the present on former occasions; and it appears to us that where the record of the case has been sent for by this Court and there appears on the record an obvious error, it is right and proper that this Court should dispose of the matter even at this stage of the proceedings having regard to the erroneous finding touching a question of jurisdiction by the lower Court, and thus save the parties to the litigation unnecessary expenses and undue delay.

The second point raised by Mr. Kulwant Sahay is that what is really the subject-matter in the present suit is validity of the compromise decree and that therefore court-fee must be paid on the full value of that decree. Mr. Mullick on the other hand urges that it is not the value of the decree which is in dispute so far as his clients are concerned, but their two-third share in the property in suit which is valued at or about Rs. 1,300. We have been referred to many cases by both sides. Mr. Kulwant Sahay in support of his argument refers us to a case reported as *Harihar Prasad Singh* v. *Shyam Lal*

Singh (1). In that case the plaintiff brought a suit to set aside a decree on the ground of fraud. The property in suit was valued at Rs. 7,000 and the decree which was sought to be set aside was valued at Rs. 2,794. Harrington, J. in delivering the judgment of the Court held that inasmuch as the real value of the relief claimed was Rs. 2,794, the plaintiff was liable to pay a court-fee upon that amount. I think that this decision must be read in conjunction with the decision of their Lordships of the Privy Council reported as *Phul Kumari* v. *Ghanshyam Misra* (2), in which their Lordships say at page 43 as follows:—"The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit." In the case decided by Harrington, J., it is clear that the value of the decree was less than the value of the property and therefore it was rightly held in that case that the court-fee should be assessed upon the value of the decree.

In the case before us however the value of the property, so far as the plaintiffs' share is concerned, is only Rs. 1,300 odd, whereas the value of the decree sought to be set aside is Rs. 12,200, and applying the principle laid down in the judgment of their Lordships of the Privy Council it seems to us that the plaintiffs are only liable to pay court-fees assessed upon their share of the property affected by the compromise decree. Mr. Kulwant Sahay refers us to another case viz., *Umatul Batul* v. *Nauji Kuar* (3). That was a decision of Mookerjee and Holmwood, JJ., but it is apparent that in that case, as also in the case reported as *Harihar Prasad Singh* v. *Shyam Lal Singh* (1), the person seeking to have the decree set aside was substantially entitled to the entire property which would be affected if the decree was set aside. In the case before us however the plaintiffs are not entitled to the entire property but only to a two-third share in it. We are of opinion therefore that the learned Subordinate Judge was wrong in directing that the plaintiffs were liable to pay court-fees assessed on the total value of the decree. This view is supported by the decision reported as *Ganesh Bhagat* v. *Sarada Prasad* (4). The facts of that case are not distinguishable from the facts of the case now before us. The decree sought to be set aside was for over Rs. 22,000, but the plaintiffs' share in the property in suit was valued at Rs. 9,000 only; and their Lordships who decided that case held that the court-fee payable must be assessed not upon Rs. 22,000 but upon Rs. 9,000. In our opinion the same principle must apply to the case before us and accordingly we direct that the order of the learned Subordinate Judge, dated 7th September 1917, be set aside and that the Subordinate Judge do proceed with the hearing of the case upon the plaintiffs' paying a court-fee assessed upon the value of their two-third share in the propperty in suit. This application succeeds and is allowed with costs measured at two gold mohurs.

Chapman, J.—I agree.

V.S./R.K. *Application allowed.*

(1) [1913] 40 Cal 615=21 I C 404.
(2) [1908] 35 Cal 202=35 I A 22 (P C).
(3) [1907] 6 C L J 427.
(4) [1915] 42 Cal 370=30 I C 111.

A. I. R. 1918 Patna 132

ROE AND COUTTS, JJ.

Chottey Lal and *others*—Appellants.

v.

Mt. Madho Bibi and *others*—Respondents.

Appeals Nos. 57, 58 and 59 of 1918 and Civil Revn. No. 82 of 1918, Decided on 10th December 1918, from Original Orders of Sub-Judge, Monghyr.

Civil P. C. (1908), Sch. 2, Para. 21—Question of partition referred to arbitration—Some members of joint family not parties to reference—Award is invalid and cannot be filed under para. 21—Civil P. C. (1908), O. 1, R. 9.

Where the question of the partition of the family properties of a joint Hindu family is referred to arbitration and some of the members of the joint family are not party to the reference, the award given in pursuance of such reference partitioning the family property is invalid and cannot be filed under para. 21, Sch. 2. [P 135 C 1]

P. K. Sen, S. P. Sen and *M. Haque*—for Appellants.

Hassan Imam, Asar Narayan Prasad and *Rajendra Prasad*—for Respondents.

Roe, J. — The defendant Laldhari Prasad was the first cousin of the deceased husband of the plaintiff; the second, third, fourth and fifth defendants were the sons of Laldhari Prasad and the sixth defendant was the adopted son of the plaintiff's husband Hit Prasad. The property in dispute was that of Sakhi Chand, the father of Hit Prasad and uncle of Laldhari Prasad. The plaintiff's case was that

the partition of this property had been referred to arbitration by all the parties to the dispute and that an award had been made in terms of the reference. She therefore asked that under S. 21, Sch. 2, Civil P. C., the award should be filed and a decree made thereon. Some ten objections were made by the various parties and these the learned Subordinate Judge discarded as without foundation. He ordered the award to be filed and a decree was theron made in accordance with the award.

The three appeals before us are by Laldhari Prasad and his major son Rajballabh Narain No. 59, by Brij Narain No. 58, and by Chottey Lal No. 57. The application in revision is made by Keshwar Narayan on the allegation that he, being the son of the defendant Brij Narain, was entitled to a share in the property and was therefore a proper party to the suit. He had applied during the course of the trial to be joined as a party. His application had been rejected by the learned Subordinate Judge. In the appeal as argued before this Court, the first objection taken is that of Chottey Lal the second defendant, on the ground that he was a major at the time of the reference to arbitration and was no party to it. By Brij Narain it is argued that the arbitrators made their award carelessly in that three debts Nos. 21, 22 and 23 of the schedule attached to the award were debts barred by limitation and in that a debt worth only Rs. 442 was valued at Rs. 510 in the award. It is further urged that he was not served with notice and that the arbitrator acted improperly in pressing for the payment of a debt due to a servant of his while the consideration of the award was actually in progress. By Laldhari Prasad it is urged that the arbitrators were guilty of carelessness, in that item No. 17 of the debts allotted to his share have been grossly overvalued. It is also urged that though the property was worth two lakhs of rupees the arbitrator managed to finish the work in one month's time; that he did not write the award himself and that he did not certify at the end of it that it was written at his dictation.

The learned Subordinate Judge dismissed the objections now urged by Brij Narain and Laldhari Prasad summarily, and indeed it is apparent on the face of it that there is no substance in them at all. With regard to the unfairness of the allotment, it is to be noted that though the property is worth two lakhs of rupees, the only unfairness alleged is with regard to sums of money amounting in all to less than Rs. 1,000. On this point the plaintiff's first witness has given evidence that the debts were divided into three classes, (1) those which were easily realisable, (2) those which could be realised with difficulty, and (3) those which were barred or not realisable at all. There is no real evidence on the defendants' side to rebut this assertion, and I have no doubt that, in making the award, the arbitrator acted fairly enough. There is no real evidence that Brij Narain received no notice. It is indeed certain that he was present during the proceedings and was aware of them, otherwise there could be no sense in his suggestion that pressure was brought to bear upon him during the proceedings to pay a debt due to the arbitrator's servant. The evidence with regard to the latter suggestion of misconduct is of the flimsiest character. The learned Subordinate Judge had no hesitation in rejecting it and I can see no reason for differing from him. The suggestion that the arbitrator was unduly hasty is not substantiated by evidence, nor is there any substance in the contention that the arbitrator was required to write the whole award with his own hand. It is not contended that the award that was made by the arbitrator was in any respect different from that filed in Court. The award filed in Court was signed by the arbitrator and that signature was a sufficient indication that he was responsible for it.

The real difficulty in the case is that the one vital point, namely, the age of Chottey Lal at the time of the reference to arbitration seems to have received no attention at all from the plaintiff. The defendant Chottey Lal gave evidence that he was a major at the time of the reference to arbitration. He produced an entry made at the time of his first admission into the the Monghyr Training Academy, and in that entry it is mentioned that the date of his birth is 3rd Baisakh 1306 Fs., which, on a reference to the Chronological Tables, will be found to correspond to the 28th April 1899. The Ekrarnama upon which the reference to arbitration was made was dated the 31st August 1917 and the award was filed on 27th September 1917. Prima facie, therefore, this boy was 18 years and 4 months at the time of the reference to arbitration. His father Laldhari did not pretend to be acting as Karta of the family. He signed the

reference to arbitration as guardian of Chottey Lal. The major son Raj Ballabh signed in his own capacity. It is clear, therefore, (and Mr. Hasan Imam admits this) that if Chottey Lal was of age on the 31st August 1917 he was no party to the Ekrarnama. The learned Subordinate Judge gives the following reasons for not accepting this certificate.

His father stated in the Ekrarnama that he was a minor. His elder brother Raj Ballabh deposed in the suit, but did not mention the fact that Chottey Lal was a major and Chottey Lal himself did not know before the date of hearing that he had attained majority:-

"Chottey Lal swears that when he took admission in the school he took his horoscope with him and the date of his birth was entered in the school register from that horoscope. No horoscope has been filed in this suit. The school register shows that there was no horoscope brought by Chottey Lal and the date of birth was entered according to the statement of some person. It is significant that the father Laldhari Prasad, who is the Karta of the family, has not deposed in the case. From the deposition of Chottey Lal it appears that his father and others consulted in the morning of the 17th January 1918 and then he was approached, and then Chottey Lal came with his objection. I do not believe that Chottey Lal has attained majority; his appearance too does not support his statement."

The learned Subordinate Judge then goes on to make a misstatement of the law with regard to the binding nature of the reference even though Chottey Lal had attained majority. In the reasons given by the learned Subordinate Judge, he seems to me to have entirely lost sight of the fact that if Chottey Lal was indeed a minor on the 31st August 1917, he must have been within a very short time of his majority. Certainly age can be more nearly told by appearance in a child of 8 years of age than in a boy nearly 18 years of age. In Indian families no festivities are held to celebrate birthdays and it is extremely rare for members of a family to know with any certainty the month in which even their adult sons or brothers were born. Oral evidence given upon the point would have been absolutely valueless and might by cross-examination at once have been shown to be so. We have before us the only documentary evidence extant of the date of this boy's birth. In spite of the fact that Chottey Lal himself has been foolish enough to say that his horoscope was shown to the head master, there is no real evidence on the record that he ever had a horoscope at all. He was under 8 years of age when he first attended the Monghyr Academy. He cannot possibly remember now whether a horoscope was sent with him or not. The school register shows that no horoscope was in fact sent with him.

The evidence of the correctness of the entry in the register that he was born on the 3rd Baisakh 1306 stands entirely unrebutted on the plaintiff's side and no question was asked in cross-examination of the defendants' witnesses to suggest that this date was inaccurate. Mr. Hasan Imam suggests in his argument that the entry was falsely made in order to qualify the boy for the Entrance Examination eight years later. There seems to be no point in this suggestion, for if his birthday had in fact been the 1st September 1899, he would have been, I understand, equally eligible for an Entrance Examination in 1917. It was never suggested in the Court below that the 3rd Baisakh was a date which would create an ability or remove a disability in respect of an examination. A statement of this description, made at a time when there was no apparent reason for a misstatement, is to my mind of far greater value than the statement that might be made when the question had become one of controversy. In the absence of any rebutting evidence, I feel that it is impossible to hold that this entry was not correct. It follows, therefore, that I must with great regret come to the conclusion that Chottey Lal was a major at the time of the reference to arbitration and that therefore he was no party to it and that, therefore, the suit as against him should have been dismissed.

Similarly Keshwar Narain is stated in an affidavit, dated the 16th April 1918, to be one and-a-half years old, implying that he was born in October 1916. He too should have been represented in the reference to arbitration as one having a share in the joint family properties. The learned Subordinate Judge holds upon this point that it is unnecessary that he should be a party to the suit for the reason that when he comes of age he may, if he wishes, contest the arbitrator's award. It would seem to me that an award purporting to partition the property of a joint family but liable to be set

aside at once by Chottey Lal and in sixteen years' time by Keshwar Narain is not a valid award. In my opinion the first proviso to section 21 of the second Schedule has not been fulfilled. I am not satisfied that the matter has been referred to arbitration by all the parties necessary to a suit for partition. Notwithstanding the provisions of Order 1, R. 9, I hold that the partition of the family property cannot be regarded as having been validly referred to arbitration. In this view the learned Subordinate Judge's order directing that the award be filed should be set aside. I would therefore set it aside and I direct that the appeal be decreed and the suit of the plaintiffs dismissed.

With regard to costs I am satisfied that Chottey Lal has been put forward solely for the purpose of defeating an equitable claim on a technical objection, I would, therefore, order that all the parties bear their own costs throughout the litigation.

Coutts, J.—I agree.

V.S./R.K. *Appeal decreed.*

A. I. R. 1918 Patna 135

JWALA PRASAD AND ALI IMAM, JJ.

Hanuman Baksh and *others*—Plaintiffs—Appellants.

v.

Tikait Ganesh Narayan Sahadeo and *others*—Defendants—Respondents.

First Appeals Nos. 63 and 76 of 1916, Decided on 1st August 1918, from decision of Sub-Judge, Ranchi, D/- 31st January 1916.

Chota Nagpur Encumbered Estates Act (1876), Ss. 3 (c) and 12-A—Contract by disqualified proprietor involving him or his heirs in liability is invalid—Ratification of contract to pay debts incurred during period of disqualification is also invalid.

A disqualified proprietor under the Chota Nagpur Encumbered Estates Act is incompetent to enter into any contract which may involve him or his heirs in pecuniary liability.

No suit can be brought upon a contract entered into by a disqualified proprietor after he emerges out of his disqualification by which he promises to pay any debt incurred by him during his disqualification. [P 137 C 1, 2]

Saroshi Charan Mitra and *Baranashi Prasad Jhunjhunwala*—for Appellants.

Rai Guru Saran Prasad and *Atul Krishna Ray*—for Respondents.

Jwala Prasad, J.—This is an appeal by the plaintiffs who are proprietors of a firm in the town of Ranchi, called the firm of Hukami Chand-Hardatt Rai. Hardatt Rai is dead, and the plaintiffs, his sons, are now the proprietors of that firm. They brought a suit in the Court of the Subordinate Judge of Ranchi for recovery of Rs. 48,225-1-10 principal and interest, on the basis of a hand-note, dated 4th May 1911. The hand-note is said to have been executed by Raja Raghubar Sahi Deo, father of defendant 1 and grandfather and great-grandfather of defendants 2 and 3 respectively. The hand-note in question is said to have been executed in respect of Rs. 31,315, which was found due from Raja Raghubar Sahi Deo to the plaintiff's firm on the date of the hand-note.

The Raja was the owner of the zamindari known as Burway Estate, and defendant 5 Manmotha Nath Chatterji, was the manager and agent holding general power-of-attorney. Manmotha Nath Chatterji executed the hand-note on behalf, and with the permission of Raja Raghubar Sahi Deo. The Raja died in January 1914. The defendants are the heirs and surviving members of the family. The present suit was accordingly brought against them on 4th May 1914. The defendants in their written statement took all possible pleas, the most important of which was that the Raja was a disqualified proprietor under the Chota Nagpur Encumbered Estates Act (6 of 1876 B. C.) and was therefore incompetent to incur debt or to enter into any contract involving pecuniary liability, and that the debts for which the hand-note in suit was executed, were all incurred during the said disqualification of the Raja and therefore the plaintiffs are not entitled to recover anything on the basis of the said hand-note.

The defendants denied that the Raja ever borrowed any money from the plaintiffs' father, or that there was any necessity for the debts, or that defendant 5 the Manager had any authority to execute the hand-note in question.

The Court below however held that tha hand-note was genuine and was executed by Manmotha Nath Chatterji as a duly constituted agent on behalf of the Raja, and that the loans were taken from time to time for valid purposes of the Raja and the family. The entire sum with the exception of Rupees 533-2-0 was advanced by the plaintiffs' firm between December 1907 and 1st October 1908 and on an adjustment of account, Rs. 17,790 was found due from the Raja to the firm on 1st October 1908, on which date a hand-note was executed for the said sum. Thereafter Rs. 533-2-0 was borrowed. The total sum, principal and interest, amounted to Rs. 21,999-8-6 on 26th July 1909 for which another hand-note was executed. On 4th May 1911, the

amount due from the defendants' father came to be Rs. 31,315, for which the present hand-note on the same date was executed. The Court further held that "the debts were contracted for the purposes of the management of the estate and the estate was certainly benefited." Upon these findings, the Court below held that "the debts are binding upon the defendants unless by law they are not recoverable."

As to the question of limitation raised by the defendants, the Court below held that the suit was brought within 3 years from the date on which the hand-note in question was executed and hence it was not barred by time, although the debts were actually contracted long before the execution of the hand-note. This view appears to be correct inasmuch as the hand-note in question created a new contract between the parties and affords a new starting point for the purposes of limitation. The Court below gave a decree to the plaintiffs for Rs. 533-2-0 with interest, against all the defendants and dismissed the suit in respect of the rest of the claim on the ground that the debts were incurred during the period that the Raja was a disqualified proprietor under the protection of Act 6 of 1876 of the Chota Nagpur Encumbered Estates Act and was therefore incompetent to enter into any contract involving him in pecuniary liability under S. 3, cl. (c) of the Act, and hence the suit of the plaintiffs is barred by S. 12A added to the Act by virtue of the Amending Act 3 of 1909 B. C. The plaintiffs have appealed to this Court and contended that the Court below is wrong in dismissing any portion of their claim. On the other hand, the defendants have appealed against the order of the Court below giving a decree to the plaintiffs in respect of Rs. 533-2-0 with interest.

The principal question that arises in connection with the plaintiffs' appeal is whether the debts incurred by the Raja covered by the hand-note in question are recoverable or not from the defendants. The Court below has held that the debts were all incurred (with the exception of Rs. 533-2-0) between December 1907 and 1st October 1908. This finding is borne out by the evidence on the record and in fact it has not been seriously challenged. The Burway Estate belonging to the Raja was brought under the operation of the Chota Nagpur Encumbered Estates Act, on 29th September 1897 and was released on 16th July 1909 (vide Exs. D and 4) with a cash balance of Rs. 12,000 after discharging all the liabilities of the estate. The aforesaid debts therefore were incurred while the Raja was under the disqualification imposed by the said Act. The disqualification is contained in S. 3, Cl. (c) of which enacts "so long as such management continues, the holder of the same property and his heir shall be incapable of entering into any contract which may involve them or either of them in pecuniary liability." The Raja and his heirs, the present defendants, were therefore incompetent to enter into any contract involving them or either of them in pecuniary liability up to 1st October 1908. The disability ceased on that date.

It is contended on behalf of the plaintiffs that the hand-note in question of 4th May 1911 was executed long after the Raja had emerged from the disability and was free to enter into any contract. It is said that the hand-note in question is not only a ratification of the original contracts when the debts were actually incurred, but was also a new contract. Reliance is placed upon the case of *Gregson* v. *Udoy Aditya Deb* (1), where their Lordships held that "It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disablity in such a way as to bind himself as to the whole," and at p. 233: "He became as free to manage his affairs as any other person." Upon the principle of ratification their Lordships held that the plaintiff in that case was entitled to the specific performance of the agreement to lease entered into by the defendant while under the protection of the Encumbered Eatates Act, which was not only confirmed by him but that benefits were obtained by him from the plaintiff on the basis of the agreement after the lease of his estate. The same principle was applied in the case of *Roy* v. *Thakur Ram Jiwan Singh* (2) and in the same volume *Jagadis Chandra Deo Dhabal* v. *Satrughan Deo Dhabal* (3).

In *Raja Satrughan Deo Dhabal* v. *Raja Jagadish Chandra Deo Dhabal* (4), Rampini, J., held that "The intention of the Act was to render the holder of an estate so taken charge of entirely capable of contracting, and that a void contract cannot be revived."

(1) [1890] 17 Cal 223=16 I A 221=5 Sar 416 (P C).
(2) [1906] 33 Cal 363.
(3) [1906] 33 Cal 1065.
(4) [1908] 7 C L J 578.

This is based upon S. 11, Contract Act, according to which a person is competent to contract provided he is not disqualified from contracting by any law to which he is subject. To remove the doubt created by the conflict of authorities and to prevent the disqualified proprietors from confirming or ratifying any contract entered into by them during the period of their disqualification, or from entering into any new contract in respect of the aforesaid debts, S. 12-A was added to the Act in 1909. This section enacts that "no suit shall be brought to charge any person to whom property is restored (1) upon any promise made after such restoration to pay any debt contracted while the management of the property was vested in the Manager, or (2) upon any ratification, made after such restoration, of any promise or contract made while the management of the property was vested in the Manager." The Amending Act was brought into force on 24th March 1909 and it is therefore contended that it could not have the retrospective effect of taking away the right of the Raja, which he, as a disqualified proprietor, had before the release of his estate, to confirm or ratify any debt incurred by him during the disqualification or to enter into any contract in respect thereto. It is more than doubtful whether he had any such vested rights. Even if he had any, the Raja ceased to be a disqualified proprietor on 16th July 1909 and therefore when the Act came into force (24th March 1909) the right to enter into any contract in respect of the debts in question had not accrued at all. Besides, the Amending Act does not at all purport to take away the right, if any, in the disqualified proprietor to confirm, ratify or deal with the debts incurred by him during the incompetency and therefore does not destroy any existing versted right that a disqualified proprietor may have. The section simply bars a suit in respect of the debts incurred during the disqualification by reason of any promise or ratification subsequent to the cessation of the disqualification. The bar in the section affects a creditor, and not a debtor (disqualified proprietor). The contention therefore of the plaintiffs fails. They are not entitled to enforce their claim by means of a suit. In other words, their suit is incompetent.

It is then contended that the section bars the suit against only the "person to whom the property is restored." In the present case it is said that the property was restored to the Raja, and not to the present defendants, who are his heirs, and hence the suit against the heirs is not barred. It may be conceded that the Act being a penal one, must be strictly construed and that no bar can be placed upon the plaintiffs' suit unless it comes within the express terms of the section. We have therefore to see whether the section contemplates any bar against the present defendants. The estate of the Raja was taken under the Act. The Raja and his heirs were disqualified from entering into any contract involving them or either of them in pecuniary liability; vide S. 3 (c). The notification, Ex. C, will show that the estate was restored to the owner thereof, and in Ex. D the name of Raja Raghubar Sahi Deo is mentioned as the person to whom the estate was restored. From Ex. A, report of the Manager, para. 12, it is clear that the members of the family, namely, the defendants were maintained at the expense of the estate. In fact they claim to be the heirs of the Raja and that the estate has devolved upon them as such. Therefore when the estate was restored to the Raja, in effect it was restored to the defendants who are the son, the grandson and the great-grandson of the Raja and were fully represented by him. I therefore hold that S. 12-A bars the present suit against the defendants. The appeal is accordingly dismissed with costs.

As to the Appeal No. 76 of 1916 I am also of opinion that it should be dismissed with costs. This appeal relates to the sum of Rs. 533-2-0 which the Court below has decreed with interest against the defendants. This sum was borrowed at the time when the hand-note of 26th July 1909 was executed, and hence after the Raja ceased to be a disqualified proprietor. The Court below has found it as a fact and I agree with that finding. It has also been held by the Court below that the debt was contracted for the family purposes which benefited the defendants. There is no substance in this appeal and it is accordingly dismissed with costs.

Ali Imam, J.—I agree.

V.S./R.K. *Appeals dismissed.*

A. I. R. 1918 Patna 138

MULLICK AND THORNHILL, JJ.

Babujan Misir and *another* — Petitioners.

v.

Sheo Sahay Chaudhury and *others*— Opposite Parties.

Letters Patent Appeals Decided on 20th June 1918, from order of Ali Imam, J., D/- 22nd April 1918.

Letters Patent (Patna), Cl. 10 — Order staying proceedings is not judgment.

An order staying proceedings is not a "judgment" within the meaning of Cl. 10, inasmuch as such order contains no final adjudication of the rights of the parties. [P 139 C 2]

(b) Letters Patent (Patna), Cl. 10—Order of single Judge staying proceedings in criminal case is not appealable.

An order of a single Judge staying proceedings in a criminal case is an order made in the exercise of criminal jurisdiction, and therefore, no appeal lies against it under Cl. 10. [P 139 C 1]

P. R. Das and *Shiva Narain Bose*— for Petitioners.

Asghur and *D. N. Sircar*—for Opposite Parties.

Mullick, J.—The question before us is whether two petitions of appeal presented respectively by Babujan Misser and Kanto Chaudhury against an order dated 22nd April 1918, made by Imam, J., a learned Judge of this Court, can be maintained under the law. It is contended on behalf of the petitioners that the order of the learned Judge is appealable under Cl. 10, Letters Patent of this Court. Notice was issued by a Division Bench of this Court upon the respondents named in the petition to show cause why the appeals should not proceed. Cause is now shown before us by Mr. Sircar while Mr. Das appears on behalf of the petitioners. The order of Imam, J., was made under the following circumstances. Two cases are now pending in the Court of a Magistrate in the District of Bhagalpur, in which Babujan and Kantoo are respectively the complainants and Shew Sahay and others are the accused and in which charges have been framed under Ss. 379 and 143, I. P. C., for theft of paddy in respect of certain disputed land. In January 1917 proceedings were instituted under S. 145, Criminal P. C., in respect of these lands betwween Deo Nandan as the first party and the above-mentioned Shew Sahay Choudhary as the second party, the former claiming under a mortgage and the latter resisting the possession delivered to the former by the civil Court in enforcement of that mortgage. In February 1917 the possession of Deo Nandan was confirmed, but upon an application to this Court that order was set aside and the case was re-opened with a direction to add certain persons as parties. The further inquiry thus directed is still pending. The complainant in each of the two above-mentioned theft cases claims as tenant under Deo Nandan.

An application was made by the accused before the Magistrate trying the theft cases for the stay of the proceedings till the disposal of the case under S. 145, Criminal P. C., but was refused. An application in revision was then made to the District Magistrate with a similar result. Then an application for revision was made to this Court and was heard by Imam, J., sitting alone as a Judge of this Court and on the 22nd April last he made an order directing that the proceedings in the trial under Ss. 379 and 143, I. P. C., should be stayed pending the decision in the case under S. 145, Criminal P. C. The point which we have now to determine is whether an appeal under the Letters Patent lies to this Court against Imam J.'s order. The matter clearly depends upon Cl. 10, Letters Patent of the Patna High Court, the material portion of which is as follows:—"And We do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being an order made in the exercise of revisional jurisdiction in a case, which has been called for by the said Court, and not being a sentence or order passed or made in the exercise of criminal jurisdiction) of one Judge of the said Court, or of one Judge of any Divisional Court constituted in pursuance of S. 108, Government of India Act of 1915."

Mr. Das contends that the order was not made in the exercise of revisional jurisdiction, but in the exercise of the Court's powers of general superintendence under S. 107, Government of India Act of 1915. He also urges that in order to bar the right of appeal the order must be made not only in the exercise of revisional jurisdiction but also in the exercise of criminal jurisdiction.

In my opinion his contention cannot be accepted. The words within brackets should, in my opinion, be paraphrased as follows:—"Except an order made in the exercise of revisional jurisdiction in a case which has been called for by the said Court and except a sentence or order passed or made in the exercise of criminal jurisdiction." If

the contention put forward by Mr. Das were correct, then the words "not being an order made in the exercise of criminal revisional jurisdiction in a case, which has been called for by the said Court" would have been quite sufficient for the purposes of the draftsman. Again comparing this clause with the corresponding clause in the Letters Patent granted to the High Court of Calcutta in 1865, it is clear that the intention of the draftsman was to restrict the right of appeal by prohibiting appeals (1) in respect of sentences or orders passed or made in the exercise of criminal jurisdiction as before, and (2) in respect of orders made in the exercise of revisional jurisdiction in other cases, namely, civil cases. The result is that whereas in the Calcutta High Court a Letters Patent appeal lies against the judgments of a Judge sitting alone in the exercise of civil revisional jurisdiction, in the High Court of Patna no such appeal lies. On the other hand, the effect of the interpretation suggested by Mr. Das would be that the right of appeal has been not restricted but extended by the Letters Patent of this Court and that not only is there an appeal against civil judgments in revision as before but that a new right of appeal has been conferred against judgments passed in the exercise of original and appellate criminal jurisdiction. In my opinion the language of the clause does not favour such an interpretation.

Furthermore Cl. 10 appears under the heading of civil jurisdiction. It could not appropriately confer under that heading a right of appeal in a matter connected with the exercise of criminal jurisdiction. Obviously it intends to define the limits of the right of appeal against certain judgments on the civil side only. Therefore, in the present cases the order of Imam, J. having been clearly made in the exercise of criminal jurisdiction the petitioners have no right of appeal.

In this view it is unnecessary to decide whether or not the order of Imam, J. was one made in the exercise of revisional criminal jurisdiction, but if it were necessary to decide that point, I would say that his order was in revision of the order of the District Magistrate. The revisional powers conferred by the Criminal Procedure Code are sufficiently wide to justify his interference in a matter of this kind.

But there is another ground which is, in my opinion, completely fatal to Mr. Das. In my opinion the order staying proceedings is not a judgment within the meaning of Cl. 10 Letters Patent. The order contains no final adjudication of the rights of the parties. To use the language of Sir Richard Couch, it is not a decision which affects the merits of the question between the parties by determining some right or liability [*The Justices of the Peace for the Town of Calcutta* v. *The Oriental Gas Company* (1)]. It merely directs whether one case shall have priority in point of time over another. Therefore, there being no judgment, no appeal lies. The result is that both the petitions of appeal must be dismissed with costs. Hearing fee one gold mohur in each case.

Thornhill, J.—I agree.

V.S./R.K. *Petitions dismissed.*

(1) [1872] 17 W R 364.

A. I. R. 1918 Patna 139

CHAPMAN AND JWALA PRASAD, JJ.

Karu Mian—Appellant.

v.

Tejo Mian and *others*—Respondents.

Appeal No. 1198 of 1916, Decided on 6th July 1917, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 25th July 1916.

(a) Registration Act (1908), S. 17 (2) (i) and (vi)—Compromise decree — Permanent lease in favour of three—One suing for one-third of leased lands—Suit compromised—Each of three parties recognized as having right in one-third—Compromise incorporated in decree—Such compromise does not require to be registered—Civil P. C. (1908), O. 23, R. 3.

Where a permanent lease was taken of certain lands by three parties, and one of them subsequently instituted a suit claiming about one-third of the leased lands, and the suit was settled by a compromise by which it was agreed that each of the three parties should be recognized as having a separate right in one-third of the property, and the compromise was incorporated in a decree of the Court:

Held: that such a compromise in which each defendant admits the plaintiff's claim to certain portions of the claim made by him in consideration of the plaintiff admitting each of the defendant's claim for certain property which each desires to retain, does not require to be registered.

[P 140 C 2]

Per *Jwala Prasad, J.*—Under O. 23, R. 3, Civil P. C., all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. Under S. 17, Registration Act, Cl. (2) (vi), "a decree or order of a Court" does not require registration, and all that has to be seen is whether the subject-matter of the subsequent suit was embodied in the compromise decree or not, and if the lands were embodied in the decree, it is not open in the sub-

sequent suit to go behind the decree and find out whether the lands were the subject-matter of the suit in which the decree was passed : 22 *Mad.* 508 (*P. C.*) and 20 *All.* 171 (*P. C.*), *Foll.*; 1 *I. C.* 913, *not Foll.* [P 142 C 1]

(b) Registration Act (1908), S. 17 (2) (vi)—Principle governing exemption of decree from registration stated.

The object of the Registration Act, requiring that a document should be registered is merely for the purpose of ensuring publicity of record in order to facilitate proof of execution and to prevent fraud, and it is on this principle that a decree which is an order of the Court has been exempted from registration. [P 141 C 1]

Krishna Sahay—for Appellant.

Sakti Kanta Bhattacharya—for Respondents.

Chapman, J. — A permanent lease was taken of Chak Gamharia in Mouzah Karudih by three parties. The first party may be represented for the purpose of this case by the name of Tejo Mian, the second party by the name of Karu Mian and the third party Chatru Mian. Each took one-third of the property leased. In the year 1906 Chatru Mian instituted a suit in which he claimed a raiyati right in 40 bighas of this land. The suit ended in a compromise in which it was agreed that each of the three parties should be recognised as having a separate right in one-third of the property, that one-third amounting in each case to 36 bighas. In the lands allotted to the party of Tejo Mian under that compromise, there lay the lands which form the subject of the present suit. In 1912 there was a survey Record of Rights, and this land, the subject of the present suit, was recorded in the name of Karu Mian. The present suit is a suit brought by Tejo Mian and his party for the recovery of possession of this land, the claim being based upon the compromise in the suit brought by Chatru Mian in 1906. A Civil Court Amin was appointed to lay out the boundaries in accordance with the compromise, and he reported that the lands in suit were within the allotment made to the plaintiffs in that previous compromise. The Munsif, however, held that the compromise was not admissible in evidence for want of registration, and in appeal the learned Judicial Commissioner has taken the opposite view and has held that registration was not necessary, with the result that he finds that the correctness of the survey record has been sufficiently rebutted by the evidence contained in the compromise decree. He accordingly decreed the plaintiffs' suit. Karu Mian now appeals to this Court. The first ground taken in appeal is that the learned Judicial Commissoner is wrong and that the compromise decree in the suit of 1916 is not admissible in evidence for want of registration.

The question for determination is whether the case comes within the exemption from registration contained in S. 17 (2) (1) Registration Act. The exemption is to the effect that the clause requiring registration in such a case as the present does not apply to a decree of Court. The first ground taken is that inasmuch as this compromise decree dealt with the property not mentioned in plaint in the suit it was to that extent an improper decree, and was therefore not a decree within the meaning of the exemption above referred to. Where however a case is compromised in the manner in which the suit of 1906 was compromised, what occurs is, that each defendant admits the plaintiff's claim to certain portions of the claim made by him in consideration of the plaintiff admitting each of the defendants' claims for certain property which each desires to retain. I understand that in such a case their Lordships of the Privy Council have held that registration is not necessary, and as an authority for this I would refer to the case of *Pranal Anni* v. *Lakshmi Anni* (1), where at p. 514 the following passage occurs with reference to the objection made in that case that the compromise had not been registered.

Their Lordships say: "If the parties after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of the land now in dispute." The same principle enunciated in more general terms will be found in a judgment of the Privy Council in the case of *Bindesri Naik* v. *Ganga Saran Sahu* (2). At p. 180 their Lordships say that they are satisfied that the provisions of the Registration Act requiring registration do not apply to a proper judicial proceeding, whe-

(1) [1899] 22 Mad 508=26 I A 101 (P C).
(2) [1898] 20 All 171=25 I A 9 (P C).

ther consisting of pleadings filed by the parties or of orders made by the Court. It is true that the Calcutta High Court in some cases have hesitated to apply the full doctrine enunciated by their Lordships, and as an example of such a case I need only refer to the judgment of Mookerjee, J., in the case of *Gurdeo Singh* v. *Chandrika Singh* (3), but to my mind the principle should not be limited in its operation as it is founded not only upon authority but also on reason. The object of the Registration Act requring that a document should be registered is merely for the purpose of ensuring publicity of record in order to facilitate proof of execution and to prevent fraud. These objects are certainly secured where a proceeding between the parties is one that takes place in the publicity of a Judicial Court and given effect to by a decree which it would be impracticable to force or farbricate. It is, I understand, on this principle and no other that a decree which is an order of the Court has been exempted from registration. The question of Court-fee or Stamp does not appear to me to be relevant in the case. If the document requires a stamp, the omission to stamp it does not necessarily defeat the suit. The stamp can be recovered in the course of litigation. No question of Court-fees arises in the present case and this is an indication that the considerations of Court-fees are quite irrelevant in the present connection. The amount of Court-fee payable would not have been greater if the suit had been one for partition.

It is then contended that the compromise was not given effect to in the decree. The decree is in the usual terms, that is to say, that the suit is decreed in terms of the compromise: the compromise is incorporated in the decree and is referred to therein. The compromise recites, as I have said, that an area similar in extent to that claimed by the plaintiff in the suit should be allotted to him and each of the parties of defendants. This means that there was a give and take and that the defendants' assent to the allotment of the lands so given to the plaintiff was moved by the consideration of a similar assent by the plaintiff to the allotment to the two defendants. It is impossible to say that such a compromise and such a decree in a case of that kind is not a proper proceeding and a proper decree within the meanig of the words of their Lordships of the Privy Council in the case reported as *Bindesri Naik* v. *Ganga Saran Sahu* (2). It is also impossible to say that this give and take between the plaintiff and the defendant was not actually in fact given effect to in the decree; it was incorporated in it. The question whether the other defendants could have executed the decree is a different question. The fact is that the decree is, as it stands, evidence of an agreement between the parties under which certain lands were allotted to each and inasmuch as it was a proper decree it was exempted from registration. I therefore hold that the learned Judicial Commissioner was correct in the view which he took of the law on the subject of registration.

It is last contended that the learned Judicial Commissioner should have gone into the question of the reports submitted by the Civil Court Amin, which had not been dealt with by the Munsif and to which objections have been made on behalf of the appellant. It is true that no mention is made of these objections in the judgment of the learned Judicial Commissioner, but before we could interfere on this ground we should have to be satisfied that these objections were brought to the notice of the learned Judicial Commissioner. The fact is that no mention of this point is made in the memorandum of appeal even to this Court. The learned Judicial Commissioner says in this connection that the report clearly shows that the lands in suit fell to the share of the plaintiff-appellant. In my opinion the grounds taken in appeal to this Court fail. The appeal is dismissed with costs.

Jwala Prasad, J.—I agree. The lands in suit were allotted to the plaintiffs in 1906 by a compromise decree bearing date 10th August 1906 in connection with a Suit No. 398 of 1916 brought by defendant 2 against the present plaintiffs and defendant 1. The Amin, who was deputed to indentify the lands in the present suit with those mentioned in the compromise decree of 1916, has held that the lands are identical with those allotted to the present plaintiffs in the said compromise decree. The only ground upon which it is contended by the learned vakil for the appellant (defendant 1 in this case) that the decree of 1906 should not be given effect to is, that the decree embodied some lands which were not the subject matter in that case. That suit was for certain lands measuring roughly about 40 bighas, which

(3) [1909] 36 Cal 193=1 I C 913.

the plaintiffs in that case (now defendant 2) claimed as his one-third share out of the entire 16 annas of the mourusi lease lands in Chak Gamharia Tanr held by him and defendants 1 and 2 in that case as his co-sharers. The parties came to terms; all the 16 annas lands of the mourusi lands in Gamharia Tanr were divided amicably amongst the parties and land equal to one-third was given to each of the three co-sharers. In such a compromise it is impossible to say that the Court could have given effect to only the lands claimed in the suit and not to the 16 annas lands which were divided between the co-sharers. Under R. 3, O. 23, Civil P. C. "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith, so far as it relates to the suit." Now this evidently contemplates that all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. It would have been impossible for the Court to confine itself to the lands which the plaintiff chose to claim in that suit without taking into consideration all the lands of the chak held by the co-sharers and which they divided amongst themselves and thus settled their disputes once for all.

All the lands of the chak though not actually claimed in the plaint were lands which related to the suit. The Court therefore had jurisdiction to give effect to the compromise lands, though not strictly claimed in that suit. The principle of the ruling in *Joti Kuruvetappa* v. *Izari Sirusappa* (4) may well apply to this case. The contention of the appellant must therefore fail. The terms of the compromise were accepted by the Court and incorporated in the decree based on the compromise. Under S. 17, Registration Act, Cl. (2) (vi), "a decree or order of a Court" does not require registration. To my mind all that we have to see is whether the subject-matter of the present suit was embodied in the decree or not, and if the lands were embodied in the decree it is not our business to go behind the decree and find out whether the lands were the subject-matter of the suit in which the decree was passed. It will be presumed in a case of this nature, where a co-proprietor seeks to have his share of the property, that the terms of the compromise, which purports to divide the entire property among all the co-proprietors parties to the suit, were before the mind of the Court when the decree was passed. I do not therefore think that there is any substance in the contention that the compromise decree in so far as it related to the land which was not directly the subject-matter of the suit of 1916, required registration under the Indian Registration Act. The point appears to be concluded by the principles deducible from the Privy Council authorities in *Bindesri Naik* v. *Ganga Saran Sahu* (2). It has not, moreover, been shown that the lands claimed in the present suit were not the lands included in those mentioned in the plaint of the former suit. The point of attack is a general one that the compromise decree dealt with more lands, i. e., 16 annas of the chak, whereas what was actually claimed by the plaintiff in that suit was a one-third share in the chak. I concur with all the other reasons and the view of the law on the subject as set forth in the judgment of my learned brother just delivered and agree that the appeal should be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(4) [1907] 30 Mad 478.

A. I. R. 1918 Patna 142

ROE AND COUTTS, JJ.

Kamleshri Prasad Singh and *another* —Defendants—Appellants.

v.

Raghubans Prasad Singh and *others* —Defendants—Respondents.

Appeal No. 146 of 1916, Decided on 10th December 1918, from Original decision of Sub-Judge, Monghyr.

(a) Hindu Law—Joint family—Manager—Karta purchasing property—Presumption is that it is joint family property unless shown that it was acquired by private funds.

Where a purchase of property is made in his own name by the karta of a Hindu joint family, the presumption is that the property is acquired out of the family funds, unless it can be shown by definite evidence that the karta acquired the property from private funds and not from funds which were in his hands as the head of the family. [P 144 C 1]

(b) Hindu Law—Joint family—Manager—Karta getting joint family bonds renewed will be presumed to have done it for benefit of family.

Where the head of a joint Hindu family collects money due upon family bonds, the presumption is that he makes the collections on behalf of the joint family, and if he re-issues the money collected on fresh loans, the presumption again is

that he issues it for the benefit of the family and not for his own private benefit. [P 144 C 2]

P. R. Das, Naresh Chandra Singh and *Sivanandan Rai*—for Appellants.

Ganesh Dutt Singh, Jal Gobind Singh and *Purnendu Narain Sinha*—for Respondents.

Roe, J.—This appeal arises out of a suit for partition. The pedigree of the family is given in the plaint. It is descended from Brij Lal Singh and the property to be divided is the ancestral property of Brij Lal Singh together with four villages subsequently acquired, namely, Pandrak, Surajpore, Rasulpore and Bhagwanpore Bansi or Barauni. In the course of the trial the plaintiff sought for and obtained leave to add to the properties to be partitioned a number of debts which were alleged to be due to the joint family.

The parties are the descendants of the four sons of Brij Lal Singh, the plaintiff and defendants 1 and 2 being descended from the third son Parsan Singh, defendants 3 and 4 from the eldest son Rang Lal Singh, defendants 5 and 6 from the second son, and defendants 8 to 13 from the youngest son.

In the Court of first instance it was alleged that there had already been a partition of the whole estate and that threfore the suit should be dismissed. This issue was found against the defendants. Defendants 1, 2, 5, 6 and 7 do not appeal, defendants 3 and 4 appeal and defendants 8 to 13 have filed a cross-appeal. In the argument before us no attempt was made to contest the learned Subordinate Judge's finding that no valid partition of the family property had taken place.

The points for consideration are only (1) whether defendants 3 and 4 being the elder branch are entitled to Jethansi or an eldest son's share; (2) whether the four villages I have named were a part of the joint family estate or the self-acquired property of Rang Lal Singh, the grandfather of defendants 3 and 4; and thirdly, whether a number of bonds standing in the name of Gita Prasad Singh and his sons represent loans made from the private purse of Gita Prasad or from the joint family estate. The learned Subordinate Judge decided all these issues against the appellants.

Upon the question of the eldest son's share the learned Subordinate Judge has dealt only with the oral evidence, and that evidence he has dealt with in a somewhat summary fashion. The documenatry evidence shows that upon a reference to arbitration of a dispute with regard to the whole family property made in the year 1905 one of the arbitrators, Deokinandan Singh, drew up a statement of the rights of the parties and in it distinctly recorded a finding that the elder branch was entitled to 5/21sts of the family property, the remaining branches being entitled only to 4/21sts. Reading the evidence of Jhumak Singh, plaintiff's witness 5, it is clear that he himself and another of the arbitrators acquiesced in the finding recorded by Deokinandan Singh. Deokinandan Singh himself gave evidence on behalf of the plaintiff and says that his decision regarding Jethansi was most probably based on the oral evidence on behalf of the parties. In 1908 a petition was filed by Sarjug Prasad Singh representing as the genealogical table shows, the branch to which the plaintiff himself belongs, in proceedings regarding the registration of the four villages under dispute upon the second point raised in this Court. In this petition it is distinctly admitted that the branch is entitled to a Jethansi share. The second witness for Gita Prasad Singh's branch, Bajrang Prasad states that up to 60 years ago Jethansi custom was recognized in the family. Seeing that there has admittedly been no partition since the separation from his brothers of Brij Lal Singh who is the great-grandfather of the majority of the parties, we may assume that there has been no partition for sixty years, and that therefore it is impossible for the custom of Jethansi, if it existed 60 years ago, to have now died out. The evidence, which I have quoted,coupled with the oral evidence of the witnesses called by defendants 3 and 4 seems to me conclusive proof of the custom alleged by defendants 3 and 4, and I would order that a partition of the immoveable property be made on the basis of a division of the property into 21 parts, of which defendants 3 and 4 will receive five parts, the remaining branches four parts each; the plaintiff's branch being again sub-divided into two equal shares of two annas each to the plaintiff of the one part and defendants 1 and 2 of the second part.

I can see no reason to disturb the finding of the learned Subordinate Judge that the villages in disppute were acquired from joint funds. Mr. P. R. Das admits that if the burden of proof is on him to show from what means the acquisition was made, his evidence does not support the burden of proof upon him. He suggests however that on the basis of the decision in the case

of *Bodh Singh Doodhooria* v. *Gunesh-chunder Sen* (1) there is no burden of proof on him at all since it is shown by the arbitrators' award and by the evidence on both sides that the family has for a very long time had separate accounts and have issued loans from their separate private funds. The ruling in question is based, I take it, upon the principle that where all the family has been dealing in immoveable property as self-acquired property, the presumption that all immovable property acquired in the name of any member of the family is joint property at once disappears. There is nothing upon the record to show that any other branch of the family has been making private acquisitions of immoveable property. The evidence with regard to separate transactions is limited to the issue of loans upon simple bonds. No case has been cited of separate acquisitions of immovable property by any of the junior branches. It is admitted that Rang Lal Singh, in whose name these properties were brought, was at the time of the purchase the Karta of the family. I am of opinion that his descendants were required to show by definite evidence that he acquired these properties from private funds and not from funds which were in his hands as the head of the family. It being admitted that they have failed to show this, the learned Subordinate Judge's decision upon this point must be upheld.

The learned Subordinate Judge has dealt with the question of the ownership of the bonds standing in the name of Gita Prasad in even more summary fashion than that in which he disposed of the other points in dispute. It is quite clear from the evidence of the plaintiff's witness at p. 19 and from the award of Deokinandan Singh at p. 29 that from 1314 onwards Gita Prasad was the manager of such business as remained joint after the reference of the family dispute to arbitration in 1905. Deokinandan Singh himself admits in his evidence at p. 17 that when he went into the accounts with the intention of settling the disputes, he found that there were 142 debtors of the joint family on bonds and bahi khatas. His award shows that with regard to one of these bonds at least the consideration had not been advanced by Gita Prasad alone. It also appears from that award that there was considerable confusion regarding the realisation of the various debts, each member of the family playing for his own hand. The presumption is that the head of the family in collecting the moneys, due upon these bonds was collecting on behalf of the joint family; and if he re-issued the moneys collected on fresh loans, the presumption would again be that he issued them for the benefit of the joint family and not for his private benefit. It is impossible for us upon the materials before us to come to a definite finding with regard to each of the loan shown in the schedule. We must therefore direct that further proceedings be taken in the lower Court with regard to the loans standing in the names of Gita Prasad and the members of his branch and claimed by him as his exclusive property. This enquiry will take the form of a taking of an account. A Commissioner will be appointed to examine the accounts of Gita Prasad and to ascertain what has been the subsequent history of the bonds outstanding in 1905, and, having ascertained, firstly, what sums have been realised and not re-issued, and secondly, what sums have been realised and re-issued, he will apportion the bonds, which have been the fruit of previous realisations or renewals of loans previously issued when the family was joint, among the four branches in equal shares. It is clear upon the evidence that there is no Jethansi custom with regard to moveable property. He will also apportion Gita Prasad's liability upon the sums realised from previous loans and not re-issued.

The appeal should be decreed in part. The immoveable pproperty, including the four villages regarding which there is a adispute, will be divided as indicated in the body of the judgment and an account will be taken of the money-lending business of Gita Prasad's branch and an adjudication made thereon on the terms above recorded. I would note that the cross-appeal of Gita Prasad is not pressed. We are asked only to say that the Commissioner in making the partition of the immovable property will have regard to the general rule of partition, that all specific plots or villages held in severalty by any member of the family will, as far as possible, be allotted to his share on partition. Having regard to the result of this apppeal we make no order as to costs either in this Court or in the Court below.

Coutts, J.—I agree.

V.S./R.K. *Appeal partly decreed.*

(1) [1873] 19 W R 356=12 B L R 317 (P C)

A. I. R. 1918 Patna 145 (1)

ROE, J.

Daroga Raut —Plaintiff—Appellant.

v.

Parema Kuer—Defendant—Respondent.

Second Appeal No. 831 of 1917, Decided on 2nd February 1918.

Court-fees Act (1870), Sch. 1, Art. 1 and Sch. 2, Art. 17—Cross-objection in suit for declaration must bear ad valorem court-fee.

The words "or cross objection" have been deliberately omitted from Art. 17, Sch. 2. Therefore a cross-objection in a suit for a declaration must bear ad valorem court-fee under Art. 1, Sch. 1, Court-fees Act. [P 145 C 1]

Judgment.—I think it is rash to assume that an item has been omitted from a schedule by an oversight. It seems to me logical to say that if a party who has been refused an order altering a summary decision or entry in a register or a declaratory decree or an order setting aside an award or an adoption is aggrieved by such an order, he should file an appeal against that refusal. It is as reasonable to say that the words "cross-objection" have been deliberately omitted from Art. 17, as it would be obviously right to say that the words "written statement, pleading, set-off or counter-claim" have been deliberately omitted from that Article. There is in the result of this conclusion no hardship. An unsuccessful litigant genuinely desirous of one of the reliefs contemplated by Art. 17 is at liberty to file an appeal forthwith irrespective of any action that may be taken by his adversary, and pay on the appeal a Court-fee of Rs. 10. If he asks for such a relief only because his adversary has preferred an appeal, he will be required, if his own appeal is time-barred, to pay an ad valorem fee. If his appeal is not time-barred, he should seek his remedy by a regular appeal, not by a cross-objection.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 145 (2)

JWALA PRASAD, J.

Bhawani Sahu—Petitioner.

v.

Prem Mashi Christian — Opposite Party.

Criminal Revn. No. 404 of 1917, Decided on 6th December 1917, from order of Deputy Commissioner, Chota Nagpur, Ranchi.

Penal Code (1860), S. 379—Crop cut and removed by order of and in presence of accused—He is guilty.

Where a crop was dishonestly cut and removed by the order of the accused, he himself being present:

Held: that the accused was guilty of an offence under S. 379. [P 146 C 1]

Rai Guru Saran Prasad—for Petitioner.

Amir Hasan—for Opposite Party.

Judgment.—The petitioner has been convicted of an offence under S. 379, I. P. C., for having removed certain crop off the land belonging to the complainant. The petitioner took a usufructuary mortgage of six annas of the village on 6th June 1916. This share was before that in the possession of one Jai Nath as usufructuary mortgagee thereof. The land from which the crop was removed was settled by Jai Nath in 1907 with the complainant for three years, and the name of the complainant was recorded in the Survey Record of Rights of 1910 as gair dakhilkar, that is, non-occupancy tenant. Both the Courts have held that the complainant continued to be in the possession of the land peacefully up to 1916 and had been paying rent of the same to the previous mortgagee Jai Nath. It has also been held that the crop in question was grown by the complainant. At the time of cutting the crop the complainant wanted to assert his right and demand the crop from the accused. The complainant refused to give any produce of the land except the rent. When the crop was ready, the accused collected men of the village and had the crop cut and removed on 9th November 1916. The accused petitioner along with four others of his men were sent up for trial. The Magistrate acquitted the other persons sent up and convicted the petitioner, upon the ground that he was directly concerned with the land and that it was by his order that the paddy was forcibly cut, whereas the other accused were only present there and helped the petitioner. The Deputy Commissioner in appeal has held that the complainant and his partners held peaceful possession of the land until Bhawani Sahu, the petitioner, obtained a footing in the village, and that the present case is the outcome of an attempt on the part of the accused to obtain forcible possession of the complainant's land. Upon the above findings the Courts below have convicted the accused under S. 379.

The only ground urged against the conviction on behalf of the petitioner is that there is no finding that the accused dishonestly removed the crop, or that he himself removed the crop. As

to the latter, the finding is that the accused ordered the romoval of the crop; that the others cut and removed it, and that the accused was present. The removal of the crop being by the order of the accused, the accused is responsible for it and is guilty under S. 379, if there be dishonest intention. As to whether there was a dishonest intention on the part of the accused in removing the crop, no doubt the Courts below have not used the expression dishonest intention: but from the findings of the Courts below there can be no other meaning than that the Courts in substance held that the removal was dishonest. The point is so clear that I would not have thought of discussing it in detail but for the insistence of the learned vakil on behalf of the petitioner that the facts found by the Courts below do not amount to a dishonest removal of the crop within the meaning of S. 379, I. P. C. S. 24 defines dishonesty as consisting in the doing of an act with the intention of causing wrongful gain to one person or wrongful loss to another. S. 23 defines wrongful gain as a gain by unlawful means of property to which the person getting it is not legally entitled and wrongful loss is a loss by an unlawful means of property to which the person losing it is legally entitled. Therefore the question is whether the accused could be legally entitled to the crop grown by the complainant.

There is no dispute that the crop was grown by the complainant and that the complainant was in possession of the land itself up to 1916 and continued to be in possession up to the time of the occurrence. There can be no pretence on behalf of the accused that he was entitled, on the strength of his usufructuary mortgage, to cut and remove the crop when he allowed the complainant to cultivate the land and to grow the crop. Now the act of the accused was therefore an act whereby he was trying to have a wrongful gain of the property. On the other hand, the removal of the crop was going to make the complainant lose the property to which he was legally entitled, so it is a clear case of a wrongful gain to the accused and a wrongful loss to the complainant; and therefore the action of the accused was dishonest in forcibly removing the crop from the possession of the complainant. There can be no question as to any bona fide dispute as to the crop. There might have been a bona fide dispute as to the right to possession of the land in June when the land was fallow. The findings are sufficient to show that the action of the accused was dishonest. The conviction is therefore upheld and the petition rejected.

V.S./R.K. *Petition rejected.*

A. I. R. 1918 Patna 146

ATKINSON AND ALI IMAM, JJ.

Ritbaran Singh and *others*—Accused —Appellants.

v.

Emperor—Opposite Party.

Criminal Reference No. 12 of 1917 and Criminal Appeals Nos. 189 and 201 of 1917, Decided on 6th October 1917 against order of Sess. Judge, Purnea.

(a) Penal Code (45 of 1860), Ss. 34, 147, 149, 325 and 326—Failure of proof of common object of unlawful assembly — Individuals alone can be convicted on proof of particular offence.

Where the alleged common object of an unlawful assembly fails, the accused persons cannot be convicted under S. 147 or under S. 325 or S. 326 with reference to Ss. 34 and 149. They can only be convicted if individual acts of illegality can be proved against each of them individually.

[P 150 C 2, P 151 C 1]

(b) Penal Code (45 of 1860), Ss. 34 and 149 —Unlawful assembly—Common object must agree in essential particulars—For conviction under S. 34 proof of common intention as distinguished from common object is necessary.

In order to sustain a conviction in a case of unlawful assembly the rule is that the common object stated in the charge must agree in essential particulars with the common object established in the evidence. The language of S. 34 is far more restrictive than that of S. 149 and the Legislature clearly intended to narrow down the scope of S. 34. To establish guilt under that section, it is necessary to prove a common intention as distinguished from a common object and it must be shown that the criminal act was committed in furtherance of that intention.

[P 150 C 1, 2]

(c) Criminal Trial—Strict proof of relationship necessary to bind master by statement of servant—Tort, Vicarious liability.

In a criminal trial if it is intended to bind a master by a statement of his servant, the relationship of master and servant must be strictly proved. It is not sufficient to say that because a man accompanied another to the thana, the former is a servant of the latter. [P 149 C 1]

(d) Criminal Trial—Conviction—Conduct of accused in giving false name and false residence on arrest is not sufficient in itself for conviction.

The conduct of an accused in giving a false name and false residence on arrest, indicates his desire to evade arrest by the police, and the evasion of arrest itself may give ground for suspicion and may be regarded as some evidence of guilty intent, but that alone is not sufficient and conclusive in the absence of reliable evidence for the purpose of conviction. Such conduct is not a part of the res gestae of the criminal act with which the accused is charged. [P 151 C 1, 2]

(e) Criminal Trial—Court's duty—Prosecutor should be required to adopt correct and proper attitude in examination-in-chief of witnesses—Inadmissible evidence should not be allowed.

It is the duty of the Judge to control the examination of witnesses and to require only legal questions to be put in a legal way. He should require the prosecution to adopt a correct and proper attitude in the examination of witnesses. The Crown Prosecutor should put such questions only as are relevant and should not get facts admitted in evidence that are inadmissible. [P 152 C 1, 2]

(f) Criminal P. C. (5 of 1898), S. 145—Actual factum of possession should be determined.

Under S. 145 as between the rival claimants, the actual factum of possession is a vital question for determination. [P 148 C 2]

Hasan Imam, Lal Mohan Ganguli and *Nirsu Narayan Singh*—for Appellants.

Sultan Ahmad and *Jyotish Chandra Bhattacharya*—for the Crown.

Ali Imam, J.—This is an appeal preferred by ten persons who have been convicted and sentenced by the Sessions Judge of Purnea. The learned Judge has also referred the case under S. 374, Criminal P. C. The appeal and the reference have been considered together. One of the appellants Sanphul Singh, who was accused 2 in the trial, has during the pendency of the appeal died, and his appeal has thus abated. The other appeallants have been convicted and sentenced under the Penal Code as stated below:—

Accused 1.—Ritabaran Singh—under Ss. 147, 148 and 302 and has been sentenced to death for the murder of Sajiwan Pandey.

Accused 5 and 4—Bhuti Singh and Garib Rai—under Ss. 147 and 325 and have been sentenced to six years' rigorous imprisonment each for rioting and having caused grievous hurt to Ram Swarup and Ram Jug.

Accused 8.—Jia Lal—under Ss. 147 and 325 and sentenced to six years' rigorous imprisonment for rioting and for causing grievous hurt to Ram Swarup Pandey.

Accused 3.—Jadu Singh—under Ss. 147 and 325 and sentenced to six years' rigorous imprisonment for rioting and having been "one of the assailants of Ram Jug who received grievous hurt."

Accused 6. — Jugeshwar Singh—under Ss. 147 and 325 and sentenced to rigorous imprisonment for five years for rioting and having been "one of the assailants of Ram Jug."

Accused 7. — Bhabichand Singh — under Ss. 147 and 325 and sentenced to rigorous imprisonment for six years for rioting and having been "one of the assailants who grievously hurt Ram Jug."

Accused 9 and 10.—Kuni Singh and Peare Dahiar—under S. 147 and sentenced to six months' rigorous imprisonment for rioting. It may also be mentioned that the accused Bhuti, Bhabichand, Garib, Jai Lal and Jadu have also been convicted under S. 326 "for an assault on Sajiwan" resulting in his death, and been sentenced to seven years' rigorous imprisonment.

It is evident on the record that a very serious breach of the peace took place on 17th January 1917, at the village Tarauni in the jurisdiction of the Dhandhaha Thana in the district of Purnea. The scene is laid on a piece of land measuring about 36 acres, which has the tenure of one Pandey Manjhi in the zamindari of Syed Azad Reza of Purnea. The history of this land discloses beyond the shadow of a doubt that it has been for some time a bone of contention between Ritbaran Singh, accused 1, on the one side, and Sajiwan, the deceased, Ram Nagina, Ram Jug and Dharam Deo on the other. Indeed it is the struggle for the possession of this land that has culminated in the disturbance of 17th January last.

The prosecution case is that Sajiwan had an eight-annas undivided share in the land with Ram Nagina, Ram Jug and Dharam Deo who were holding the remaining eight-annas. It is alleged that Ritbaran the principal accused, came to the land at the head of a large mob of 100 or 150 men armed with spears and lathis at about noon, when Sajiwan and his party were peacefully occupied in uprooting and harvesting their Tori (mustared) crop with the help of their labourers on the land in question. It is said that Ritbaran called upon Sajiwan and the labourers to desist from uprooting the crop, that Sajiwan refused to listen to them and that thereupon Ritbaran gave him a spear thrust in his abdominal regions causing a mortal injury to which he succumbed that night. It is also alleged that on intervention Ram Swarup, the brother of Sajiwan, and Ram Jug, the cosharer, were also severely assaulted. One Nawazi Tiara, labourer of Sajiwan Pandey, was also hit with a spear after he had run away from the field and reached Sukul Darga's house some distance from the place of occurrence. One Dukha, also a labourer, received a spear wound when he was running away from the field and was chased. It will

thus appear that not less than 5 persons, namely, Sajiwan, Ram Jug, Ram Swarup, Nawazi Tiar and Dukha were wounded on the side of the prosecution. Two men, namely, the accused Bhuti Singh and Bhabichand Singh also sustained injuries, but it is suggested that they did so by accident in the affray.

As the charges framed against the accused relate to the injuries on Saji-Ram Swarupand Ram Jug, it will not perhaps be necessary to enter into a detailed examination of circumstances under which the remaining four persons came by their injuries. Ritbaran Singh denies the title and possession of Sajiwan to the land, the subject-matter of dispute, and avers that he was de facto in possession of this land and he claims to have a good title thereto. He also denies his presence at the place of occurrence on 17th of January and his participation in the riot that took place on that occasion. The accused Jadu Singh, Jugeshwar Singh, Kunni Singh, Peare Dahiar, Garib Rai and Jailal Rai also deny their presence at the occurrence. The two accused Bhuti and Bhabichand Singh allege in their written statements that an unlawful assembly composed of Sajiwan and his supporters wanted to uproot the Tori crop forcibly and were opposed by the servants and ploughmen of Ritbaran Singh, in the course of which these two accused persons received their injuries. It would appear from the above that there was admittedly a fracas between the party of Sajiwan Pandey on the one hand and the party of Ritbaran Singh on the other on the lands forming the subject-matter of dispute on 17th January 1917, and that one of these was in possession of the land when the other tried to dispossess him.

The case went to trial before the learned Sessions Judge with seven counts, out of which the first, the second and the seventh can be sustained only if the assembly of Ritbaran Singh and his party is proved to have been unlawful. In other words, the common object of the assembly must be proved to come within the mischief of S. 141, Penal Code. The common object as set out in the charge was "to beat off the party of Sajiwan Pandey, Ram Jug Dubey, Dharamdeo Singh and others with their labourers from certain lands, loot the Tori crops harvested by them and take forcible and wrongful possession of the land." It is evident from the language of the charge that the common object of the assembly was to dispossess Sajiwan and his supporters of the land dispute from their alleged lawful possession and that the crowd headed by Ritbaran Singh came to carry out this object. As between the rival claimants the actual factum of possession becomes a vital question for determination. If Sajiwan Pandey was lawfully in possession then he and his supporters were in peaceful occupation of the land, and Ritbaran's assembly of a riotous mob must be held to have had an unlawful common object, viz., to wrongfully dispossess Sajiwan Pandey from the land in question. On the other hand if Sajiwan Pandey was a trespasser and his supporters, though cosharers of Ritbaran Singh, were actively abetting the trespass by Sajiwan Pandey and Ritbaran and his men in vindication of his right and title coupled with possession advanced to maintain Ritbaran's possession and oppose dispossession by Sajiwan Pandey and his supporters, then the common object of the assembly would not be unlawful. For this proposition there is ample authority which will be referred to later. On the question of fact as to whether Sajiwan Pandey or Ritbaran Singh was in possession of this land, it will be necessary to scrutinize the evidence on the record.

The prosecution has adduced oral and documentary evidence in support of its case. The oral evidence is directed to establish that Ritbaran Singh was never in possession of any portion of the land in dispute and that ever since Sajiwan's purchase of the land, which dates back to 10th November 1915, the latter has exclusively exercised acts of possession over it, and that even before the Sajiwan's vendor, one Shivanandan was in undisturbed possession of this land to the extent of eight annas from 9th April 1913, when he purchased an eight-annas tenure-holder's share in the same at an auction sale. The prosecution witnesses deny the possession of Ritbaran at any time on any portion of the tenure even prior to the auction sale. The accused Ritbaran has not given any evidence but relies on such evidence as has been brought on the record in the course of the trial by the prosecution and on the strength of which his Counsel urges possession of the land in dispute has been conclusively proved. (His Lordship discussed the evidence at great length and in the course of this discussion with regard to a statement made by a person alleged to have been an agent of the accused observed and proceeded to find as follows:) The learned Government Advocate has asked us to treat this

statement of Rangi as that of an agent binding his principal, the accused Ritbaran. The elementary rule is that before the admission of an agent can be received, the fact of his agency must be established. This is usally done by proving that the agent has acquired credit by acting in that capacity on former occasions and that he has been recognized by the principal in other instances of a similar character to that in question (Roscoe on Evidence). The only evidence on the record on this point that has been placed before us is that of Kamla Prasad, Head Constable. In his examination-in-chief he says—"Rangi Singh was Ritbaran Singh's servant." Nothing has been elicited from him to show how he came to know of the relationship of master and servant existing between Ritbaran and Rangi Singh. Evidently his acquaintance with Rangi Singh was of short duration. He says in cross examination: —"I saw Rangi Singh for the first time in December 1916. He went with Ritbaran to the Thana; he had no business of his own then." This man's evidence has been challenged in cross-examination and the entry (Ex. 23) containing the statement of Rangi Singh was put to him as having been concocted in collusion with Sajiwan Pandey. We find nothing in his re-examination to show the source of his knowledge regarding Rangi Singh being a servant of Ritbaran. In a criminal trial if it is intended to bind the master by the statement of servant, the relationship of master and servant must be strictly proved.

It is not sufficient to say that because a man accompanied another to the Thana the former is a servant of the latter. Then again, there is no evidence that Rangi Singh had any authority from Ritbaran Singh to make the statement he did, nor is there anything on the record that there were any other instances of a similar character to that before us when there was recognition by the principal. As regards Ex. 33, the document does not bear anybody's signature as mentioned before, nor is it proved to have been in the handwriting of the accused Ritbaran. The learned Counsel on behalf of the accused Ritbaran has repudiated Exs. 32 and 33. The learned Sessions Judge has relied on these documents. For the reason given above, we do not consider they have been properly admitted, but even if they be considered as evidence in the case there is little doubt that up to 9th January 1917 the Tori crop was claimed by Ritbaran to have been his. It has been suggested on behalf of the prosecution that Exs. 32 and 33 go to show that on 9th of January 1917 Ritbaran had been dispossessed, because Ram Swarup and his men had uprooted and removed a portion of the crop growing on the lands. We are unable to take that view, for the removal of a part of a crop by trespassers cannot be held to be dispossession of the right and lawful owner who had possession of the rest of the crop grown by him and standing on the land. There seems to have been no action taken by the Police after Ex. 32 was recorded. We do not consider that this inaction was justifiable, when information was laid of the facts of an unlawful assembly being in existence whose members were uprooting and taking away the crop not grown by them from land not in their possession to the extent of an eight annas share. The next document to be referred to is Ex. 5, which purports to be an entry in the station diary of Dhandhaha Thana on 15th January 1917, and the entry is in the form of a note of Ram Nagina Dubey's information of an apprehansion of a breach of the peace. It runs as follows:— "Ram Nagina Dubey, a resident of Tarauni, came to the Thana and reported that a land dispute exists between him and Ritbaran Singh of the same village for two or three years; Sanphul Singh, Jadu Singh, Garib Rai, Bhabichand Singh and others of Chandwa village are coming to the land to put Ritbaran in possession of it, and they are threatening to cause loot, to assault us and to set fire to houses when the opportunity comes. I report this for the future.

The information has therefore been entered in the diary." This information of Ram Nagina Dubey makes no mention of Sajiwan Pandey and formulates as a case a land dispute existing between him and Ritbaran Singh for two or three years. The whole history of the case does not show that there has been any question between Ritbaran on one side and Ram Nagina with his cosharers and Ram Jug and Dharamdeo on the other. The last three men are admitted by the defence to be the representatives of Brijpal and their share of eight annas of the tenure has never been questioned. It is therefore of no assistance to the prosecution on the question of the alleged possession of the eight annas of the tenure by Sajiwan Pandey. After a very careful consideration of the oral and documentary evidence on record relative to the posses-

sion of this eight annas share of the tenure in dispute between Ritbaran Singh and Sajiwan Pandey, we are forced to the conclusion that ever since Ritbaran was put in possession by Shivnandan Sahu, who was a benami purchaser for him at the auction-sale, the accused Ritbaran continued in possession and that his possession has never since been disturbed and that the efforts of Sajiwan Pandey and his supporters to oust Ritbaran were infructuous, and that on 17th January 1917, when this serious breach of the peace took place and Sajiwan Pandey was mortally wounded, Ritbaran was in actual possession of the tenure in respect of his eight annas share. Our finding therefore is that dispossession of Sajiwan Pandey and his supporters was not the object of the supporters of Ritbaran on the day of occurrence. On the contrary we find that their presence and such violence as they committed was due to and with the object of resisting the dispossession of Ritbaran, who was in actual and existing occupation and enjoyment of his share of the tenure.

In view of this finding the question that arises for consideration is how far the charge under Ss. 147, 148 and 149, framed by the learned Judge can be sustained against the accused. The common object as set out in the charge has three component parts in it, namely, first, to beat off the party of Sajiwan Pandey, Ram Jug Dubey, Dharamdeo Singh and others from certain lands; second, to loot the Tori crops under harvest by them, and third to take forcible and wrongful possession of the lands. If Ritbaran Singh was in possession and not Sajiwan Pandey, as we have found, the object of the assembly must be held to have been resistance against dispossession of Ritbaran and each of the three component parts set out in the charges must fail, for every one of them as an illegal act rests on the assumption that Sajiwan Pandey and his supporters were in possession, which we are unable to hold.

The question then is whether the conviction of the appellants for rioting can stand in the light of the above finding. To sustain a conviction in a case of unlawful assembly the rule is that the common object stated in the charge must agree in essential particulars with the common object established on the evidence. As we find the accused Ritbaran was in possession of the land and not Sajiwan Pandey, we are forced to the conclusion that the common object stated in the charge has not been substantially established [*Pachkauri* v. *Queen-Empress* (1), *Poresh Nath Sircar* v. *Emperor* (2), *Silajit Mahoto* v. *Emperor* (3) and *Fateh Singh* v. *Emperor* (4)]. In the circumstances charges Nos. 1, 2 and 7 must fail and the conviction and sentence of all the accused thereunder must necessarily be set aside.

Having regard to our opinion on the first portion of this case, the further consideration of the facts must be confined to the question of direct and individual culpability as distinguished from constructive guilt. Before proceeding to deal with this question in detail we desire to consider a suggestion that was put forward by the learned Government Advocate. He asks us to apply S. 34, I. P. C., to the facts of this case. We have examined the question from his point of view, but on the facts and circumstances of the case we are unable to agree with the suggestion put forward by the learned Government Advocate. The language of S. 34 is far more restrictive than that of S. 149, and the Legislature clearly intended to narrow down the scope of S. 34. To establish guilt under that section, it is necessary to prove a common intention and it must be shown that the criminal act was committed in furtherance of that intention. On the evidence it is difficult to hold that among the assailants of Sajiwan there was a common intention to kill him, or cause grievous hurt to him: so also as regards the assailants of Ram Swarup and Ram Jug. On the evidence there can be no doubt that there was use of force generally and promiscuous blows were given. This negatives the theory that the assault on any particular man was induced and carried out by a preconcerted design to deal with him in a particular way. For the application of S. 34 it must be shown that there was a common intention as distinguished from a common object. The rulings quoted by the learned Judge for constructive guilt reported as *Emperor* v. *Ram Newaz* (5), *Hanuman* v. *Emperor* (6) and *Gouridas Namasudra* v. *Emperor* (7) are distinguishable and the facts and circumstances to which they apply are different from those of the present case. We are therefore of opinion that the case before us is not one which

(1) [1897] 24 Cal 686.
(2) [1906] 33 Cal 295.
(3) [1909] 36 Cal 865=4 I C 19.
(4) A I R 1914 Cal 286=20 I C 140=41 Cal 43.
(5) [1913] 35 All 506=21 I C 663.
(6) [1913] 35 All 560=21 I C 1005.
(7) [1909] 36 Cal 659=2 I C 841.

falls within the meaning of S. 34, Penal Code.

We now proceed to deal with the case of each individual accused and start with the case of the principal accused Ritbaran Singh who has been convicted under S. 302, I. P. C., and sentenced to death. In order to do this it is necessary to state what the prosecution case is against this accused. He is said to have organised the riot on the 17th January; to have come to the place of occurrence armed with a spear at the head of a mob, to have ordered the assault and to have given the fatal blow to Sajiwan Pandey. (His Lordship then proceeded to discuss the evidence regarding the presence and participation of Ritbaran Singh in the raiyat and proceeded:)—All that the above witnesses prove is that on Wednesday morning they saw four carts crossing the ghat at Kuari with men and Ritbaran was amongst them. Ali these witnesses were found by Gora Chand Das, Sub-Inspector, on the 28th or the 29th of January. Kauri Ghat is a much frequented ferry and the evidence of these witnesses does not prove more than Ritbaran having been found crossing the ghat in company of some of the accused and others on the morning of Wednesday. There is no doubt some evidence of preparation, but it cannot be taken as a proof of the presence of this accused at the occurrence.

There is one more point that must be considered relative to the question of Ritbaran's presence at the occurrence and his inflicting the fatal injury on Sajiwan Pandey. The learned Government Advocate has drawn our attention to the conduct of the accused Ritbaran at the time of his arrest and has asked us to draw from it an inference of his guilt. It appears from the evidence of Jang Bahadur, dafadar, that on some information received by him he discovered Ritbaran and put some questions to him. The accused then gave him a false name and a false residence, on which the dafadar arrested him. There can be no question that the conduct of the accused in giving a false name and a false residence indicates his desire to evade arrest by the Police. The learned Government Advocate argues that this conduct on the part of Ritbaran is evidence of his guilty mind. On the other hand the defence urges upon us the consideration that the motive in giving a false name and residence might be the desire to escape harassment at the hands of the Police. It is impossible for us on the evidence to say what the motive was but the evasion of arrest by itself may give ground for suspicion and may be regarded as some evidence of guilty intent, but that alone is not sufficient and conclusive in the absence of reliable evidence for the purpose of conviction. Such conduct is not a part of the res gestae of the criminal act with which the accused is charged. We may mention that in appreciating the evidence adduced on behalf of the prosecution with reference to the accused Ritbaran we have not overlooked the value of the evidence of conduct as to preparation and as to evasion of arrest.

On a very careful consideration of the whole body of evidence produced on behalf of the prosecution with reference to the presence of the accused Ritbaran Singh at the occurrence and his inflicting the fatal injury, we are unable to hold that there is satisfactory and reliable evidence on the record to establish his presence at the place of occurrence and that he took part in the assult on Sajiwan Pandey, Ram Jug Dubey, Ram Swarup Dubey or any of their companions. We feel no doubt in our mind that Ritbaran Singh organised the breach of the peace that took place at Tarauni on 17th January and that the disturbance was in his interest; at the same time we equally feel no hesitation in holding that he kept away from the fight and left it to his relations and friends to resist the carrying away of his crops by Sajiwan Pandey and his supporters.

On the evidence we hold that the omission to mention accused Ritbaran's name as a member of the mob by Banwari at the Thana and by Ram Jug and Nawazi before the Sub-Divisional Officer, Mr. Sarkar, was due to the fact that the man was not at the place of occurrence, and that probably the private prosecutors did not implicate him at those stages for fear of his being able to prove a successful alibi, but that when it was discovered by Ram Nagina on the night following the occurrence that Ritbaran could not produce any such alibi he and Ram Swarup were tempted to introduce his name and did so in their statements Exs. 4 and 1 before Mr. Sarkar, which we hold was an invention. The general evidence of the assault by and the presence of Ritbaran is untrustworthy, unreliable and not by any means sufficient to justify his conviction. We hold that the opinion of assessors in this case that Ritbaran was not present at the time of occurrence is correct upon a proper appreciation of the evidence.

We therefore set aside the conviction of Ritbaran Singh under Ss 147, 148 and 302, I. P. C., and consequently we also set aside the sentence of death passed upon him by the learned Judge and direct his release. We have held above the conviction of rioting under S. 147, I. P. C., cannot be sustained because of the failure to substantiate in material particulars the common object of the assembly as set out in the charge sheet, and therefore we set aside the conviction and sentence passed upon Kunni Singh and Peare Dahiar by the learned Sessions Judge under that section of the Indian Penal Code, and we accordingly order their release. For the same reasons the conviction of the remaining accused Jadu Singh, Garib Rai, Bhuti Singh, Jugeshwar Singh, Bhabichand Singh and Jailal under S. 147, I. P. C., must also fail, and we set the same accordingly aside. But with reference to the other charges against them the case stands on quite a different footing. We will take the case of these accused separately with reference to these charges. (His Lordship then discussed the case of each accused as to the individual acts against them and convicted and sentenced them for such acts where proved by evidence, and proceeded:) Mr. Hasan Imam in the course of this able argument made a very grave attack on the attitude and conduct of the District Superintendent Feilman as to the manner and the method in which he gave his evidence before the Sessions Judge. We think the attack made on Mr. Feilman was unwarranted by the facts and we fail to see any ground for the suggestion that he acted otherwise than in accordance with his duty, and that fairly and honestly. No doubt in Mr. Feilman's evidence as recorded certain illegalities appear as to certain facts which were brought out in evidence and which were not in point of law admissible in evidence against the accused. But Mr. Feilman was not responsible for these irregularities. The fault was certainly due to the manner and the method adopted by the legal gentlemen representing the Crown in the lower Court as to the examination of these witnesses; and the form in which questions were allowed to be put to him was illegal and wrong.

The examination by Mr. Feilman in chief bristles with irrelevancies and the admission of facts in evidence which were inadmissible. But the learned Judge should have controlled the examination-in-chief and required only legal questions to be put in a legal way. However Mr. Feilman does not deserve censure or blame for what, after all, is not his fault. The line adopted by the Crown Prosecutor in his examination-in chief of Mr. Feilman leaves much to be desired in the interests of justice, showing disregard of the requirements of law. The learned Sessions Judge, we think, should have required the prosecution to adopt a more correct and proper attitude in the examination of witnesses generally and Mr. Feilman in particular and having said this, we think that the learned Sessions Judge will on future occasions act with prudence and take care to see that the evidence is legally adduced and legally given.

V.S./R.K. *Orders modified.*

A. I. R. 1918 Patna 152

JWALA PRASAD, J.

Jewraj Ramji Das—Petitioner.

v.

Dullavji Howji—Accused—Opposite Party.

Criminal Revn. No. 353 of 1917, Decided on 21st November 1917, against order of Magt., Dhanbad.

Criminal P. C. (1898), S. 528—Trial under Ss. 500 and 504, I. P. C.—District Magistrate on being moved transferring case to his own file on ground that no offence under S. 500 was made out and offences under S. 504 being summarily triable much delay was caused—District Magistrate could not decide what offence was made out—Delay is no ground for transfer—Order was set aside in revision.

Accused was being tried before a Subordinate Magistrate for offences under Ss. 500 and 504, I. P. C. On an application under S. 528, Criminal P. C., the District Magistrate transferred the case to his own file on the grounds that no offence under S. 500 was disclosed, that the offence under S. 504 was triable summarily and that the trial before the Subordinate Magistrate had already become protracted:

Held: (1) that it was for the Subordinate Magistrate to determine whether a case under S. 500 or S. 504, I. P. C. was made out, and that the District Magistrate was not at that stage competent to decide whether an offence under S. 500 was or was not committed; (2) that delay in disposing of the case could not be a ground for taking action under S. 528, and that if the District Magistrate thought there was delay he should have asked the Subordinate Magistrate to expedite the trial; (3) that the order of the District Magistrate was bad and must be set aside. [P 154 C 1]

Hasan Imam and *G. C. Pal*—for Petitioner.

Panchanan Banerji—for Opposite Party.

Judgment.—The petitioner filed a complaint before the Magistrate of Dhanbad against the accused-opposite

party for offences under Ss. 500 and 504 mentioned in column 6 of the petition. This petition was filed on 17th May 1917. The complainant was examined on oath under S. 200, Criminal P. C., and was called upon to prove his case under S. 202. On 1st June 1917 after the petitioner examined his witnesses, the Magistrate summoned the opposite party accused under S. 500, I. P .C. The accused was allowed to appear by a Mukhtear as he applied for exemption from personal appearance on the ground that he was ill. On 31st July 1917 the case was transferred to the file of Mr S. N. Sen, Deputy Magistrate at Dhanbad, for disposal. On that date the witnesses for the prosecution were examined and the case was adjourned for further hearing to 17th August, and the accused was called upon to appear personally on that date, as the Magistrate wanted to examine him personally. This was within the power of the Magistrate to do under S. 205, cl. (2), and he had a right to examine the accused instead of allowing him to be examined by a proxy or representative. On 17th August the accused did not appear and a warrant was ordered to be issued against him to enforce his attendance. Annoyed by this order of the Magistrate the accused moved the District Magistrate of Dhanbad to transfer the case from the file of Mr. S. N. Sen to some other Magistrate, on the ground that the accused apprehended bias in the mind of the Magistrate for the reason that he had directed a warrant to be issued to enforce his attendance. The District Magistrate held that the ground for transfer urged by the accused was not made out.

Upon that finding the District Magistrate should have rejected the application of the accused to transfer the case. The District Magistrate however transferred the case to his own file on the ground that the case was of a petty nature and that an offence under S. 500, I. P. C., was not made out, but one under S. 504, I. P. C., only which was triable summarily, and that under S. 260, Criminal P. C., there was no other Magistrate vested with summary powers to try the case. The District Magistrate was impelled to remove the case from the file of Mr. S. N. Sen by the reason, as he says, that a case of such a petty nature should not have dragged on for so long a time as three months. I think that the order of the District Magistrate cannot be supported. The case was before the Deputy Magistrate and as the witnesses for the prosecution were examined, it was for him to determine whether a case under S. 500 or 504, I. P. C., was made out. The District Magistrate was not competent at that stage to decide whether an offence under S. 500 was or was not committed. Apart from the fact that the accusation against the accused was distinctly mentioned in the petition of complaint to be one under S. 500 along with S. 504, the Magistrate who took cognizance of the offence summoned the accused after taking into consideration not only the complaint petition and the examination of the complainant on oath, but also upon the statement of the witnesses that were examined before him when the complainant was called upon to prove his case. The learned counsel on behalf of the accused opposite party has cited to me an authority in the case of *Fanindra Nath Chatterji* v. *Emperor* (1). In that case the accused were summoned under Ss. 186 and 504, I. P. C., and they were put upon their trial under the ordinary procedure for trial prescribed in the Code of Criminal Procedure. At a later stage of the enquiry the complainant omitted all reference to criminal intimidation on the basis of which the accused was summoned under S. 504. The trying Magistrate dropped S. 504 and proceeded to try the case summarily under S. 506 from that stage. It was held that the procedure adopted by the Magistrate was not objectionable.

The case before us is different from that in *Fanindra Nath Chatterji* v. *Emperor* (1). In the present case the trying Magistrate who heard the witnesses has not come to any conclusion as regards the offence under S. 500 under which the accused was summoned, nor the complainant in his evidence drops the facts constituting an offence under that section. Even if the authority in *Fanindra Nath Chatterji* v. *Emperor* (1) be accepted and applied, I do not think it was for the District Magistrate to take away the jurisdiction of the trying Magistrate to complete the trial. I am supported in this view by the authority in the case of *Gopinath Patnaik* v. *Narain Das Banerjee* (2). The facts of that case very approximately appear to be similar to the present case. The District Magistrate in that case transferred the case to his own file, upon the ground that no offence was made out against the

(1) [1909] 36 Cal 67=1 I C 519.
(2) [1903] 30 Cal 693.

Police Officers who were on their trial for house-trespass and that no charge could be framed against the accused in that case, on the ground that the accused were protected by their warrants. It was held that the case ought to have been left to the Deputy Magistrate to be disposed of and that it would have been for that Magistrate who was trying the case to determine whether the offence charged was made out, or whether, assuming the facts to be true, the Police were protected by their warrants under which they purported to act. In the present case, I think upon the principle of the ruling quoted above, the matter should have been left to the Deputy Magistrate to decide whether an offence under S. 500 was made out or not.

I am not at all impressed with the view of the District Magistrate that there was any inordinate delay in the case, namely, of three months. I have looked at the order-sheet in the case and find that the delay, if any, was caused by the accused himself. The accused was ordered to be summoned on 1st June and the case was made over to the Magistrate on 31st July, and on that very day the witnesses were examined. On 17th August the accused did not appear and the delay was caused by him in the disposal of the case. However that is not a ground upon which I would transfer the case from the file of the trying Magistrate to another Magistrate, or would recommend that the District Magistrate should take up the case to his own file because, as he says, the Magistrate subordinate to him did not dispose of the case quickly. If that was so, the District Magistrate could ask him to expedite the disposal of cases. But that is not at all a valid ground as contemplated in S.528 to give rise to a judicial exercise of discretion to transfer the case from the file of a Subordinate Magistrate to his own file. I would therefore set aside the order of transfer passed by the District Magistrate and restore the case to the file of the Deputy Magistrate who heard the case. I was called upon by the accused to determine that an offence under S. 500 was not made out. I refrain from doing so. It will be for the trying Magistrate to decide that, and besides it would be premature and injudicious to give any expression of opinion by this Court; and I think that the expression of opinion by the District Magistrate on the point was also uncalled for at that stage.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 154

ALI IMAM, J.

Dhuri Patak—Plaintiff—Appellant.

v.

Timal Singh and *others*—Defendants—Respondents.

Second Appeal No. 735 of 1917, Decided on 17th April 1918, from decision of Sub-Judge, Chapra, D/- 29th March 1917.

Civil P. C. (1908), O. 34, R. 1—Redemption suit—Claim withdrawn against one of mortgagees—Suit should be dismissed for non-joinder of necessary parties.

Where in a redemption suit the plaintiff withdraws his claim as against one of the mortgagees, the suit should be dismissed for non-joinder of necessary parties. [P 154 C 2, P 155 C 1]

Parmeshwar Dayal—for Appellant.

B. N. Mitter—for Respondents.

Judgment.—The plaintiff instituted this suit for the redemption of a holding measuring 1 bigha 2 cottas 17 dhurs of land that was originally the holding of one Bhikari Kuarmi, who had admittedly mortgaged it to defendants 1 and 2 and also to one Jagdish Singh, who was a defendant in the suit but against whom the plaintiff did not proceed having withdrawn his suit against him. The Munsif decreed the suit but the Subordinate Judge reversed the decision of the Munsif and has dismissed the suit. This appeal is from the decision of the learned Subordinate Judge.

It appears that there had been a previous suit for declaration of title and recovery of possession between the plaintiff and the defendants 1 and 2 and also Jagdish in respect of the land in suit. The Munsif relied on the decision given in that case and held that the title of the plaintiff to the holding in question was declared in the previous suit and that the decision of that case operated as res judicate in the present one on the question of the plaintiff's title. The learned Subordinate Judge on the other hand in his judgment has made no reference to the decision in the previous case, nor has he dealt with the question of res judicata taken up in the judgment of the Munsif. He has rested his decision on the question of title on the point that the plaintiff had not acquired the equity of redemption in respect of this holding, because there was no such transfer to him by a registered instrument. The appeal however is concluded on the question of the defect of parties. Under O. 34, R. 1, it was incumbent on the plaintiff to implead Jagdish in this case, but it appears that he withdrew his suit against Jagdish. This is not permissible to him

and the lower appellate Court was right in holding that the Munsif was wrong in passing a decree for redemption in the absence of defendant 3. This aspect of the case should have been sufficient for the lower appellate Court to have given his decision in reversing the judgment and decree of the Munsif. I agree with the lower appellate Court in the view that the absence of Jagdish from the present case is a sufficient defect to set aside the judgment and the decree given by the Munsif. The point is concluded by a decision of this Court reported as *Girwar Narain Mahton* v. *Mt. Makbulunnissa* (1). The appeal is therefore dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(1) [1917] 1 Pat L J 468=36 I C 542.

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* *A. I. R. 1918 Patna 155

Full Bench

DAWSON-MILLER, C. J., CHAPMAN, MULLICK, ROE AND ATKINSON, JJ.

Parmeshwar Ahir—Petitioner.

v.

Emperor—Opposite Party.

Original Misc. Case No. 1 of 1918, Decided on 4th February 1918.

*** * (a) Councils Act (1861), S. 22—Governor-General in Council can create new tribunals contemplated in Defence of India (Criminal Law Amendment) Act (1915), S. 4—High Courts Act (1861), S. 9.**

Section 22, Councils Act, 1861, read with S. 9, High Courts Act, 1861, is in terms amply wide to give the Governor-General of India in Council power to create new tribunals such as those contemplated in S. 4 of the Defence of India (Criminal Law Amendment) Act, 1915: 4 *Cal.* 172 (*P. C.*), *Foll.* [P 162 C 1]

Per *Chapman, J.*—A Court cannot be constituted otherwise than in the name of the Sovereign, and before it can be held that the Indian Legislature can create a Court it must be clear beyond doubt that the power to create a Court has been properly delegated. [P 162 C 2; P 163 C 1, 2]

*** * (b) Councils Act (1861), S. 22—Enactment of Indian Legislature outside scope of powers conferred—High Court can in proper proceeding declare such enactment ultra vires and of no force.**

If an enactment of the Indian Legislature is outside the scope of the powers conferred upon the Governor-General in Council by Act of Parliament, the High Court has power in a proper proceeding to declare such an enactment ultra vires and of no force and effect, with all the consequences that may result therefrom. [P 157 C 1]

Per *Chapman, J.*—The power conferred on the Governor-General in Council by S. 22 included the power to make laws and regulations for all persons and all Courts of justice whatever and for all places and things whatever. This delegation of plenary power was designed for the benefit of public interests of the greatest magnitude and whatever may fairly be regarded as incidental to or consequential to the main purpose ought not, unless judicially prohibited, to be held by judicial construction to be ultra vires. [P 163 C 1, 2]

P. R. Das, *A. Sen* and *S. M. Mullick*—for Petitioner.

T. C. Gubbins—for the Crown.

Dawson-Miller, C. J.—This matter comes before us on the application of one Parmeshwar Ahir, an Indian subject of His Majesty, praying that a writ of habeas corpus may issue to the jailor of Buxar Jail, where he is now imprisoned, to produce him before this Court with a view to enquire into the legality of his detention.

The application came originally before a single Judge of this Court and as the case involved questions of constitutional importance affecting the legislative powers of the Governor-General of India in Council, he ordered that notice should issue in the first instance to shew cause why a writ of habeas corpus should not issue on the Jailor of Buxar Jail to produce the body of Parmeshwar Ahir with a view to consider whether or not his conviction was valid, and it was directed that the notice should be served on the Crown. By this procedure the Government of India was given an opportunity of appearing by Counsel and the matter was referred to a Full Bench.

The facts of the case which were not in dispute appear from the petition and from documentary evidence put in on behalf of the Government of India, who instructed the Advocate-General to appear at the hearing to shew cause against the rule. The petitioner was arrested in connexion with what are known as the Bakr-Id riots, which occurred in different parts of this province in the months of September and October last resulting in considerable loss of life, personal injury and destruction of property. He was tried and convicted of dacoity, rioting and offences under S. 295, I. P. C., and sentenced to five years' rigorous imprisonment. The legality of the whole proceedings, which terminated in the conviction and imprisonment of the petitioner, is called in question on the ground that the tribunal which tried the case had no jurisdiction to act. The tribunal in question consisted of three Commissioners specially appointed by the Local Government of Bihar and Orissa under powers granted by the Defence of India (Criminal Law Amendment) Act, 1915 (Act 4 of 1915), for the trial of persons under the said Act in the District of Shahabad. It is not disputed that the tribunal was propely constituted in accordance with

the provisions of the Defence of India Act and it is not necessary to refer to the rules and notifications contained in the copies of the Gazette which have been handed in and which shew that the proper formalities were complied with, but it is contended that the Act itself in so far as it granted the powers mentioned is ultra vires the Imperial Council, on the ground that it was beyond the power of the Governor-General in Council to constitute a Court of justice or to authorise any other person to constitute such a Court.

The Defence of India Act as the preamble shews is in the nature of emergency legislation passed owing to the existing state of war and is entitled: "An Act to provide for special measures to secure the public safety and the defence of British India and for the more speedy trial of certain offences." It is a temporary measure only and by S. 1 (4) its operation is to cease six months after the termination of the war. It received the assent of the Governor-General on the 19th March 1915 and Ss. 1 and 2 came into immediate operation. The rest of the Act was to come into operation in any province or part thereof by notification in the Gazette of India by the Governor-General in Council. By S. 2 (1): "The Governor-General in Council may make rules for the purpose of securing the public safety and the defence of British India and as to the powers and duties of public servants and other persons in furtherance of that purpose." Then follow certain particular purposes for which rules may be made without prejudice to the generality of the foregoing power. These relate to precautions necessitated directly by reason of the war and are not material in the present case. The rest of S. 2 limits the punishment to be imposed by the rules for contravention of any order issued under the authority of the same, and provides for publication of the rules in the Gazette of India whereupon they shall have effect as if enacted in the Act. By S. 3 (1)—"The Local Government may by order in writing direct that any person accused of anything which is an offence in virtue of any rule made under S. 2, or accused of any offence punishable with death, transportation or imprisonment for a term which may extend to seven years, or of criminal conspiracy to commit, or of abetting, or of attempting to commit or abet any such offence, shall be tried by Commissioners appointed under this Act." By S. 3 (2) orders under sub-S. (1) may be made in respect of all persons or any class of persons accused of any offence or any class of offences referred to in that sub-section. By S. 4 all trials under the Act shall be held by three Commissioners of whom two at least must have certain legal qualifications and such Commissioners are to be appointed by the Local Government for the whole or any part of the province or for the trial of particular persons or classes of persons.

Sections 5, 7 and 9 provide that the existing procedure in criminal cases and the rules of the evidence shall in certain respects be modified for the purposes of trials under the Act, and S. 6 provides that any sentence authorised by law may be imposed and the judgment of the Commissioners shall be final and conclusive and no order of confirmation shall be necessary. S. 10 gives the Local Government power by notification in the local official Gazette to make rules regulating the procedure to be adopted at the trials by the Commissioners and the execution of sentences passed by them. Ss. 8 and 11 are important. They are as follows: "8. (1) Notwithstanding the provisions of the Code of Criminal Procedure, 1898, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of Commissioners appointed under this Act and no Court shall have authority to revise any such order or sentence or to transfer any case from such Commissioners, or to make any order under S. 49, Criminal P. C., 1898, or have any jurisdiction of any kind in respect of any proceedings under this Act. "(2) Nothing in sub-S. (1) shall be deemed to affect the power of the Governor-General in Council or the Local Government to make orders under S. 401 or 402, Criminal P. C., 1898, in respect of persons sentenced by Commissioners under this Act." "11. No order under this Act shall be called in question in any Court and no suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act."

It should be observed that the Act is designed not only to carry into effect the precautions enumerated in para. 2, S. 2 (1), which may be regarded as precautions directly necessitated by reason of a state of war, but also to provide special measures for dealing speedily with offences affecting the public safety,

which though not directly arising through a state of war are particularly undesirable in times of great stress and emergency. We are not concerned however with the wisdom of the policy underlying the enactment in question. If the Act itself is outside the scope of the powers conferred upon the Governor-General in Council by Act of Parliament, I conceive that this Court has power in a proper proceeding to declare such an enactment ultra vires and of no force and effect with all the consequences that may result therefrom.

When the Defence of India Act was passed the Government of India Act, 1915 (5 and 6 Geo. 5, C. 61), which consolidated and re-enacted existing Statutes relating to the Government of India and the functions of the High Courts, had not come into operation. It is therefore necessary to consider the Defence of India Act in the light of the powers conferred upon the Governor-General in Council by earlier Statutes and in particular the Indian Councils Act, 1861, 24 and 25 Vict. C. 67) and the Indian High Courts Act passed in the same year (24 and 25 Vict. C. 104). Before doing so it would be convenient to deal shortly with the learned and elaborate argument of Mr. Das on behalf of the petitioner in which he surveyed the whole history of the powers conferred upon or exercised by the East India Company from its earliest infancy when a Charter was granted by Queen Elizabeth in the year 1600 to certain merchants trading in the East Indies. It is sufficient for our purpose to say that the Company, under whatever name it was from time to time called, in the course of its development gradually acquired by successive charters certain legislative and administrative powers and certain rights and prerogatives appertaining to the sovereign which they at first exercised in delegation of the powers so granted. Having established themselves in territories extending from Madras northwards into Bengal, Bihar and Orissa, and other parts of India, the Company undoubtedly in exercise of powers conferred or assumed not only made their own laws but also constituted Courts for the administration of the laws which they sought to enforce. Whether this was done by virtue of the prerogative of the British sovereign or whether after the Dewani was obtained by Lord Clive from Shah Alum in 1765, it was done by virtue of the sovereign rights of the Moghul Emperor, or whether it was done by reason of an assumed power devoid of legal sanction, does not appear to me to be of vital consequence in the view I take of this case.

Mr. Das's argument on behalf of the petitioner however was largely directed to the point that the powers of the Company to establish Courts were derived either from the sovereign powers of the Moghul Emperor or in virtue of the prerogative of the Crown up to the period between 1858 and 1861 when by the enactments passed in those years, he contends, those powers ceased to exist in the Govenment of India and were transferred to the Crown in Parliament. The question we must consider is whether the power which was undoubtedly exercised before 1858 was continued in the Governor-General in Council after 1861 by the enactments of that year, and for this purpose a short survey of the earlier legislation becomes necessary in order to see how far Parliament has recognized that power either expressly or by implication and whether, if it was so recognized, there is anything to indicate that a different policy was intended to be followed by the two enactments of 1861. It was not until the so-called Regulation Act of 1773 (13 Geo. 3, C. 63) and the Charter of George 3 establishing the Supreme Court in the following year came into force, that the executive and legislative powers of the Company then exercised by the Governor-General in Council, came to be questioned. The acute conflict which then arose between the Governor-General in Council on the one hand and the Supreme Court on the other led to the passing of the East India Company Act of 1781 (21 Geo. 3, C. 70). That enactment provided that the Governor-General in Council should not be subject jointly or severally to the jurisdiction of the Supreme Court when acting in their public capacity and that persons impleaded in the Supreme Court for acts done by written order of the Governor-General in Council might plead the general issue and proof of such order should amount to a complete justification of such acts except in cases affecting the rights of British subjects over which the jurisdiction of the Supreme Court was recognized. All matters concerning the revenue were also declared beyond the jurisdiction of the Supreme Court. The conflict although not so acute continued thereafter to some extent until 1858, when the territories and Government of India were transferred to and exercised in the name of the Crown. In the mean-

time however new Courts were established by the Company in the conquered or ceded territories. In 1793 (33 Geo. 3, C. 52) "the whole Civil and Military Government of the Presidency of Fort William in Bengal and also the ordering, management and Government of all the territorial acquisitions and revenues of the Kingdoms and Provinces of Bengal, Bihar and Orissa were vested in the Governor-General in Council subject to the restrictions of unrepealed enactments and the control of the Board of Directors in matters relating to the declaration of war and treaties guaranteeing possessions."

In 1833 the Government of India Act of that year (3 & 4 William 4, C. 85) was passed. It provided that the Government of the British territories in India should remain the Company until 1854 (subsequently continued by an Act of 1853 "until Parliament shall otherwise provide") and that all the real and personal property of the Company should be held in trust for the Crown for the service of India. S. 39 vested the Government in the Governor-General in Council and S. 45 provided that all laws and regulations made by the Governor-General in Council should be of the same force and effect throughout the Indian territories as any Act of Parliament and "shall be taken notice of by all Courts of justice whatsoever within the same territories in the same manner as any public Act of Parliament would and ought to be taken notice of." S. 46 provided that it should not be lawful for the Governor-General in Council without the sanction of the Court of Directors to make any law or regulation which should empower any Courts of justice other than those established by Royal Charter to sentence to death any of His Majesty's natural born subjects born in Europe or their children or which should abolish any of the Courts established by Royal Charter. S. 51 expressly reserved the right of Parliament to legislate for India and provided that the laws and regulations made by the Governor-General in Council should be transmitted to England and laid before both Houses of Parliament "the better to enable Parliament to exercise at all times such right and power."

No other Act of importance was passed until 1858, but it should be observed that although the enactments of the Indian Council were from 1833 brought directly under the notice and control of Parliament, no question seems to have been raised therein as to the powers of the former body to constitute, as they did, new Courts or to interfere with the jurisdiction of existing Courts. Indeed it is conceded by Mr. Das that the power of the Indian Legislature to interfere with the jurisdiction of any existing Court cannot be contested and in view of the ruling of the Judicial Committee in the case of *Empress* v. *Burah* (1), it is difficult to see how such a contention could be urged with any hope of success even by Counsel of Mr. Das's undoubted courage and ability. He does contend however that there is no power in the Governor-General in Council to constitute a new Court. The power of destruction except as expressly limited by the Act of 1861 is conceded, the power of construction is denied. It is not necessary to refer in detail to the Government of India Act, 1858 (21 & 22 Vict. C. 106). It marked the end of the activities of the old East India Company, although the Company was not formally dissolved until 1874, and it is directed that henceforward India should be governed by and in the name of Her Majesty. The Secretary of State for India was clothed with the powers formerly exercised by the Company or the Court of Directors or Court of Proprietors. A new Council was to be established which together with and under the direction of the Secretary of State was to form the Secretary of State in Council and conduct the business transacted in the United Kingdom in relation to the Government of India in place of the old Court of Directors and Court of Proprietors. The Council in India was to remain under the style of the Council of the Governor-General in India and all existing establishments and all laws and provisions then in force were to continue subject to the provisions of the Act pending further changes. The next few years were pregnant with legislation relating to India and in 1861 the Indian Councils Act and the Indian High Courts Act were passed.

By S. 22 of the former Act the Governor-General in Council was given power, subject to the provisions of the Act, to make laws and regulations "for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now [or hereafter (see 55 & 56 Vic., C. 14, S. 3)] under the dominion of Her Majesty and to make laws and regulations for all persons

(1) [1879] 4 Cal 172=5 I A 178 (P C).

whether British or native foreigners or others and for all Courts of justice whatever and for all places and things whatever within the said territories." Certain restrictions on the wide powers given above are set out in the section. Those material to the present case are that the said laws and regulations shall not repeal or in any way affect any of the provisions of this Act or the unrepealed sections of the Acts of 1833, 1853 and 1854, or any of the provisions of the Acts of 1858 and 1859 "or any provisions of any Act passed in this present session of Parliament or hereafter to be passed in any wise affecting Her Majesty's Indian territories or the inhabitants thereof: or which may affect the authority of Parliament or the constitution and rights of the East India Company or any part of the unwritten laws of the constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the Crown over any part of the said territories.' By the Indian High Courts Act, 1861, the Supreme Court and the Sudder Courts were established and by S. 9 the jurisdiction of the High Courts to be established thereunder is defined. Such jurisdiction was twofold: (1) that which should be expressly granted by Letters Patent, and (2) save as otherwise directed by the Letters Patent "and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council" such jurisdiction as was exercised in the same presidency by any of the Courts abolished under the Act.

The Letters Patent dated the 9th February 1916, under which the High Court at Patna was constituted, provided by Cl. 41 as follows: "And we do further ordain and declare that all the provisions of these Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council and also of the Governor-General in Council under S. 71, Government of India Act, 1915, and also of the Governor-General in cases of emergency under S. 72 of that Act and may be in all respects amended and altered thereby." It is clear therefore that whatever jurisdiction this Court has, whether derived from the Letters Patent or whether as the successor to the jurisdiction which the High Court at Calcutta formerly exercised in this Province, in either case such jurisdiction is subject to the legislative powers of the Governor-General in Council and the only question for determination is, assuming this Court has power to issue a writ of habeas corpus, is this a case in which the Governor-General in Council has acted outside the scope of the powers; It is contended that the words "laws and regulations" are synonymous and that the power granted to make laws should be confined to declaring the law as defined by Blackstone at page 44, Vol. 1, S. 2, of his Commentaries where he says: "Municipal law is properly defined to be a rule of civil conduct prescribed by the supreme power in a State of commanding what is right and prohibiting what is wrong," and that the power to make laws does not carry with it the power of creating the machinery by which the laws shall be enforced. The power of creating Courts, it is said, is an attribute of sovereignty exercised either by virtue of the royal prerogative or possibly now a days by a Sovereign Legislature and in either case is outside the scope of the powers of the Governor-General in Council since 1858. Whatever may have been the extent of the royal prerogative in respect of creating Courts in former times, it is probably accurate to say that at the present day that power would not ordinarily be exercised without the consent of Parliament. If then this power must now be regarded as a function of the Legislature in England it is difficult to see why the same power, which had previously been exercised by the Governor-General in Council, should be regarded as excluded by the Act of 1861 or the Act of 1858 from the functions of the Legislative Council in India which is empowered to make laws and regulations for all Courts and all persons.

In *Damodar Gordhan* v. *Deoram Kanji* (2) Lord Selborne, in delivering the judgment of their Lordships, described the combined effect of the Acts of 1833 and 1861 in these words: "'By the Imperial Statute 3rd and 4th William, cap. 85, S. 43, a general power of legislation with certain exceptions not material for this purpose was given to the Governor-General in Council as to (among other things) 'all Courts of Justice whether established by Her Majesty's Charters or otherwise and the jurisdiction thereof.' This power is in substance continued by 24 and 25 Vic., cap. 67, S. 22, though the particular clause of the former Statute is thereby repealed." And the same noble Lord in *Burah's* case (1), to which I shall refer

(2) [1875-77] 1 Bom 367=3 I A 120 (P C).

again presently, is reported as saying [*Empress* v. *Burah* (1)]: "The Indian Legislature has powers expressly limited by the Act of Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting whin these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself." But if on the other hand the power is to be regarded as part of the prerogative of the Crown S. 24, Indian Councils Act, 1861, provides that no law or regulation shall be deemed invalid by reason only that it affects the prerogative of the Crown. Moreover, at the time when the Act of 1861 was passed the words "laws and regulations" had received a recognised significance and included, in my view, the power of making laws and enforcing their observance by the creation of Courts of justice. Many new Courts have been created by Acts of the Indian Council since 1861 and our attention was drawn to a list of such Courts by the learned Advocate-General in the course of the argument. Some of them may be mentioned as typical.

The Recorders Courts at Rangoon and Moulmein were created by Act 21 of 1863; the Chief Court of Lower Burma by Act 6 of 1900; the Punjab Chief Court by Act 19 of 1865; the Central Provinces Courts by Act 14 of 1865. Other Courts were created by the Criminal Law Procedure Code, 1898. It is also worthy of notice that in 1857, acting under the powers conferred by the Act of 1833, already referred to, Act 11 of 1857 was passed by the Governor-General in Council entitled: "An Act for the prevention, trial and punishment of offences against the State." It was in pari materia with the Defence of India Act, 1915. It gave the executive Government of any presidency or place power to establish a Special Court to try certain offences, including murder, arson and robbery, within proclaimed areas and the decision of such Court were declared to be final and not subject to the Sudder Courts. There can be no doubt that many persons were tried and convicted by such Courtts. It has never, so far as I am aware, been suggested that the Act in question was illegal. So also in 1860 by Act 22 of that year the Chittagong Hill Tracts were entirely excluded from the jurisdiction of the Civil and Criminal Courts and from the revenue laws and officers, and power was given to the Local Government to appoint what Courts and officers it thought fit and to issue what instructions it pleased for the guidance of such officers and Courts. None of these Acts has been challenged or impeached. The decrees of the Courts so constituted have issued far and wide and have affected many persons.

The Acts constituting them were within the knowledge of Parliament but in no case has the power to create such Courts been called in question. And with full knowledge of the manner in which the powers conferred by previous Statutes had been exercised by the Governor-General in Council, the Imperial Legislature on successive occasions extending over a number of years has reenacted those powers in almost identical pharaseology. In the case above referred to of *Empress* v. *Burah* (1), the Court had to consider the powers conferred on the Indian Council by the Acts of 1833 and 1861. By an Act of the Governor-General in Council passed in 1869 certain districts were removed form the jurisdiction of the existing Courts and placed under the jurisdiction of officers to be appointed by the Lieutenant-Governor of Bengal, who was also empowered to extend the provisions of the Act to the Cassyah and Jynteeah Hills. This the Lieutenant-Governor did in 1871 by notification in the Gazette and constituted a Court to exercise the powers of revision and appeal formerly exercised by the High Court of Calcutta. It was objected that the Act was ultra vires on the grounds, (i) that the Governor-General in Council had no power to interfere with the jurisdiction of the High Court, and (ii) that he had no power to delegate his legislative functions to the Lieutenant-Governor, as, it was contended, had been done by the Act. A Full Bench of the High Court of Calcutta were unanimous in holding that the Governor-General in Council had power to remove the district in question from the jurisdiction of the High Court and this view was affirmed on appeal to His Majesty in Council. The Court differed as to the power to delegate authority to the Local Government and their Lordships overruling the majority of the Court decided that such power was also intra vires.

In dealing with the proper inference to be drawn from the fact that the disputed powers had been regularly exercised by the Governor-General in Coun-

cil under the provisions of the earlier Act, which had been re-enacted in similar language in the Act of 1861, Sir Richard Garth, C. J., in the Court below [*Empress* v. *Burah* (3)] is reported as saying: "Has then the Legislature of this country been proceeding all these years upon a principle unwarranted by law? Has it been abdicating its proper functions and transferring powers which it had no right to transfer. The answer to this question will be found in the Councils Act of 1861. That Act has put a construction upon the meaning of the Indian Charter of 1833 which, it seems to me is almost impossible to misunderstand."

This view was approved on appeal. Lord Selbourne in delivering the judgment of the Board said: "If their Lordships were to adopt the view of the majority of the High Court they would be casting doubt upon the validity of a long course of legislation appropriate as far as they can judge to the peculiar circumstances of India, great part of which belongs to the period antecedent to the year 1861 and must therefore (as Sir Richard Garth well observed) be presumed to have been known to and in view of the Imperial Parliament when Councils Act of that year was passed." The Indian Councils Act, 1915, afforded another opportunity for Parliament to correct, if it required correction, the manner in which the Indian Council had for so long been exercising the powers which they conceived to have been conferred by the existing Acts, but the Government of India Act, 1915, which was passed after the Defence of India Act came into operation, re-enacted the former Statutes in practically identical language and must be in my view have been intended to recognize the correctness of the interpretation placed upon the former enactments by the Indian Council.

The same canon of construction which was enunciated by Sir Richard Garth and approved by their Lordships of the Privy Council in *Burah's* case (1), was followed by Sir John Edge, C. J., and four other Judges of the High Court at Allahabad in *Abdulla* v. *Mohan Gir* (4) in 1889, and Lord Macnaghten in the case of *Commissioners for Special Purposes of Income-tax* v. *Pemsel* (5) expressed similar views in a case dealing with the construction of words occurring in the Income-tax Acts.

(3) [1877-78] 3 Cal 63=1 C L R 161.
(4) [1889] 11 All 490 (F B).
(5) [1891] A C 531=61 L J Q B 265.

It was contended that *Burah's* case (1) was no authority for the proposition that the Indian Legislature could constitute new Courts, as this point was not urged in argument before the Court which tried that case and was not specifically dealt with by the judgments. On page 181 of the report in the *Indian Law Reports*, 4 *Calcutta Series*, Lord Selborne in dealing with the question of the Indian Legislative Council's powers of delegation says: "What was done is this: The Governor-General in Council has determined in due and ordinary course of legislation to remove a particular district from the jurisdiction of the ordinary Courts and offices and to place it under new Courts and offices to be appointed by and responsible to the Lieutenant-Governor of Bengal." There can be no question therefore that the fact that new Courts had been created was a matter which was brought before the notice of their Lordships and admitting that it is accurate to say that the question was not specifically dealt with, it is highly improbable that the point could have been lost sight of.

It seems reasonable to suppose that once it was determined that power to interfere with the jurisdiction of the High Court existed, the power to substitute a new Court to act in place of that whose jurisdiction had been determined was regarded as a matter which could not well be challenged. That case is at the least a light for our guidance in the present case, but I do not consider the matter as at all concluded by reason of that decision where the point was not specifically dealt with. I prefer to rest my decision upon the construction of the Act of 1861 viewed in the light of previous enactments and the powers consistently exercised thereunder. It was contended on behalf of the petitioner that in so far as new Courts were constituted by the East India Company before 1858 this was done in the ceded or conquered provinces in exercise of the royal prerogative or in the regulation provinces in exercise of the soverign powers of the Moghul Emperor, both of which powers it is said were taken away from the Governor-General in Council in 1858 and vested in the Crown or in the Secretary of State in Council, and in so far as they were constituted after 1861, it was merely a re-arrangement of existing Courts created under earlier powers. As to the first part of this contention, even if it is conceded that the assumption of the powers exercised in

the earlier period was justified on the constitutional grounds stated, it can hardly be disputed that Parliament recognized and acquiesed in what was done and I find nothing in the enactments of 1858 or 1861 to lead to the supposition that a different policy towards the Indian Legislature was at that time contemplated. It appears to me that S. 22 of the Indian Councils Act of 1861, read with S. 9, High Courts Act, is in terms amply wide enough to cover the powers now in question and had it been intended to deprive the Governor-General in Council of the powers so long exercised by his predecessors, such intention would have been expressed in clear and unambiguous language. Having regard to the opinion just expressed, it is not necessary to deal with the second part of the argument just mentioned. It would appear however to be based upon a false assumption. Some of the Courts mentioned in an earlier part of this judgment were entirely new Courts and some were in newly acquired territory. No question has so far been raised as to the validity of their constitution. Indeed apart from the High Courts it would be difficult at the present day to find any Court in British India which does not owe its existence to an Act of the Indian Legislature. Were we to decide that such Acts are ultra vires practically the whole administration of justice in British India would cease to exist. I think the petitioner's application should be rejected and the rule will be discharged. The decision arrived at makes it unnecessary to consider the question which was raised as ancillary to the main question, namely, whether this Court has jurisdiction to issue a writ of habeas corpus and that point I leave undecided.

Chapman, J.—The petitioner is confined under sentence from a tribunal constituted under the Defence of India Act, 1915. He has moved this Court for a writ of habeas curpus on one ground only, namely, that so far as the Defence of India Act authorised the creation of the tribunal, the Act is void inasmuch as it is beyond the power of the Governor-General of India in Council to constitute a Court or to authorise any other person or persons to constitute a Court. It is contended that the Indian Legislature is not sovereign inasmuch as it derives its powers from Act of Parliament, that the power to create a Court of justice rests in some special manner in the sovereign and that this power cannot be delegated otherwise than by an express enactment or proceeding to which the sovereign is a party. It is not necessary for the purposes of this decision to deal elaborately with the latter part of this contention. The argument was mainly concerned with the authorities which deal with the prerogative to create Courts in England. But the sovereign power in respect of Courts outside Great Britain has histories and rests upon foundations of its own [*Campbell* v. *Hall* (6) and *In the matter of the States of Jersey* (7)]. It is sufficient to say that a Court cannot be properly constituted otherwise than in the name of the sovereign and that therefore before I can hold that the Indian Legislature can create a Court it must be clear beyond doubt that the power to create a Court has been properly delegated.

The powers of the Governor-General of India in Council, so far as the Defence of India Act is concerned, are derived from the Government of India Act of 1858 and India Councils Act of 1861 (21 and 22 Vic., C. 106, and 24 and 25 Vic., C. 67). The former Act recited that the Government of the territories then in the possession of or under the Government of the East India Company and all powers in relation to Government vested in or exercised by the said Company, and all rights vested in or which if the Act had not been passed might have been exercised by the said Company in relation to any territories, shall become vested in Her Majesty and be exercised in her name. It was enacted that India shall be governed by and in the name of Her Majesty and all the rights referred to may be exercised by and in the name of Her Majesty as rights incidental to the Government of India; that the existing Council in India should be styled: "The Council of the Governor-General in India." The Indian Councils Act of 1861 provided for the addition to this existing Council of further members for the better exercise of powers to make laws and regulations and that at meetings of the enlarged Council so constituted the Governor-General of India in Council should have power to make laws and regulations for repealing, amending or altering any law and any regulation whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty and to make laws and regulations for all Courts of justice whatever and for all places or things whatever within the said territories. This

(6) 20 St Tr 239.
(7) 8 St Tr (n s) 286.

power was subject to certain provisos and control, with which it is not necessary now to deal. These Statutes in terms recognized and were expressly founded upon the facts then existing.

Section 7 of the Government of India Act of 1858 refers to the Council in India then bearing that name. It is necessary therefore to refer shortly to the constitution of the Council in India existing at the time of the enactment of the Government of India Act of 1858. The East India Company was originally a corporation with a trade monopoly created by charter from the Crown. It soon became necessary for the Company's officers to exercise powers of Government over the members of the Company who were engaged in trade in India. Such powers were accordingly conferred upon the Governor in Council in each of the Company's factories and were extended over all persons residing within factory limits. In 1765 the Company obtained the Diwani or right to conduct the revenue and civil administration on behalf of the Moghul Emperor in the Provinces of Bengal, Bihar and Orissa. In view of this expansion of power and responsibility the East India Company Act of 1772 was enacted and it was directed that for the Government of the Presidency of Fort William in Bengal the Company should appoint a Governor-General and Councillors and that the whole Civil and Military Government of the Presidency, the ordering, management and government of all the territorial acquisitions and revenues in the Provinces of Bengal, Bihar and Orissa should be vested in the said Governor-General in Council. Thereupon the creation of Courts for the proper administration of civil justice was immediately undertaken and proceedings called regulations were issued creating these Courts. As instances of these regulations the regulations of 1780 and 1798 may be referred to. This form of Government in India was continued from time to time by successive Acts of Parliament and the recognition was not thought inconsistent with the sovereignty of the Crown. In the recital to the Act of 1813 (53 Geo. 3, C. 155) reference was made to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and for territorial acquisitions in India.

In 1833 the powers of the Governor-General of India in Council were again revised and it was enacted that the superintendence, direction and control of the whole of the civil Government should be thereby vested in the Governor-General of India in Council. At the time the Government of India Act of 1858 was passed this Council had created an elaborate system of administration of Civil and Criminal justice. What then can be the meaning of S. 22, Councils Act, 1861, which enables this Council which had been entrusted with the Government of India at meetings to which additional persons had been summoned to make laws and regulations repealing, amending or altering any law or regulation whatever now in force in the Indian territories? Several of the regulations then in force were regulations creating Courts. The power included the powers to make laws and regulations for all persons and all Courts of justice whatever and for all places or things whatever. This delegation of plenary power was designed for the benefit of public interests of the greatest magnitude and whatever may fairly be regarded as incidental to or consequential to the main purpose ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires [*Attorney-General* v. *Great Eastern Railway Company* (8)].

This principle has been applied by the Privy Council to the interpretation of the Acts of the Imperial Parliament creating the Indian Legislature in the case *Empress* v. *Burah* (1). Their Lordships say that when the question is raised whether the limits of the powers of the Indian Legislature have been exceeded if the act done lies within the general scope of the affirmative words conferring the power and if there is no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further or to enlarge constructively those conditions or restrictions. Now it is clear that the creation of a Court is within the general scope of the affirmative words which confer powers upon the Governor-General of India in Council, for it cannot be denied that the creation of Courts is an essential function of Government. It is also clear that there is no express condition or restriction in the Statute which would apply. Their Lordships' judgment also sanctions the principle that where there has been a long course of legislation appropriate to the peculiar circumstances of India prior to the year 1861 it must be presumed to have been known to the Imperial Parliament when the Indian Councils Act of 1861 was passed and that the inference may be drawn that

(8) [1880] 5 A C 473=49 L J Ch 545.

the Imperial Parliament intended to sanction the continuance of the exercise of legislative powers of the same kind. By the application of these principles the Imperial Parliament must be held to have, in 1861, sanctioned the continuance of legislation for the creation of Courts. So far as it may be said to be necessary that the King in person should take a part in the delegation of power such as this, it is sufficient to say that these Statutes received the assent of the Crown—an assent which was not merely formal but which was affirmed so far as the Government of India Act of 1858 is concerned, in a historic proclamation.

The petitioner's counsel has endeavoured to combat this manifest conclusion by contending that whenever the East India Company, prior to 1861, desired to create a Court, they never ventured to do so without either obtaining a Charter from the sovereign or a special Act of Parliament or authority from the Emperor of Delhi. I am not satisfied that the proposition is true even for the period prior to 1772, for the first Charter creating Mayors' Courts for Madras, Calcutta and Bombay in 1726 refers to the reputation already made for strict and equal distribution of justice. The Act of 1772 creating the Supreme Court of Calcutta as first enacted appears to have enabled cases to be brought before that Court by way of appeal from the Provincial Courts and thus recognised the existence of Courts which were or might be created irrespective of the Act (see concluding portion of S. 16, East India Company Act of 1772). The creation of the Provincial Court of Final Civil Appeal (the Sadder Dewani Adaulat) was, it is true, subsequently validated by Act of Parliament in 1781, but this was done merely in order to obviate conflict with the Supreme Court. The Court of Final Criminal Appeal and the entire system of Criminal Courts created in 1793 received no such validation and can be ascribed to no special express authority either from the Sovereign or Parliament in England or from the Emperor at Delhi or to the Sovereign prerogative in ceded and conquered territory. It can be referred only to the Act of 1772. Since the enactment of the Government of India Act of 1858 there have been repeated instances of the creation of new Courts by the Governor-General of India in Council without any authority other than that derived from the Government of India Act of 1858 and the Indian Councils Act of 1861. The Acts creating these Courts were subject to disallowance by the Crown by order conveyed through the Secretary of State for India, who is representative of the Crown so far as India is concerned. None of these Acts were ever disallowed. The Indian Councils Act came before Parliament for amendment in 1890, 1891, 1892 and 1909 and the Statute of the law on the subject of the Government of India was consolidated by an Act of 1915. Yet the continuous course of legislation for the creation of Courts was never at any time questioned.

The creation of the Court under whose warrant the petitioner is held in custody has not been attacked upon any special ground. It was not, for instance, contended that the Defence of India Act is invalid on the ground that it involves the abrogation of a function essential to the operative existence of this Court. It is clear that the Governor-General in the Legislative Council has power to create Courts. I agree that the ground upon which the petitioner asks for our interference fails on the merits. It is not therefore necessary for me to consider whether this Court has power to issue a writ of habeas corpus and I leave the question undetermined.

Mullick, J.—I entirely concur in the judgment of the learned Chief Justice. In the view I take it is unnecessary to discuss the limits of the authority of the Crown to erect Courts of Justice in India by executive order. In my opinion the authority conferred by S. 22, Indian Councils Act of 1861, was sufficient to justify the Governor-General in Council in constituting by means of Act 4 of 1915 the tribunal by which the petitioner before us has been convicted.

Roe, J.—I concur in the order proposed. The passages quoted in the judgment of the learned Chief Justice from the judgment of the Judicial Committee in the case of *Empress* v. *Burah* (1) furnish in my view a complete answer to the petitioner's case.

Atkinson, J.—Having had the opportunity of reading and considering the judgment of the learned Chief Justice I desire to express my entire concurrence therewith.

V.S./R.K. *Application rejected.*

*A. I. R. 1918 Patna 165

JWALA PRASAD, J.

Hayat Khan and *another*—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Revn. 51 of 1917, Decided on 15th November 1917, against order of Addl. Magistrate, Dhanbad, D/- 15th September 1917.

*** (a) Criminal P. C. (1898), S. 403—S. 403 is no bar to trial of separate offence caused in same transaction — Accused convicted under S. 352, I. P. C., can be tried again under Ss. 147 and 323 for causing injury to another man who intervened.**

Accused were tried and convicted of an offence under S. 352, I. P. C., on the complaint of *A*. Subsequently on the complaint of *B* they were charged with offences under Ss. 147 and 323, I. P. C. *B's* allegation was that the accused were assaulting *A* when he interfered and tried to stop them and that thereupon the accused turned upon *B* and beat him :

Held : that the second trial was not barred by S. 403 (1), Criminal P. C. [P 167 C 1]

(b) Criminal P. C. (1898), Ss. 236 and 403—To apply S. 403 it is necessary to see if any charges under S. 236 could be framed in previous trial — When there is no doubt as to what offence is committed S. 236 does not apply.

In order to apply S. 403 (1) it is necessary to see whether under S. 236 of the Code any charge in the previous trial could have been framed for the offences for which the accused is sought to be tried at the second trial. S. 236 of the Code only applies when the act or a series of acts is of such a nature that it is doubtful which of the several offences the facts would constitute. Where the facts disclosed in the previous trial leave no manner of doubt as to the offences they constituted, S. 236 has no application. [P 166 C 1]

(c) Criminal P. C. (1898), S. 526—Conviction in another distinct trial by same Magistrate is no ground of transfer.

The opinion expressed by the Magistrate in a previous case in which the accused was tried and convicted on a separate and distinct charge is in itself no ground for the transfer of the case. [P 168 C 1]

G. C. Pal—for Appellants.

Mrityunjoy Lal—for the Crown.

Judgment. — This is an application against an order of the Additional Magistrate of Dhanbad, dated 15th September 1917, rejecting the application by the petitioners to the District Magistrate for the transfer of the case pending before the Deputy Magistrate of the District, Mr. S. N. Sen, the petitioners having been put upon their trial for offences under S. 147 and S. 323, I. P. C., on the complaint of one Wajid Khan. The complaint of Wajid Khan was filed on 21st May 1917 in respect of an occurrence that was said to have taken place on 18th May 1917. Wajid Khan is now dead. The witnesses for the prosecution have almost been examined. The examination of the witnesses commenced on 27th July and finished by 18th August, when the case was adjourned to 1st Septmber 1917. On the 1st the case was adjourned to 3rd on account of the inability of the Civil Surgeon to attend on that date for examination. On 3rd the petitioners made an application to the Deputy Magistrate for an adjournment of the case in order to enable them to apply for the quashing of the trial or transfer of the case from the file of the Deputy Magistrate to some other Magistrate. On 15th September an application was made under S. 528, Criminal P. C., to the District Magistrate, which was rejected by him. On 21st September the petitioners again applied to the Deputy Magistrate for an adjournment of the case in order to move this High Court, which they did by their petition dated 4th October 1917. It is urged on behalf of the petitioners that the present trial of the offences under Ss. 147 and 323 is barred by S. 403, Criminal P. C. This contention is based upon the following facts: One Lalu Khan had filed a complaint for an occurrence which is said to have taken place on 18th May. One of the accused, Hayat Khan, was summoned in that case under S. 352 and was, after trial, convicted on 31st August 1917, by the same Deputy Magistrate, under S. 352. In the judgment of that case the Deputy Magistrate said as follows: "The accused has not been charged under S. 147, I. P. C., as there was no common intention to begin with to assault Lalu Khan."

I have been shown by the opposite party, who appears to oppose the Rule, a copy of the complaint petition of Lalu Khan. In this petition Lalu Khan complained against Hayat, Jouri Khan, and 18 or 19 other persons. It was alleged by him in that petition that he had lent money to one Satar Khan at an interest of one anna per rupee at about 5 p. m. On the day of the occurrence the accused persons asked him why he lent money at the low rate of one anna, and abused him. He protested, whereupon Hayat Khan struck him with a lathi on his right shoulder joint and that Salamat Khan also struck him with lathis and then ran away. After that Wajid, his brother, was assaulted by the accused and was severely injured and could not sit up, and therefore did not come with him. Wajid, in his petition filed on 21st May, after setting out the reason of the occurrence and the details as given by Lalu Khan, said that after Lalu was assaulted with lathis he asked the

accused not to do so, whereupon they severely assaulted him. In this complaint of Wajid, Jouri Khan and Hayat Khan, along with others, have been mentioned as accused. Subsequently processes were issued by the Magistrate against Jouri and Hayat mentioned in the complaint of Wajid. Hayat did appear on 28th June 1917. On 11th July 1917 the second petitioner appeared in Court, having been sent up by the Police. His name is said to be Sarwar Khan. On that very day Lalu Khan was shown petitioner 2, Sarwar Khan, and he said that this was the man named as Jouri Khan in the complaint petition of Wajid. He was therefore proceeded with as the person against whom the warrant of arrest was issued and the two petitioners were therefore put upon their trial.

The judgment of the Magistrate dated 31st August 1917, convicting the accused of an offence under S. 352 with the observation, quoted above, that the accused was not charged under S. 147 as there was no common intention to assault Lalu Khan, is pleaded by the petitioners as a bar to the present trial for charges under Ss. 147 and 323 under which they are now being tried. The plea is based upon S. 403(1), Criminal P. C. In order to apply S. 403 (1), it is necessary to see whether under S. 236 any charge could have been framed for the present offences under Ss. 147 and 323. S. 236 only applies when the act or a series of acts is of such a nature that it is doubtful which of the several offences the facts would constitute. The facts disclosed in Lalu's complaint left no manner of doubt as to the offences they constituted. Therefore S. 236 has no application at all: S. 237 only follows S. 236, and is only an enabling section which empowers a Magistrate to convict on a charge which has not been framed under S. 236. So if S. 236 does not apply, S. 237 has also no application. The first trial was on the facts alleged in the petition of Lalu which related to the assault upon Lalu; and the conviction of Hayat, petitioner 1, was under S. 352 for an assault upon Lalu. The present charge related to the facts which led to the attack upon Wajid Khan and has nothing to do with the facts constituting the assault upon Lalu. The present charges are as follows: *First*: "That you two on or about 18th May 1917 at Pachgari Bazar, P. S. Katras, District Manbhum, with some 20 Kabulis, being members of an unlawful assembly, the common object of which was to assault Wajid Khan, beat him with sticks so severely as to result in his falling down almost senseless and thereby committed an offence punishable under S. 147, Penal Code, and within my cognizance." *Secondly*: "That you two on or about the said 18th day of May 1917 at Pachgari Bazar, P. S. Katras, District Manbhum, voluntarily caused hurt to Wajid Khan by beating him with sticks and thereby committed an offence punishable under S. 323, Penal Code, and within my cognizance."

The facts set forth in the two complaint petitions mentioned above will clearly show that Lalu Khan, the complainant in the first case, was first met by the accused and there was an altercation between them, in the course of which he was assaulted. While he was being assaulted his brother Wajid, complainant in the present case, came up and remonstrated, and was, upon the orders of one of them, severely assaulted. In the course of events that took place in immediate succession, no doubt both the persons are said to have been injured; but certainly they are not said to have been assaulted simultaneously. The assault upon Lalu who was first attacked may not be the result of the common intention or motive of an unlawful assembly. The subsequent assault upon Wajid Khan who came up to remonstrate may be the result of the common intention of the persons roused at once to assault him for his officious interference.

Upon the facts the Magistrate is to enquire and to determine whether there was a common intention or common object on the part of the accused persons in order to assault this man Wajid so as to constitute an offence under S. 147. The Magistrate, enquiring into the complaint of Lalu Khan, held that no common intention to assault Lalu was proved. He did not and could not hold that there was no common intention to assault Wajid. That was not the point before him to decide. The words that the Magistrate has used, which I have quoted above, will clearly go to show that he knew full well that he was disposing of the case of Lalu Khan only, for he says that "there was no common intention to begin with to assault Lalu." The petitioners are not going to be tried under S. 147 upon the facts alleged in the complaint petition of Lalu. They cannot, of course, be tried for riot under S. 147 for the events that led to the assault upon Lalu, which may be disclosed in the complaint of Wajid which is now the subject-matter

of trial. So far as the facts resulting in the assault upon Lalu are concerned, there cannot be a second trial by virtue of S. 403 even if those facts constitute an offence under S. 147, Penal Code. That has been the view taken in the case of *Basireddi* v. *Khayrat Ali* (1), where the charge against the accused person was under Ss. 147, 325 and 448, and, the accused having been tried under S. 325, the case terminated upon a compromise between the parties in an acquittal of the accused persons. As regards Ss. 323 and 325, it was held that a further charge under S. 147 or S. 448 cannot lie. I am in agreement so far as that ruling is concerned, and I think there cannot be any further trial for an offence under S. 147 in respect of the complaint of Lalu Khan. But a distinct offence on a separate set of facts is said to have occurred when, as I have said above, Wajid came upon the scene, and the present charge under S. 147 in respect of the attack upon Wajid under which the accused have been summoned will have to be determined afresh. The present charge under S. 147 under which the petitioners are charged in my opinion would come under S. 235 (1), Criminal P. C. This disposes of the objection so far as the charge under S. 147 is concerned. S. 403 does not bar the trial of the accused on the present charge under S. 147, Penal Code.

There now remains the charge under S. 323. There cannot be any doubt that the assault, if any, committed upon Wajid was quite a separate offence and had nothing to do with the assault committed upon Lalu, although both the assaults may have been committed in the course of the same transaction. I would refer to illustration (g) of S. 235 under Cl. (1) of that section, which says that "*A* with six others committed the offence of rioting, grievous hurt and assaulting a public servant. *A* was separately charged with, and convicted of, offences under Ss. 147, 325 and 152." The offences under Ss. 323 and 325 committed by the members of an unlawful assembly in a riot are separate from the offence of the riot itself; and the individual persons found guilty of having caused hurt may be convicted separately and irrespective of the charges under S. 147. The conviction of Hayat for an assault upon Lalu does not bar his trial for the assault upon Wajid. There can be no doubt therefore that S. 403 has no application at all so far as the charge under S. 323 is concerned. This contention of the petitioners is therefore rejected.

The second ground urged by the learned vakil for the petitioners is that cognizance was taken by the Magistrate in this case under S. 190 (c) and therefore the Magistrate could not try the case himself. The cognizance of the complaint of Wajid is not disputed to have been taken under S. 190 (a) upon the complaint of Wajid. Hence all the offences and all the persons mentioned in the complaint petition as well as those disclosed in evidence were before the Magistrate upon a cognizance taken by him under S. 190 (a) upon the complaint of Wajid. The case against the petitioners was not taken cognizance of by the Magistrate upon any extraneous information or upon his own knowledge or suspicion.

It is contended by the petitioner No. 2 that the complaint petition mentions the name of Jouri Khan as the accused, not Sarwar Khan. Well, in the evidence of Lalu Khan call him Jouri or Sarwar he was the person who assaulted Wajid Khan. He was identified by him on the 11th July 1917, when the man was brought under arrest. It is for the Magistrate to believe or disbelieve Lalu. The complaint petition after giving the names of certain accused adds etc., "wagarah:" so that even if Jouri Khan and Sarwar Khan are two different persons, Sarwar, the present accused, might come under the category wagarah etc., whose name is not disclosed in the complaint petition, provided he is satisfactorily identified as the person named in the petition. The cognizance of the offence against the second petitioner (Sarwar) was properly taken under S. 190 (a) and I overrule this contention of the learned vakil for the petitioner.

The last contention of the learned vakil has been that the case should be transferred from the file of the Deputy Magistrate, Mr. S. N. Sen, to some other Magistrate. The ground for this contention is that the Deputy Magistrate in the case of Lalu Khan, which was disposed of on 31st August 1917, disbelieved the evidence of the petitioner No. 1 Hayat Khan and therefore there will be no impartial trial by the same Magistrate of the present case against him. The trial in the case commenced, as I have said before, on 27th July when the witnesses for the prosecution were examined. The application to the Court was made on 4th October and to the first Court on 3rd September. The delay has been very inordinate and the peti-

(1) [1913] 20 I C 618.

tion for transfer is made after the prosecution case is almost over. It is said that the petitioners came to know of the opinion of the Magistrate as regards the defence when the judgment was delivered in the case of Lalu Khan on 31st August 1917. The opinion expressed by the Magistrate in the case of Lalu Khan as regards the defence of Hayat in itself is no ground for the transfer of the case. The most important question for the Magistrate in the present trial would be whether the petitioners did or did not assault Wajid and whether they were members of any unlawful assembly and committed riot or not. The Magistrate will decide upon the evidence of the case. I do not think that the ground mentioned is sufficient for directing the transfer of the case particularly at so late a stage. I therefore overrule this contention also. The application of the petitioners is rejected.

V.S./R.K. *Application rejected.*

A. I. R. 1918 Patna 168

MULLICK AND ATKINSON, JJ.

Kailash Prasad Varma—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 282 of 1917, Decided on 3rd August 1917, against an order of Sess. Judge, Darbhanga, D/- 13th of June 1917.

(a) Criminal P. C. (1898), S. 234—"Person" includes "persons."

In S. 234 the word "person" includes the plural number and is not restricted to the singular number: 33 *Cal.* 292; 6 *C. L. J.* 757, *Diss. from.* and 36 *I. C.* 879, *Rel. on.* [P 169 C 1]

(b) Criminal P. C. (1898), S. 234—Accused should not be tried jointly if trial is prejudicial to their interest—Procedure is at Court's discretion.

Section 234 is an empowering section and no Magistrate or Judge should try or allow an accused to be put on trial jointly with another if he thinks the effect of so doing would be prejudicial to the interest of the accused. But as to the method of procedure it is for the trial Court in the exercise of its discretion to settle and determine, whether the trial should be joint or not. If a joint trial would prejudice the accused then the trial should be separate. [P 170 C 1]

(c) Criminal P. C. (1898), S. 234—Joint trial for criminal breach of trust on different occasions is legal—Penal Code (1860), S. 409.

Two accused were jointly tried for criminal breach of trust in respect of three sums of money committed on three different dates within one year:

Held: that the joint trial was legal. [P 170 C 1]

S. P. Varma—for Petitioner.

Manohar Lal—for the Crown.

Atkinson, J. — The petitioner jointly with another was charged under S. 409, I. P. C., with criminal breach of trust by converting to his own use three various sums of money on various dates within one year. The charge relates to the sums of Rs. 38-1-0 appropriated on 6th July 1916, Rs. 100-4-0 on 31st July 1916 and Rs. 140-12-0 on 25th October 1916. The accused is a subordinate in the Post Office at Samastipur and his duty was to deal, as registration clerk, with money received in payment of V. P. P. orders. The Sub. Post Master of this Office is a man called C. M. Bose. The Inspector paid a visit to this Post Office and discovered that certain misappropriations or criminal breaches of trust of public money had taken place; accordingly the petitioner Kailash Prasad Varma and C. M. Bose were jointly charged under S. 409, I P. C., with the offences mentioned above. The petitioner's defence was that he was innocent, that he merely did what he was asked by the Sub-Post Master Bose and that he was in no way responsible. On the other hand Mr. Bose, the petitioner's co-accused, stated that he was not responsible, but that he trusted the petitioner implicitly in the preparation of the register and initialed the same from time to time as prepared by the petitioner; and that though he might be guilty of negligence, he was guilty of no crime. The case was tried by the Subdivisional Officer with the result that the accused Sub-Post Master Bose was acquitted and discharged, and his acquittal was maintained and upheld by the Sessions Judge on appeal. Thus Bose is out of this case. The petitioner was convicted by the trial Court and sentenced to one year in respect of each charge preferred against him, each period of one year to run concurrently. On appeal the learned Sessions Judge maintained the petitioner's conviction, and the present application is made before us to set aside that conviction.

Two points are taken and pressed forcibly by Mr. Varma on behalf of the petitioner. The first point is one of importance and interest, as it raises a serious point touching the construction of the Code of Criminal Procedure.

Mr. Varma argues that there was no power to try the accused persons together jointly even where they committed the same offence or three of the same offences within a period of 12 months; that is to say, that S. 234, Criminal P. C., only applies to one person and does not and cannot apply to

two or more persons; and that there is no jurisdiction to try under the Code of Criminal Procedure persons jointly even though they may commit the same or similar offences, save under the provisions of S. 239 and then only if the offence with which they have been charged arises out of the same transaction. It is argued before us by Mr. Varma that the transtrations were separate, at each distinct and separate from the other, and that consequently the trial of the accused persons, the petitioner and Mr. Bose, even under S. 239 would have been illegal. If Mr. Varma is right in his argument as to the illegality of the trial, then the conviction cannot stand and will have to be set aside. In support of his argument the learned counsel for the petitioner relies entirely upon the case reported as *Budhai Sheik* v. *Emperor* (1). In that case their Lordships of the Calcutta High Court held that the meaning of the word "person" mentioned in S. 234, Criminal P. C., was applicable in the singular number and did not apply to the case of two persons or more than two, who might be guilty of committing three of the same kind of offences within a period of one year. With great respect to the learned Judges, who decided that case, I venture to say that the reasoning of their Lordships is not very convincing. However it appears to us that their Lordships in that case seemed to have based their judgment entirely upon the position in which S. 234 is to be found in the classification or group of sections set out in the Code. S. 233 is a general section, which provides that every person charged with an offence or with separate offences should be separately tried for each offence; however exceptions from the general rule are provided for in the succeeding Ss. 234 to 239 which are permissive and not mandatory; S. 234 runs: "When a person is accused of more offences than one of the same kind committed within the period of 12 months from the first to the last of such offences, he may be charged with and tried at one trial for any number of them not exceeding three." Reading that section I cannot understand why any limitation should be sought to be placed upon the word "person" as defined by the General Clauses Act.

No doubt the Calcutta High Court in the case reported as *Bhudhai Sheikh* v. *Emperor* (1) held that the word "person" applied merely in the singular number; and that it was not applicable to the case of two or more than two persons. The decision reported as *Budhai Sheik* v. *Emperor* (1) was followed in a case reported as *Tilakdhari Das* v. *Emperor* (2) and there likewise two distinguished Judges of the Calcutta High Court followed the rule laid down in *Budhai Sheik* v. *Emperor* (1) and Mr. Justice Mookerjee and another learned Judge also expressed the same view, but the ratio decidendi of these decisions do not commend themselves to us and they appear to be completely at variance with the thoughtful and considered judgments of two Judges of the Allahabad High Court in a case reported as *Emperor* v. *Bechan Pande* (3) and in which Mr. Justice Piggott and Mr. Justice Walsh laid down most emphatically that in S. 234, Criminal P. C., the word "person" is to have its ordinary and nutural meaning as defined by the General Clauses Act and is not to be restricted to the singular number. The learned Judges suggest that it would reduce the administration of the Criminal law to a farce if there could be no trial of accused persons jointly guilty, unless under the provisions of S. 239, and at page 460 (of *I. L. R.* 38 *All.*) of the report their Lordships say on the question of law involved for our consideration: "We have expressed our opinion in a case which has just come before us. The question of the operation of S. 234, Criminal P. C., was raised in a simple form. In the present case it is suggested that the question is complicated by the fact that six persons in all were involved in each of the three charges. The provisions of S. 233 and the following sections of the Code of Criminal Procedure require to be considered together. They occur in a sub-division of the Code headed "Joinder of Charges." The general principle that there shall be a separate charge and a separate trial for every distinct offence of which any person is accused is first laid down in S. 233 of the Code. Then follow a number of sections specifying possible exceptions. In these sections where a Court is empowered to try offences jointly or accused persons jointly, the word "may" is used in each case, and not the word "shall" as used in S. 233, where the general principle is laid down. These are therefore empowering sections, which require to be used with due discretion and in suitable cases. In the present case the prosecution set out to prove that the six accused persons, act-

(1) [1906] 33 Cal 292.

(2) [1907] 6 C L J 757.
(3) [1917] 38 All 457=36 I C 879.

ing together, had committed each of the three offences specified in the several charges. On the wording of the section there was nothing illegal in the framing of the three joint charges against all the accused, or in the trial of these three charges at one trial."

That expression of opinion as to the interpretation to be given to S. 234 commends itself to us. Certainly it is consistent with the principles of the Criminal Law of England; and I think not inconsistent with the principles of the law of Criminal Procedure enacted in S. 234 as to what the law is, and ought to be. I do not say that in every case where persons are jointly accused that the Crown must necessarily try them together. The section is an empowering section; but no Magistrate or Judge should try or allow an accused to be put on trial jointly with another if he thinks the effect of so doing would be prejudicial to the interest of the accused. But as to the method of procedure it is for the trial Court in the exercise of its discretion to settle and determine whether the trial should be joint or not. If a joint trial would prejudice the accused, then obviously the trial should be separate.

In this case at the trial no objection was taken whatsoever by the accused to the joint trial. The trial proceeded and the conviction was pronounced, and it was not till the accused went before the District Judge on appeal that for the first time it was urged or suggested that the accused persons having been tried together the original trial was illegal and void by law. I think that if there was any likelihood or fear that the accused would have been or was in fact prejudiced by a joint trial with his co-accused, he would have been alert to raise the question of jurisdiction at the earliest possible moment. Having taken his chance and proceeded to trial, the petitioner for the first time urged after conviction that he has been prejudiced by what has been done. This disposes of the first point which has been taken by Mr. Varma on behalf of the petitioner.

The second point which he has taken is, that the evidence in respect of two charges does not warrant a conviction under S. 409, Penal Code, that is to say, that with regard to first two items, namely, Rs. 38-1-0 alleged to have been misappropriated on 6th July 1916, and Rs. 100-4-0 on31st July 1916, the evidence shows these items were taken for a mere temporary loan to tide over a previous financial difficulty in one case for two weeks and in another for 12 days; but that eventually they found their way into the pockets of the persons who were entitled to receive the money and Mr. Varma therefore argued that there was no user of the money or misappropriation by the petitioner within the meaning of S. 409, Penal Code, or at least that there was no user of the money with any intention of committing a criminal breach of trust.

With regard to the third item no question arises. The sum of Rupees 140-12-0 was admittedly received, retained, misapplied and used by the petitioner for his own purposes. The learned Sess. Judge in summing up the evidence very candidly observes that in regard to the first two items, the evidence shows that the accused did retain them, but the money was afterwards refunded and paid to the persons properly entitled to receive it though late. Mr. Varma says that though his client was guilty of a breach of a rule of the Post Office Department, yet he was not guilty of a criminal breach of trust. Well the lower Court answered that argument by relying on the express admission and confession made by the petitioner himself. This is referred to as Ex. A. In that exhibit the petitioner stated that on two other occasions he did misapply public money which came into his possession in the discharge of his duty, and from that admission it is apparent that he did commit criminal breaches of trust in respect of the other transactions; and on this admission the prosecution asked the Court to infer that there was in the mind of the petitioner, at the time when he got the various sums of money in question, the intention to use them for his own purposes within the meaning of S. 409, Penal Code. We do not think that this was an unfair inference to draw, more especially when the admission of the accused coupled with the evidence shown on the part of the prisoner a systematic course of dealing involving the misappropriation of public money and within quite a recent date from the commission of the first offence charged and which the petitioner admitted. After giving our best consideration to the second point we also think that the petitioner is not entitled to succeed, as the confession or statement made by the petitioner is such as to warrant an inference that the petitioner retained the money so long in his hands in breach of the rules of the Post Office as to clearly show an intention on his part to use the money for his own purposes. The third argument that

has been addressed to us is on the question of sentence. We have been asked to reduce the sentence; but a breach of trust committed by a person who is employed in a Post Office in respect of money belonging to the public is a grave offence; and we ought not to encourage the public to think that offences of this character can be dealt with lightly; to do so would be a great injury to the administration of justice and the public service. We have considered all the points argued very carefully and we have come to the conclusion that it is quite impossible to reduce the sentences even by one day. The application is rejected.

Mullick, J.—I agree.

V.S./R.K. *Application rejected.*

A. I. R. 1918 Patna 171

CHAMIER, C. J. AND SHARFUDDIN, J.

Kuldip Singh—Appellant.

v.

Kuldip Choudhuri—Respondent.

Second Appeal No. 1117 of 1916. Decided on 9th July 1917, from decision of Dist. Judge, Monghyr, D/- 29th July 1916.

Civil P. C. (1908), O. 23, R. 1—Withdrawal of suit with permission to bring fresh suit on payment of costs—Second suit is maintainable, although instituted without paying costs provided costs are paid before trial—Permission to withdraw is not operative until costs are paid—Order allowing withdrawal should limit time within which costs are to be paid.

Where a plaintiff is allowed to withdraw a suit with permission to bring a fresh suit, the payment of the costs of the first suit being made a condition precedent to the institution of a fresh suit, and a second suit is instituted without payment of such costs, the suit is maintainable provided the costs are paid before the suit comes on for trial.

In such cases until the costs are paid the permission is not operative and therefore there is no withdrawal with liberty to bring a fresh suit, the result being that until there is such a withdrawal the former suit remains pending and is under S. 10, Civil P. C., a bar to the trial of the second suit. [P 171 C 2, P 172 C 1]

The order allowing withdrawal of the suit in such cases should limit the time within which costs should be paid and should go on to direct that on failure to pay costs within that time, the original suit shall stand dismissed with costs. [P 172 C 1]

Mahomed Fakhruddin—for Appellant.

Avadh Behari Chaubey—for Respondent.

Chamier, C. J.—The plaintiff in the present suit, which is for the rent of certain lands for the years 1318, 1319, and 1320 F., brought a previous suit for the years 1315, 1316, 1317 and 1318 F. He asked for permission to withdraw that suit and bring another suit and the Court passed the following order: "The plaintiff has filed a petition to withdraw the suit with permission to bring a fresh suit on the ground of errors in the plaint. Ordered that the plaintiff may withdraw the suit and bring a fresh suit if not otherwise barred. The defendent is allowed costs against the plaintiff and the payment of costs is made a condition precedent to the institution of a fresh suit." That order was dated 25th March, 1914. The present suit was instituted on 8th September 1914, which was exactly three years after the expiry of 1311 F., the first of the years now in suit. The Munsif decreed the claim, but on appeal the District Judge, though holding in favour of the plaintiff, on the merits, allowed the appeal and dismissed the suit on the ground that it was barred by the order recited above.

In second appeal it is contended that the District Judge's order is wrong. Similar orders were considered by the Calcutta High Court in the cases of *Abdul Aziz Molla* v. *Ebrahim Molla* (1) and *Shital Prasad Mondal* v. *Gaya Prosad Dingal* [*Sadhu Charan Tewari* v. *Baikuntha Nath Madak* (2)] In the earlier case the order passed was almost in exactly the same terms as the order which we have to consider in the present case. At the time when the second suit was instituted the costs of the first suit had not been paid, but they were paid before the suit came on for trial. The High Court held that the suit was maintainable. In the latter case also the order passed was paticularly in the same terms as the order which we have to consider in this case, and the High Court held that as the plaintiff had obtained leave to withdraw with permission to bring a fresh suit on payment of the costs of the first suit, the Court ought merely to have regarded S. 10 as a bar to its proceeding with the trial of the second suit and that it should have proceeded with that trial when the costs of the first suit were paid. The result of these rulings is curious, but it is difficult to resist the reasoning on which the decisions are based. The condition of the permission to withdraw the first suit and bring a fresh suit was the payment of costs only. Until the costs were paid the permission was not operative, and therefore there was no withdrawal with liberty to bring a fresh suit, and the result was that until there was such a

(1) [1904] 31 Cal 965.
(2) A I R 1914 Cal 207=23 I C 210.

withdrawal the former suit remained pending and was, under S. 10 of the Code, a bar to the trial of the second suit. The difficulty which has arisen in the present case is due to the incompleteness of the order passed in the first suit. The order in such circumstances should limit the time within which costs should be paid and should go on to direct that on failure to pay costs within that time the original suit shall stand dismissed with costs. In my opinion, it is not possible to distinguish the present case from the cases cited, and I would therefore hold that the District Judge was wrong in dismissing the suit. I would allow htis appeal, set aside the decree of the District Judge, and give the plaintiff a decree for three years' rent at the rate of Rs. 9-8-0 per annum plus 25 per cent damages. In the circumstances I would make no order as to costs in any Court.

Sharfuddin, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 172

JWALA PRASAD, J.

Munshi Mian—Petitioner.

v.

Emperor— Opposite Party.

Criminal Revn. No. 363 of 1917, Decided on 4th December 1917, against order of Sub-Divl. Magistrate, Motihari, D/- 23rd August 1917.

(a) Criminal P. C. (1898), S. 202—Local investigation does not only mean site inspection but includes inquiry in locality—Term investigation is to be interpreted in ordinary sense.

The local investigation referred to in S. 202, Criminal P. C., is not restricted to the investigation of the physical features only : it means an inquiry into the truth or falsity of the allegations made in the complaint petition. The word "local" is used with a view to hold the investigation in the locality for the convenience of the parties and their witnesses, and it may also necessitate in certain cases an inspection of the place of occurrence. The word "investigation" is not defined in the Code. It must be taken to have been used in its ordinary sense.

[P 172 C 2, P 173 C 1]

(b) Criminal P. C. (1898), S. 203—On perusal of report of local investigation Magistrate can dismiss complaint without taking any evidence.

After receiving the result of the local investigation directed under S. 202 the Magistrate is not bound to examine any witnesses or to hold any enquiry before he dismisses the complaint.

[P 173 C 2]

(c) Criminal P. C. (1898), S. 17—Deputy Magistrate is subordinate to Subdivisional Officer.

A Deputy Magistrate attached to a subdivision is subordinate to the Subdivisional Officer of that subdivision.

[P 173 C 1]

K. P. Jayaswal and *Amir Hossain*—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Judgment. — This is an application against an order of the Sub-Divisional Magistrate of Motihari, dated 23rd August 1917, directing the prosecution of the petitioner under S. 476, Criminal P. C., for an offence under S. 211, Penal Code. One Munshi Mian had lodged a complaint against the Sub-Inspector of Police and others on 31st July 1917. The complaint was taken cognizance of by the Sub-Divisional Magistrate and the complainant was examined on oath. The Magistrate distrusted the bona fides of the allegations made in the complaint petition, and on the 31st July directed that a local investigation be held by Mr. Masud, a Deputy Magistrate of Motihari, for the purpose of ascertaining the truth or falsity of of the complaint. Mr. Masud examined a number of witnesses on the spot and submitted his report on 13th August 1917. In this report he held that the charge brought by the complainant was maliciously false and recommended the dismissal of the complaint and for steps to be taken for proceeding against the complainant under S. 211, Penal Code. On 23rd August 1917 the Sub-Divisional Magistrate after the receipt of the report of Mr. Masud dismissed the complaint under S. 203, Criminal P. C., and under S. 476 directed the prosecution of the petitioner and sent him in custody to the District Magistrate for trial. The learned Counsel for the petitioner contends that the order of the Sub-Divisional Magistrate is illegal inasmuch as the complaint was not legally disposed of under the Code of Criminal Procedure. The main ground for this contention is that the Sub-Divisional Magistrate could not direct a local investigation in this case under S. 202, as there was no doubt of any physical feature which had to be elucidated by any enquiry. To my mind the local investigation referred to in S. 202 is not restricted to the investigation of the physical features only; the local investigation in the section means an enquiry into the truth or falsity of the allegations made in the complaint petition. The word "local" is used with a view to hold the investigation in the locality for the convenience of the parties and their witnesses and also it may necessitate in certain cases an inspection of the place of occurrence. But certainly it is not confined to the inspection of the locality itself. The word "investigation" is not defined in the

Code, and we have to take it as having been used in the Code in its ordinary sense, particularly when the word is understood in the above sense in the case of an enquiry by a Police Officer previous to the submission of the report in respect of an information lodged before the Police. The Sub-Divisional Magistrate also understood the expression of this sense, for he expressly directed the local investigation "to be held for the purpose of ascertaining the truth or falsity of the complaint."

The next contention of the learned Counsel for the petitioner has been that the Sub-Divisional Magistrate could not direct Mr. Masud to hold the local investigation as he was not subordinate to him, whereas the section says that a local investigation should be directed to an officer subordinate to the Magistrate taking cognizance, or to a Police Officer, or any other person other than a Magistrate or a Police Officer. The Deputy Magistrate who was directed to hold the local invastigation was attached to the sub-division of which Mr. Chandra was the Sub-Divisional Officer and was therefore subordinate to him: S. 17 Criminal P. C.) I therefore overrule this contention as well.

The third objection of the learned Counsel was that the Sub-Divisional Officer had not himself directed the local investigation but had done it through the District Magistrate and he was therefore wrong in so doing. I think that there has been some misconception on this point. The Sub-Divisional Officer has written a very long order sheet giving reasons for the conclusion at which he has arrived, namely, the direction that he made for the local investigation. He himself disposed of the point judicially in terms of S. 202, Criminal P. C., and he also named the officer who had to make the local investigation. The misapprehension has arisen from the fact that towards the end of the order sheet the Sub-Divisional Officer used the words "with the approval of the District Magistrate the local investigation may be held by Mr. Masud, Deputy Magistrate of the first class." Before that he had already directed that the investigation would be made by Mr. Masud. The approval of the Magistrate was not required as to the local investigation itself which was a judicial determination of the Sub-Divisional Magistrate, but only as regards the deputation of Mr. Masud. That does not appear to be at all objectionable, for the approval of the District Magistrate was needed for the deputation of Mr. Masud as the District Magistrate has general control over all the Magistrates, including those under the Sub-Divisional Officer S. 17, Criminal P. C. We are not concerned at all with that phase of the case; that is altogether an administrative matter. The order passed by the Sub-Divisional Magistrate was a valid order under S. 202. The District Magistrate was not at all consulted and the Sub-Divisional Magistrate was not influenced in the use of his discretion. This contention is also overruled.

Lastly on this point it has been submitted that the complaint petition was not validly disposed of and that the Sub-Divisional Magistrate did not himself examine the witnesses and determine the complaint, but he used the report of Mr. Masud for coming to the conclusion that the charge alleged was false. This also appears to me to be untenable. S. 202 completely provides what the Magistrate ought to do on receipt of a complaint petition. Prior to that the Magistrate is to examine the complainant on oath and then under this section, if he is not satisfied as to the truth of the complaint, he can postpone the issue of the process and direct a local investigation to be made. The Magistrate is not required to examine the witnesses himself; he has to use certainly the result arrived at by the investigating officer. S. 203 says that the Magistrate before whom the complaint is made may dismiss the complaint if "after examining the complainant and considering the result of the investigation there is in his judgment no sufficient ground for proceeding." The Magistrate has to use his discretion only at the stage of staying the process and directing the local investigation. After that the Code does not provide that the Magistrate should examine any witnesses or hold any enquiry before he could dismiss the complaint. It is sufficient that he takes into consideration the result of the investigation arrived at by the officer deputed by him. The Sub-Divisional Magistrate in his order of the 23rd August says that "after giving the matter my careful consideration I find that the conclusions arrived at by Mr. Masud are entirely correct as a result of the investigation, I have no option but to hold the complaint to be false." Reading this order sheet along with the order sheet of 31st July 1917, there can be no manner of doubt that the Sub-Divisional Magistrate has given his best consideration to the case. We are not concerned whether his conclusions were

right or wrong, but that he did consider the case carefully before coming to that conclusion there can be no doubt. I therefore reject the application.

The petitioner has come direct to this Court without in the first instance having moved the Sessions Judge. This is wrong, and the High Court declines to exercise jurisdiction unless there was a special reason to the contrary. No special reason has been shown however in this case.

V.S./R.K. *Application rejected.*

A. I. R. 1918 Patna 174

JWALA PRASAD, J.

Mahomed Abdul Latif—Defendant—Appellant.

v.

Habibur Rahman and *others*—Plaintiffs—Respondents.

Appeal No. 589 of 1917, Decided on 11th April 1918, from the Appellate decree of Dist. Judge, Patna.

(a) Transfer of Property Act (4 of 1882), S. 111 (g)—Suit for rent—Denial of title in suit causes forfeiture.

A denial by a tenant of his landlord's title in a suit for rent causes a forfeiture of the tenancy enabling the landlord to eject the tenant as a trespasser. [P 174 C 2]

(b) Transfer of Property Act (4 of 1882), S. 111 (g)—Determination of tenancy on ground of denial of landlord's title—Notice by landlord is not necessary—It is sufficient if something is done to show intention to determine lease.

In order to determine a tenancy on the ground of denial of title by the tenant, it is not necessary that any notice should be given or a prescribed act should be done by the landlord. It is sufficient if something is done by the lessor to show his intention to determine the lease. [P 175 C 2]

Purnendu Narayan Sinha and *Panchanan Banerji*—for Appellant.

Mohammad Hasan Jan—for Respondents.

Judgment. — This second appeal arises out of a suit for ejectment of defendant 1 from two plots of homestead land in Mouza Dariapur Sher, and in the alternative for muthar-fa rent for 1320 to four annas kisht of 1323 Falsi. The Mouza was partitioned in 1894 and the lands in dispute, bearing, Batwara Khasra Nos. 65 and 67, fell in Touzi No. 98. The plaintiffs now hold the entire 16 annas of Touzi No. 98. Defendent 1 holds the lands as tenant thereof. He denied the title of the plaintiffs to khas possession or to rent and set up the title of Nur Jahan, wife of defendant 2, to the lands in suit. Nur Jahan was impleaded as defendant 2 in the suit and after her death her husband was substituted in her place. There was no appearance in the Courts below by Nur Jahan or her husband. The suit was contested by defendant 1 only. The Courts below have concurrently held that the plaintiffs as owners of 16 annas of Touzi No. 98 are proprietors of the disputed lands which have fallen in their Touzi and that Nur Jahan, denfendant 2, has no concern with the disputed lands. This finding as to the plaintiffs' title to the lands in suit is not pressed before me in this appeal. The plaintiffs are therefore owners of the lands in suit and defendant 1 is tenant thereof. The Courts below have decreed the suit for possession in favour of the plaintiffs. Defendant 1 has preferred this second appeal.

In 1907 the plaintiffs brought a suit for recovery of rent from defendant 1. In that suit the defendant denied the relationship of landlord and tenant and set up the title of Nur Jahan. The plaintiffs' suit was dismissed on 19th June 1908. The plaintiffs subsequently brought another suit for rent. Defendent 1 again denied the title of the plaintiffs and the relationship of landlord and tenant, with the result that the plaintiffs had to withdraw the suit with liberty to bring a fresh suit. The plaintiffs therefore in the present suit seek to recover possession of the property in this suit on the ground that the denial of their title by the defendant in the two previous suits for rent constituted a forfeiture of the tenancy. The Courts below have found as a fact that the lands in suit are homestead lands and are not governed by the Bengal Tenancy Act, and that defendant 1 clearly and unequivocally denied the title of plaintiffs in the previous suits referred to above. The attempt of the defendant to challenge these findings of fact is futile. In the first place, the appellant is not entitled to re-open the findings in fact in second appeal. Apart from this a reference to the written statement of the defendant, Exs. 6 and 6 (1) in the previous suits, and his deposition in the suit of 1907 clearly go to show that defendant 1 openly and clearly repudiated in toto the plaintiffs' title to the land. It is also admitted, as held by the Courts below, that the lands when acquired were homestead lands and hence are not governed by the Bengal Tenancy Act. This finding is not seriously disputed in the second appeal. The defendant not only denied the plaintiffs' title in the previous suits but persists in denying it in the present suit and in

setting up the title of a third person. There can therefore be no doubt that defendant 1 has forfeited his right of tenancy in the lands in suit and is liable to be ejected therefrom. The learned vakil on behalf of the appellant however contends that the defendant is not liable to be ejected from the lands in suit, inasmuch as there is nothing to show that the plaintiffs did any act prior to the suit for ejectment showing their intention to determine the lease. Reliance is placed upon Cl. (g) S.111, Transfer of Property Act, which runs as follows.

"A lease of immovable property determines by foreiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case in lessor or his transferee does some act showing his intention to determine the lease."

This point does not appear to have been taken in the Courts below nor in the written statement. The defendant, to my mind, is not entitled to raise this point in second appeal, particularly when the decision on the point involves determination of facts which should have been raised in and determined by the Courts below. The defendant is a purchaser of the holding of the plots Nos. 65 and 67 from Kanhai Mahto and Gopi Halvai respectively by means of sale deed executed some 27 or 28 years ago, i. e., about the year 1888, the exact dates whereof are not disclosed. The origin of the tenancy is not at all known. Kanchi and Gopi must have held the lands for over 12 years prior to 1888, when they transferred the occupancy rights in the lands to defendant 1. The tenancy was therefore probably created before the Transfer of Property Act. If the tenancy was created prior to the Transfer of Property Act of 1882, Cl. (g), S. 111 will not apply, as clearly held in *Padmanabaya* v. *Ranga* (1), which was followed in *Korapalu* v. *Narayana* (2); vide also *Ramnath Sil* v. *Siba Sundari Debya* (3). It was for the defendant appellant to show that the tenancy was created after the Transfer of Property Act in order to take advantage of the clause mentioned above. The defendant did not take this plea nor offered any evidence to show when the tenancy was created. He is not entitled in second appeal to raise this question.

Again even if the tenancy was created after the Transfer of Property Act, it appears to me that the clause does not require any notice to be given, nor a prescribed act to be done on the part of the lessor. It is sufficient if something is done by the lessor to show his intention to determine the lease. In the present case the defendant repudiated the plaintiffs' title in 1907 and the plaintiffs' suit for rent was dismissed. Subsequently the plaintiffs had to withdraw their second suit for rent on account of the denial of their title by the defendant. The plaintiffs therefore bring the present suit for ejectment treating the defendant as trespasser, as they are entitled to do so; vide *Khater Mistri* v. *Sadruddi Khan* (4), *Nilmadhab Bose* v. *Ananta Ram Bagdi* (5) and *Ramnath Sil* v. *Siba Sundari Debya* (3). The withdrawal of the suit, with liberty to bring another suit, was an act done by the plaintiffs sufficient to indicate the intention of cancelling the lease and ejecting the defendant from the holdings. The plaintiffs have accomplished their intention by bringing the present action for ejectment. It is thus clear that the plaintiffs are entitled to eject defendant 1, whether the tenancy was created before or after the Transfer of Property Act. I therefore hold that the defendant has foreited the lease and the plaintiffs are entitled to recover possession in the present suit. The result is that agreeing with the views of the Courts below I dismiss the appeal with costs.

V.S./R.K. *Appeal dismissed.*

(1) [1910] 34 Mad 161=6 I C 447.
(2) [1913] 38 Mad 445=20 I C 930.
(3) [1917] 40 I C 348.
(4) [1907] 34 Cal 922.
(5) [1898] 2 C W N 755.

A. I. R. 1918 Patna 175

MULLICK AND ATKINSON, JJ.

Atul Chandra Metra—Plaintiff—Appellant.

v.

Mritunjoy Bose—Defendant — Respondent.

Appeal No. 25 of 1917 Decided on 18th December 1917, from Appellate Decree of Dist. Judge, Cuttack, D/- 2nd January 1917.

(a) Hindu Law— Widow— Full estate is vested in widow for some purposes—Alienation in accordance with custom in family—Decree against widow is binding on reversioners—Civil P. C. (5 of 1908), S. 11.

A Hindu widow is not merely a life-tenant. The full estate is vested in her for some purposes.

A Hindu died leaving two widows and a daughter by a predeceased wife. The widows, purporting to settle a dispute as to the daughter's maintenance, executed a pattah granting a permanent raiyati interest in certain agricultural land. Thereafter the daughter sued the widows on the allegation that they had declined to deliver the pattah and also dispossessed her from a part of the property covered by that document. The plaint further alleged that the pattah was executed in accordance with a custom prevalent in the family, by which married daughters, who resided in the family dwelling house were entitled to receive a certain amount by way of maintenance for themselves, their husbands and their children, to be enjoyed by them and after their death by their descendants. The widows denied the custom, but the Court held it proved and gave the plaintiff a decree:

Held: that the widows were sued not in their personal capacity but in their capacity as full owners, and that therefore the decree was binding on the reversioners. [P 177 C 2]

(b) Cosharers—Exclusive possession by one cosharer of joint property can be retained so long as co-owner's title is not denied.

Cases between co-owners are to be decided according to the principles of justice, equity and good conscience and ordinarily one cosharer is entitled to keep possession of a portion of the joint property and to enjoy it in exclusive possession so long as he does not deny the title of his co-owner or oust him in the eye of law. The remedy of the co-owners in these circumstances is to apply for partition or compensation.

[P 178 C 2]

J. N. Bose, S. C. Bose and *S. N. Ray*—for Appellant.

B. N. Sinha—for Respondent.

Mullick, J.—This appeal arises out of a litigation connected with the estate of the gentleman named Lala Siromani Rai, who had three wives named Sadaymani, Khirodemani and Pareshmani. Sadaymani predeceased him, leaving two daughters named Hula Rai and Swarna Rai. It appears that on 20th February 1820 Khirodemani and Pareshmani, purporting to settle a dispute as to maintenance between themselves and Swarna Rai, executed a pattah in favour of Swarna granting a permanent raiyati interest in 18 bighas of agricultural land and 12½ kottahs of homestead and garden lands. Pareshmani and Khirodemani are now dead and the present suit is brought by the plaintiff for declaration of title and recovery of joint possession in respect of the lands covered by the pattah, on the allegation that the pattah was fraudulent, illegal and inoperative as against him. It is contended that the alienation made by Khirodemani and Pareshmani was not binding upon the reversioners and the plaintiff being a reversioner of a half share, he is entitled to possession of all the properties of the original proprietor jointly with defendant Mritunjoy Bose. The Subordinate Judge framed in this suit no less than 10 issues, but it appears that the parties agreed that before any evidence was recorded argument should be heard on issues Nos. 4, 6, 7 and 8, which were as follows:

4. "Is the suit barred by the principle of res judicata?" 6. "Was there any custom in defendant's mother's father's family to keep gharjamais and to allow his daughters and their descendants properties for their maintienance as alleged by the defendant?" 7. Has the pattah, dated 20th February 1890, been obtained by fraud, force and coercion? Is it valid and binding against him?" 8. "Has the defendant acquired an absolute title to the lands as claimed by him?"

The learned Subordinate Judge found all these issues in favour of the defendant. It appears that he also determined issues Nos. 1, 9 and 10. Issue No. 1 deals with the maintainability of the suit, issue No. 9 about the question whether the plaintiff was entitled to certain moveable properties and issue No. 10 whether he was entitled to any damages. He considered it unnecessary to determine the other issues and in the result he dismissed the whole suit. There was then an appeal to the District Judge who came to the same conclusion, and the present second appeal before us is consequently preferred by the plaintifi. Now the first objection taken by the learned vakil for the appellant is that the learned Subordinate Judge heard the argument on the preliminary issues on 19th February 1916, but on 21st February 1916 he, without giving the plaintiff's pleader an opportunity of being heard, accepted from the defendant a copy of the plaint filed in a previous suit to which reference will be presently made. That paper was marked Ex. E and the order sheet contains an entry that pleaders were heard and judgment was reserved. It is contended that no pleader representing the plaintiff was heard and that the learned Subordinate Judge's entry in the order sheet is erroneous. On 8th March 1916 judgment was finally delivered in the suit.

Now if this alleged error of procedure on the part of the Subordinate Judge had affected any decision of the facts, we should have been compelled to remand the case, but we find that the document, Ex. E, was a document which was only required for the purpose of ascertaining what was the nature of the previous suit and what were the questions directly and substantially in

issue therein. It did not require any evidence to explain the contents of the document and the learned Subordinate Judge was in a position, merely from the document itself and the judgment and the written statement, to ascertain whether or not any issue was determined in the suit which constituted res judicata between the parties. The plaintiff's pleader, although he may not have been heard with regard to the admissibility of the document on 21st February 1916, had ample opportunity of being heard before the learned Subordinate Judge and if the written statement was before the Court, what objection could there be to the filing of the plaint also? The learned District Judge states in his appellate judgment that he heard the pleaders in full on both sides and he came to the conclusion that there was an issue in the previous suit which constitutes res judicata in the present suit.

Now what was that suit? That suit was brought by Swarna Rai against Khirodemani and Pareshmani on the allegation that they had declined to deliver the pattah executed on 20th February 1890, and also dispossessed her from a part of the property covered by the document. The plaint further alleged that the pattah was executed in accordance with a custom prevalent in the family by which married daughters, who resided in the family dwelling house, were entitled to receive a certain amount by way of maintenance for themselves, their husbands and their children, to be enjoyed by them and after their death by their descendants. The defendants, the widows of Lala Siromani Rai, denied the custom. The suit was contested and indeed very hotly contested, and it was finally decreed that the plaintiff should get possession of the properties mentioned in a schedule and that her possession in the remaining properties should be confirmed. Upon the pleadings of the parties issue No. 1 was framed as follows: "Whether the custom alleged in para. 2 of the plaint is prevalent in the family of the defendants. If so, whether according to such custom, the plaintiff is entitled to any maintenance and to what amount." Issue No. 2 runs as follows: "Whether such a custom is unreasonable and can be enforced." Issue No. 3 runs as follows: "Whether the defendants gave effect to such custom by promising to pay to the plaintiff maintenance of Rs. 200 in cash and 24 aris of paddy per year and whether they actually paid the plaintiff at that rate?"

The Court found issues Nos. 1, 2 and 3 in favour of the plaintiff and held that the evidence showed that the defendants had given effect to the custom by assigning to the plaintiff by the pattah of 1890 the land covered by that document in lieu of money payment of Rs. 200 and 24 aris of paddy. The learned vakil for the appellant contends before us that the finding of the Court in regard to the above issues cannot operate in this suit as res judicata. His first ground is that the finding in the suit was against two widows in their personal capacity and that the alienation was made not by them as representing the inheritance but as representing themselves, and therefore although they themselves were bound during their lifetime, the plaintiff who is a reversioner and claims from the last full owner, can in no way be affected by their act. The short answer to this contention is that a Hindu widow represents for some purposes the full estate. She is not merely a life-tenant. The whole estate is vested in her absolutely for some purposes and as was observed by their Lordships in *Katama Natchiar* v. *Rajah of Shivagunga* (1), it is obvious there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

In our opinion Swarna's suit against the widows was laid not in their personal capacity, but in their capacity as full owners. Her object in instituting the suit was to assert the claim that by reason of a family custom she, her husband and her children were permanently entitled to a share in the family estate on account of maintenance. A suit of this nature, in my opinion, cannot for a moment be called a suit against the widows to enforce an alienation made in their personal capacity and if that is the correct view, then any decree obtained in the suit against the widows will clearly bind the reversioners. So also would any finding in that suit on an issue directly and substantially in issue bind not only the parties in that suit, but also the persons claiming under them as their representatives. If therefore the present plaintiff is the representative of the widows as full owners and claims under them as such, then he also would be bound by the finding on issue Nos. 1, 2 and 3 in that suit. But then it is urged that the plaintiff does not claim through the

(1) [1861-63] 9 M I A 539 = 2 W R 31 (P C).

widows, but from the last full owner. In my opinion as the widows represented the inheritance in that suit, the plaintiff must be bound by any finding that was arrived at against the widows in that suit. Therefore upon the principle of *Shivagunga's* case (1), we must hold that the custom alleged was a valid custom and that the pattah which the widows were ordered to deliver to Swarna is binding upon the present plaintiff.

Now the learned vakil for the appellant contends that although the pattah may have been binding, it does not convey any permanent interest in the property. The document shows that the grant was made to Swarna, her children and her husband for maintenance out of her father's estate from generation to generation. It is contended that these words "generation to generation" cannot, having regard to the circumstances of the family, be construed to import permanency, and that having regard to the fact that the son of Swarna, the present defendant, was in existence at the time when the pattah was executed, it could not have been intended that a permanent grant of maintaining a person, who some day would become a proprietor himself. In my opinion we must construe the document as it stands and as the parties agreed to argue the case before the learned Subordinate Judge without any evidence, we must hold that no facts have been shown which are necessarily inconsistent with the view that the words "generation to generation" were intended to make a permanent grant in respect of the lands alienated.

Then it is urged that although the defendant may have acquired a valid tenancy in respect of the land transferred ,there has been a merger since by the death of the two widows he became a reversioner to the estate. The reply to this is that in respect of the pattah lands, the defendant appears to be an occupancy raiyat and as he has acquired a proprietary right to only a share in the state, the law of merger does not apply to him by reason of section 22 of the Bengal Tenancy Act. Finally, it is urged that the plaintiff should have been given an opportunity of showing that the decree in Swarna's suit was not fairly and properly obtained against the widows. Now that is a question of fact, which ought to have been determined on evidence, but as the parties declined to adduce any evidence and agreed to argue the question of res judicata upon the materials before the learned Subordinate Judge, it is too late now to ask that we should remand the case for the purpose of investigating this question of fact.

The learned vakil for the appellant urges that the learned pleader who appeared for the plaintiff in the Court of the Subordinate Judge acted in ignorance of the law and that if he had been alive to the importance of the ruling of their Lordships in *Shivagunga's* case (1), he would certainly have not consented to the decision of the case merely upon the documents. However that may be, the learned pleader who conducted the case must take the responsibility for any prejudice or injury that may have been caused to his client. We cannot at this stage reopen the whole proceeding and order an investigation into facts simply because he omitted to do his duty.

Finally, the learned vakil for the appellant had endeavoured to show that in respect of the 2 kottas $7\frac{1}{2}$ gandas. the decision in Swarna's suit could not be a bar inasmuch as that land was not covered by the pattah of 1890. Whether they are covered by the pattah or not, it is sufficient to say that as the plaintiff and the defendant are cosharers in an estate, the plaintiff is not of necessity entitled to a decree for joint possession and recovery of possession in respect of his eight-anna share in this small portion of land. Cases between co-owners are to be decided according to the principles of justice, equity and good conscience and ordinarily one cosharer is entitled to keep possession of a portion of the joint property and to enjoy it in exclusive possession so long as he does not deny the title of his co-owner or oust him in the eye of the law. The remedy of the co-owners in these circumstances is to apply for partition or compensation and therefore the learned District Judge, although he does not refer to this as one of his reasons, was right in holding that the suit was not maintainable. This disposes of all the points argued before us and the result is that the appeal is dismissed with costs.

Atkinson, J.—I agree.

V.S./R.K. *Appeal dismissed.*

*A. I. R. 1918 Patna 179

Special Bench

DAWSON-MILLER, C. J., CHAPMAN AND ATKINSON, JJ.

Ghinua Uraon—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 202 of 1917, Decided on 4th December 1917, from decision of J. C., Chota Nagpur.

*** (a) Penal Code (45 of 1860), S. 84—Person labouring under delusion but otherwise sane committing act of revenge—If act done knowingly he can be punished as sane man.**

Where a person otherwise sane but labouring under the influence of an insane delusion commits an act of revenge for some supposed grievance or injury, he is nevertheless punishable according to the nature of the crime committed, if at the time he understood that he was committing a wrong and unlawful act. In other words, he must be considered in the sane situation as to responsibility as a sane person would be if the facts with regard to which the delusion exists were true. [P 181 C 1]

*** (b) Criminal P. C. (5 of 1898), S. 164—Jurisdiction in case is not essential to record confession — Honorary Third Class Bench Magistrate can singly record confession—No form of questions prescribed to test voluntariness of confession.**

A Magistrate recording a confession need not be one having jurisdiction in the case.

An Honorary Magistrate of the Third Class not empowered to sit singly has nevertheless power to record a confession.

No form of questions is prescribed by S. 164 (3), Criminal P. C., from which a Magistrate recording a confession must satisfy himself that he believes the confession was made voluntarily. [P 183 C 1, 2]

(c) Criminal P. C. (5 of 1898), Ss. 164 and 533—Defects in confession can be cured by oral evidence.

Under S. 533 a defect in the compliance with the provisions of S. 164 of the Code can be cured by evidence taken by the Court before which the confession is tendered. [P 183 C 2]

(d) Criminal P. C. (5 of 1898), S. 465—Preliminary inquiry under S. 465 is not trial.

The preliminary inquiry held under S. 465 is not a trial in the sense of ascertaining whether the accused is guilty or not of the offence charged. [P 181 C 2]

Sarat Kumar Banerji—for Appellant.

Asst. Govt. Advocate—for the Crown.

Dawson-Miller, C. J. and Chapman, J.—The appellant Ghinua Uraon was tried in July last on a charge of murder before the Judicial Commissioner of Chota Nagpur assisted by assessors. He was found guilty and sentenced to transportation for life under S. 302, Penal Code. From that conviction and sentence he now appeals to this Court. A number of arguments have been urged before us by the learned vakil on his behalf in support of the appeal, and it is necessary in order to appreciate the nature of the points taken that we should state shortly the facts connected with the alleged crime and the nature of the proceedings which have led to this appeal. The appellant, who is a cultivator of about 35 years of age, lived at the village of Waina, about 2 miles from Loherdaga, the police head-quarters in the Ranchi District. In an adjoining house within the same angan as that of the appellant's house there lived an uncle of the appellant by name Ramna Uraon with the murder of whom the appellant is charged. On 20th October 1915 about half an hour before midnight the appellant presented himself at the Loherdaga Thana and made a statement to the Sub-Inspector in charge. There were blood stains on the clothes and person of the appellant. From the information received from the appellant the Sub-Inspector himself prepared a first information report under S. 154, Criminal P. C., incorporating therein the statement made to him by the appellant and signed it with his own name as informant. The Sub-Inspector then went with the appellant to the house of Maulvi Abdul Qadir Shaikh, Honorary Magistrate of the Third Class, before whom the appellant made a statement confessing that he had cut his uncle's throat with a spade.

The reason alleged by the appellant in his confession for committing this act was that the people of the village had been surrounding his house and throwing clods of earth and stones at it and had on that day at the time of the evening meal taken him away for the purpose of sacrificing him in order to liberate the village; that on the way to the stream where he was being taken he appealed for help to his uncle Ramna who refused assistance; that he shortly afterwards eluded his captors and returning to his house took a spade and cut the neck of his uncle, who was then asleep on the verandah near the appellant's door, and that he did this out of anger because Ramna had refused to assist him. Whilst this confession was being made and recorded by the Honorary Magistrate, the Sub-Inspector was not present and took no part in it. The confession when recorded in writing was read over to the accused and received his thumb impression by way of signature, and the Honorary Magistrate wrote thereon and signed the memorandum required by S. 164, Criminal P. C. The Honorary Magistrate who was sub-

sequently called as a witness at the trial testified that he was satisfied that the satement was made voluntarily. After making the statement just referred to, the appellant was taken back to the thana and detained. The Sub-Inspector then went to Waina village arriving about 2 a. m. on the 21st October, where he found the dead body of Ramna severely lacerated about the head and neck. He also found a bloodstained spade in the appellant's house. The body was examined on the 22nd October by the Assistant Surgeon, who testified before the committing Magistrate that death was due to the wounds found on the head and neck of the deceased man and that such wounds could have been caused by the spade found in the appellant's house. The accused was charged with murder and on 20th December 1915 was committed by the Deputy Magistrate of Ranchi to take his trial in the Court of Session for an offence under S. 302, Penal Code. The case, having been adjourned in order that the appellant might be placed under medical observation, came on before Mr. Inglis, the Officiating Judicial Commissioner of Chota Nagpur, and two assessors on 28th July 1916, when it appeared that the appellant did not understand the charge.

The Court then proceeded to try in the first instance under S. 465, Criminal P. C., the question whether the appellant was then of unsound mind and consequently incapable of making his defence. From the evidence of the Civil Surgeon under whose supervision the appellant had been since the preceding January and from questions addressed to the appellant the Court and assessors found that the appellant was of unsound mind at that time and incapable of making his defence and so reported to the Local Government. The trial was accordingly postponed in compliance with S. 465, Criminal P. C. The appellant was subsequently by order of the Local Government confined in the Patna Lunatic Asylum. Eight months later' on 30th March 1917, the visitors of the Asylum reported that the appellant had recovered and was capable of making his defence. Meantime Mr. C. H. Reid had succeeded Mr. Inglis as Judicial Commissioner of Chota Nagpur at Ranchi and on 24th July 1917 the appellant came up for trial before Mr. Reid, the then Judicial Commissioner, assisted by two fresh assessors. It was found by the Court that the appellant at that time was capable of pleading and understood that he was being tried for murder, and the trial proceeded. The appellant pleaded not guilty his defence being he knew nothing about what had happened and that he did not make the confession referred to. Four local witnesses were called, including the wife of the deceased Ramna and the wife of the appellant. These witnesses deposed that they saw no signs of madness in the appellant before the death of Ramna and that the occurrences referred to by the appellant in his confession as having taken place in the village immediately before the alleged murder did not in fact happen. Ramna's wife stated that the appellant and Ramna were on bad terms and used frequently to quarrel. The appellant's wife on the other hand said they were on good terms and never quarrelled. The Honorary Magistrate who recorded the confession was also called and deposed to the effect already stated. The other witnesses were principally Police Officers including the Sub-Inspector Nazir Hussain, to whom the appellant made his first statement and who signed the first information. The evidence taken before Mr. Inglis when the appellant's mental capacity was enquired into was also before the Court in compliance with S. 465 (2), Criminal P. C. The learned Judicial Commissioner came to the conclusion that the confession was voluntarily made and was admissible in evidence. He found that the appellant was clearly proved to have murdered the deceased man intentionally and that when he committed the deed, he knew the nature of his act and that what he was doing was wrong and contrary to law. In these findings both the assessors agreed, one of them adding "at the same time I think he was a little mad." As to the appellant's state of mind the Judicial Commissioner found that he was labouring under a delusion at the time of the murder that the villagers wanted to sacrifice him and in the excitement caused by this delusion he murdered his uncle. The appellant was found guilty and sentenced as already stated.

It was argued on apeal before us: 1. That the appellant was insane when the deed was committed. 2. That the trial before Mr. Reid in July last was irregular and illegal, on the ground that the Court which resumed the postponed trial was differently constituted from that which in the first instance tried the question of the appellant's capacity to make his defence under S. 465, Criminal P. C. 3. That the confession made before the Honorary Magistrate was inadmissible as such Magistrate

had no authority or power to record a confession or to perform any magisterial act except when sitting with one or more other Magistrates as a Bench. 4. That the confession on the face of it was bad and inadmissible on the ground that no questions or answars were recorded showing that the Magistrate had reason to believe that it was made voluntarily.

As to the pervious state of mind of the appellant when the deed was committed, there is no direct evidence to show that he was perfectly sane at that time. The four local witnesses called, including the appellant's wife depose to his sanity. It was contended however that the fact of his making a confession of such a nature is in itself evidence from which insanity can be inferred. Assuming in the appellant's favour that the confession was a genuine statement as to his motives in committing the deed, and that he was in fact labouring under the delusion that the deceased had refused to assist him at a time when he was in danger of losing his life at the hands of the villagers, the fact that he was labouring under a delusion of this kind, apart from any evidence that he was in other respects insane or incapable of understanding that he was committing a wrong and unlawful act, is not in our opinion sufficient ground for excusing the appellant from the consequences of his act. The point of view from which cases of this class should be regarded was considered by the House of Lords as long ago as 1843 in *M'Naghten's* case (1) when their Lordships took the opinion of the English Judges. From the principles there enunciated and which have been regarded as settled law ever since, it may be taken that where a person otherwise sane but labouring under the influence on an insane delusion commits an act of revenge for some supposed grievance or injury, he is nevertheless punishable according to the nature of the crime committed if at the time he understood that he was committing a wrong and unlawful act. In other words, he must be considered in the same situation as to responsibility as a sane person would be if the facts with regard to which the delusion exists were true. In the present case assuming the facts as stated in the confession to have been true, they afforded no justification for the crime committed and there is no evidence to show that the appellant did not realize that he was committing a wrongful act. On the contrary, the circumstances all seem to point to the conclusion that the appellant was conscious of having committed a crime. It is difficult otherwise to understand why he should immediately have gone to the Police Station and made a confession in which he stated that he acted in anger against the deceased. Had he been incapable of understanding the wrongful nature of his act, it is difficult to believe that it would have occurred to him to go to the Police Station at all. It is perhaps not important to observe that in his petition of appeal to this Court the appellant alleges that he was under the influence of liquor and knows absolutely nothing that occurred. This change of ground is calculated to throw some suspicion upon the bona fides of his first story as told to the Magistrate, but we do not desire to base our judgment in any way upon this consideration. In our opinion the contention that the appellant was not accountable for his action fails.

In considering the second point, namely, the competence of the Court as constituted on 24th July to try the case, it is necessary to consider the sections of the Code of Criminal Procedure which bear upon the matter. It was contended that S. 295 made it obligatory that the assessors should attend the trial as they had attended on the first occasion before Mr. Inglis, or that if both assessors were prevented from attending, the trial ought to have begun de novo with fresh assessors under S. 285 (2), and further that the substitution of a different Judge in place of the one before whom the appellant originally came for trial rendered the whole trial abortive and illegal. It is necessary to consider however the effect of S. 465 of the Code, which provides machinery whereby the Court may hold a preliminary investigation as to the accused's state of mind with a view to ascertaining whether he is at that time capable of making his defence. In one sense he may be said to be then on his trial; but the preliminary enquiry is not a trial in the sense of ascertaining whether the accused is guilty or not of the offence charged. Its object is to ascertain whether the accused was then in a fit state to be tried. If the enquiry resulted in the accused being found capable of making his denfence, no doubt the trial in the proper sense of the word would proceed without any adjournment. But if the result of the enquiry is to prove the accused to be incapable of making his defence, then the section

(1) [1843] 10 Cl & F 200=8 Scott (n s) 595.

provides that the trial shall be postponed.

In S. 295 and in other sections the word "adjourned" is used ,which implies that the trial has already begun, and we think that the word "postponed" in S. 465 was not merely fortuitous but was deliberately chosen to indicate something different from an adjournment as used in other sections. Moreover sub-S. (2), S. 465 provides that the trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court. In our view sub-S. (2) would have been unnecessary if the preliminary enquiry resulting in a postponement and the subsequent trial, if any, as to the accused's guilt were regarded by the Legislature as one trial. We think that the sub-section was merely an enabling enactment giving the Court, if any, which should subsequently try the accused, power to take into consideration the earlier proceedings as if they were part of the record in the trial without the necessity of formal proof. It was contended however that sub-S. (2) makes it necessary to regard the preliminary enquiry and the subsequent trial as one for all purposes, with the consequence that the personnel of the Court must remain throughout as originally constituted. We are unable to accept this view. But if there is an ambiguity as to the meaning of the sub-section, one is entitled to consider what consequence would result from such an interpretation with a view to ascertaining what the real intention of the Legislature was. In *Vacher and Sons, Ltd.* v. *London Society of Compositors* (2) Lord Atkinson in his speech at p. 121 says : "It is no doubt well established that in construing the words of a Statute susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction, for, as there are many things which the Legislature is presumed not to have intended to bring about, a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them." In the present case a period of 12 months elapsed between the preliminary enquiry and the subsequent trial and it is by no means improbable that in similar cases a much longer period might elapse. In many cases, as in fact happened in the present instance, the Judge who presided over the preliminary enquiry might cease to occupy his office, or might die or otherwise become incapable of acting. On the contention put forward on behalf of the appellant it would result that no trial could then take place before his successor at all or, if it did, the whole proceeding must be commenced de novo.

We think it was to meet such a condition of affairs that S. 465 (2) was framed. The interpretation contended for on behalf of the appellant would lead to the assumption that the Legislature intended to bring about the result already indicated, but it seems to us that this is an unwarrantable assumption. The principle of construction laid down by the House of Lords goes a long way to confirm the view already expressed as to the proper construction of S. 465, and we are of opinion that the legality of the trial before Mr. Reid cannot be impugned. The third point taken by the appellant raises the question of the admissibility of the confession. This depends upon whether an Honorary Magistrate of the third class not empowered to sit singly has power to record a confession. S. 164 of the Code provides that every Magistrate not being a Police Officer may record any statement or confession made to him in the course of an investigation under Chap. 14. These words in themselves are clearly wide enough to cover the present case and in Sch. 3 of the Code the ordinary powers of a Magistrate of the third class are enumerated. No. 13 reads as follows: "Powers to record statements or confessions during the Police investigation, S. 164."

By Ss. 14 and 16, the Local Government have power to confer all or any of the powers of a Magistrate of the first, second or third class on any person, with certain restrictions as to Police Officers, and to direct any two or more Magistrate to sit together as a Bench. The appointment of Moulvi Abdul Quadir Sheikh and Babu Biran Singh appears in the Bihar and Orissa Gazette under date 23rd July 1913. The appointment purported to be in exercise of the powers conferred by Ss. 14 and 15 and the proviso to S. 357 of the Code and recited that the Lieutenant Governor was pleased "(a) to confer on each of the gentlemen named below the powers of a Magistrate of the third class in the district of Ranchi for a period of the three years from the date of this notification, and (b) to direct them to sit as members of the Lohardaga Municipal Bench

(2) [1913] A C 107=82 L J K B 232.

in the said district." Then follow their names.

It was contended that the only powers conferred by the Local Government on the Magistrates named were those appertaining to a Bench of Magistrates and that they had no power to perform any magisterial act except when sitting with one or more other Magistrates as a Bench. We can see no reason for so limiting their power. The functions of a Bench of Magistrates of the third class consist mainly in trying certain classes of cases (see S. 261) and are distinct from several of the powers of a Magistrate set out in Schedule 3. Ss. 14 and 15 deal with both classes of magisterial acts and there is nothing in the terms of the appointment to limit the powers conferred to one class only. On the contrary, the terms of appointment seem to us clearly to confer all the powers conferrable by the sections mentioned. It was further contended that a Magistrate of the third class had no power to receive and record the confession, as he had no authority to carry on a preliminary inquiry or to act in a judicial capacity in a case of murder. The explanation appended to S. 164 shews that the Magistrate recording the confession need not be one having jurisdiction in the case, and the power granted to a Magistrate of the third class in Sch. 3 (13) is not confined to cases judicially before him as in the case of certain other powers e. g., those mentioned in Ss. (4) and (5) of the same Schedule. Further, if it is necessary to decide the point, it appears to us that an Honorary Magistrate recording the confession of an accused person under S. 164, Criminal P. C., is not exercising a judicial act as such. The cases cited on behalf of the appellant and reported as *Queen-Empress* v. *Alagu Kone* (3) and *Suppa Tevan* v. *Emperor* (4) do not support the contention now put forward. The question for decision in those cases was whether a prosecution for perjury under S. 193, Penal Code, would lie against a witness in a murder trial for having given a false statement of oath before a Magistrate acting under S. 164, Criminal P. C. The cases turned upon whether an oath could be administered by a Magistrate so acting. It was decided that an oath could be administered in such a case by reason of the powers given in Ss. 4 and 5 of the Oaths Act (10 of 1873) and that having regard to S. 4 (m) Criminal P. C., the recording of the statement on oath was a stage in a judicial proceeding within S. 193 of the Penal Code. It is clear that the ratio decidendi of those cases can have no application to the confession of an accused person to whom an oath cannot legally be administered. The case of *Queen-Empress* v. *Bharma* bin *Ningappa* (5) was also referred to, but this is still less an authority in the appellant's favour. In our opinion the objection cannot be sustained.

The last objection that the confession was on the face of it bad as it did not disclose all the questions and answers put and received must also fail. No form of questions is prescribed by S. 164 (3) from which the Magistrate must satisfy himself that he believes the confession was made voluntarily. The questions recorded as having been put and the answers given as well as the demeanour of the appellant may well have convinced the Magistrate that the confession was a voluntary one, and there is no reason to suppose that the recorded statement does not record all the question put. Moreover under S. 533 a defect in the compliance with the provisions of Ss. 164 and 364 can be cured by evidence taken by the Court before which the confession or statement of the accused person is tendered. In the present case the Magistrate was examined by the Court and deposed that the statement was recorded as given and that he was satisfied that it was voluntarily made. He was not cross-examined. In our opinion the appeal should be dismissed. We wish to draw attention however to the recommendation contained in the latter part of the Judicial Commissioner's judgment and to say that this Court approves of the course there suggested.

Atkinson, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(3) [1893] 16 Mad 421.
(4) [1906] 29 Mad 89.
(5) [1887] 11 Bom 702.

* **A. I. R. 1918 Patna 183**

JWALA PRASAD, J.

Khetrabasi Sahu and *others* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 386 of 1917, Decided on 5th December 1917, from order of Magistrate, Cuttack.

(a) Criminal P. C. (1898), S. 125—Application under S. 125—Magistrate dealing with application does not exercise appellate or revisional jurisdiction.

A District Magistrate dealing with an application under S. 125 is exercising neither appellate

nor revisional jurisdiction and it is not incumbent upon him to hear the Mukhtear of the petitioner before disposing of the application.

[P 184 C 2]

*** (b) Criminal P. C. (1898), S. 107—Continuity of acts by accused apprehended to tend to breach of peace—S. 107 applies although acts constitute specific offences under Penal Code.**

Where acts committed by an accused person are of such a nature that the continuity of these acts or the commission of similar acts by the accused is apprehended to be tending to a breach of the peace, S. 107 is applicable notwithstanding that the acts already committed by the accused constitute specific offences under the Penal Code.

[P 185 C 1]

G. C. Pal—for Petitioners.

Asst. Govt. Advocate — for the Crown.

Judgment.—The petitioners have been ordered by the Magistrate of Cuttack each to execute a bond of Rs. 100 with two sureties in a like amount each to keep the peace for one year or in default to undergo simple imprisonment for the same period unless the required security is sooner furnished. The order is made under S. 118 read with S. 107, Criminal P. C.

Against this order the petitioners moved the District Magistrate of Cuttack under S. 125 of the Code. The District Magistrate rejected their petition summarily, saying that he had perused the grounds of motion and the judgment of the Magistrate, and that he saw no reason whatever to cancel the bonds executed by the petitioners. Against this order of the District Magistrate the petitioners have now come to this Court. The main contention of the petitioners has been that their petition to the District Magistrate under S. 125 was not legally disposed of, inasmuch as no opportunity was given to them or their Mukhtear to place their case before the District Magistrate. This ground has not been specifically taken in the petition presented to this Court but a letter, dated 2nd October 1917, purporting to have been written to the learned vakil for the petitioners by their Mukhtear who appeared for them before the District Magistrate has been filed. In this letter it is stated that the Mukhtear presented a petition, upon which the District Magistrate directed him to file a supplementary petition as the one filed was argumentative in nature. The amended petition was filed the next day when the District Magistrate had not come to Court, and it was sent to his house along with the first petition which set forth all the arguments on behalf of the petitioners. The District Magistrate in his order says that he perused the petition and also considered the judgment of the first Court and then rejected the petition summarily.

The petition under S. 125 of the Code could not be treated as an appeal, for there is no appeal from an order under S. 118, Criminal P. C. As there is a special S. 125, that petition could not be treated as a petition under S. 435 and therefore the Magistrate was not exercising either appellate or revisional jurisdiction in dealing with the petition in question. S. 125 of the Code gives power to the Magistrate to cancel any bond directed to be executed by order of any Court subordinate to him for reasons to be recorded in writing. I do not think that it was incumbent upon the District Magistrate to hear the Mukhtear for the petitioners before disposing of the application under S. 125. S. 440 of the Code says that no party has any right to be heard either personally or by Pleader before any Court in the exercise of its revisionai power subject to the limitation of S. 439, sub-Cl. 2, which specially provides for giving an opportunity to the accused to be heard in revision before any order is passed to his prejudice. So that unless the petition in question was an appeal or a revision which, as shown, it was not, the party had no right to be heard. The contention of the learned vakil for the petitioner should be overruled. But I have heard the learned Vakil at length on the merits of the case and I have carefully gone through the judgment written by the Magistrate who tried the case. The proceedings before the Magistrate are not challenged as being in any way affected by illegality or any irregularity in the proceedings. It is however contended that there is no sufficient evidence of overt acts against the accused person which would justify an inference that there was a likelihood of a breach of the peace to be committed by them. The Magistrate has addressed at length on this point. He has come to the conclusion that all the seven accused belong to a different faction in the village headed by accused 1, Khetrabasi, and that the opposite party belong to the opposite faction and that the two parties are fighting for some times; that the party of the accused is strong and overwhelming in numbers and are threatening with violence and harassing the opposite party in various ways. The Magistrate says that it has been satisfactorily proved that the accused persons threatened to beat Daitari Sahu and Uchhab Sahu, the opposite party.

and harassed them in other ways and that there is every likelihood of a breach of the peace by them. The Magistrate has given specific instances when these violent acts of aggravation were committed by the accused under the orders of Khetrabasi. One instance is that the accused Daitari Sahu once threatened to beat him at the zamindar's kacheri. This is said as having been corroborated by the zamindar himself.

The accused persons are said to have gone to the house of Daitari Sahu and abused him filthily for his having deposed before the Inspector of Police in connexion with the case. This is said to have been supported by the evidence of Lochan Sahu (P. W. 9). Daffadar (P. W. 11) says that the accused persons once threw brickbats into the house of Daitari Sahu. The chaukidar had to be directed to keep strict watch over the accused persons so that no breach of the peace might be committed. On the evidence the Magistrate has held that the accused and some other persons of their party held sittings at Khetra's house at intervals of 2 or 3 days at about midnight and that the people of the locality are all afraid of them.

It is contended by the learned vakil for the petitioners that the overt acts alleged in this case were specific offences themselves and should have been dealt with under the Indian Penal Code instead of under S. 107, Criminal P. C. The argument appears to be inconsistent with the earlier part of the learned vakil's argument where he said no overt act was proved. For an inference that there would be a likelihood of a breach of the peace it is necessary to show overt acts, but each overt act from which a breach of the peace could be inferred would be in itself an offence punishable under the Indian Penal Code. I cannot conceive an act from which an imminent danger of the breach of the peace could be gathered without that act being penal in itself. This is not a real distinction, but the distinction is that where the acts committed by the accused are of such a nature that the continuity of these acts, or the commission of similar acts by the accused is apprehended to be tending to breach of the peace, S. 107 would be applicable notwithstanding that the acts already committed by the accused constituted specific offences under the Indian Penal Code. It was also contended that the acts in this case specified by the Magistrate were past acts of long standing and that there was no immediate apprehension of the breach of the peace.

From the summary of the findings of the learned Magistrate on the point that I have given above, it is apparent that these persons are in conspiracy to annoy and to harass the opposite party and that at intervals of 2 or 3 days meetings are held at the house of accused 1 and further that the opposite party is so much horrified that they remain confined. The opposite party consists of only two persons who are compelled to confine themselves in their houses and are prevented from carrying on their ordinary avocation. I could not imagine a stronger case for an action under S. 107, where the people of the whole village on the side of the accused have combined against two helpless persons. The findings of the Magistrate, if correct certainly justifies action under S. 107. The learned vakil does not challenge the finding upon the ground that it is not based upon evidence, and as a matter of fact the evidence that has been placed before him goes to show that the findings are justified by the facts on the record. I therefore do not find any ground for interfering in this case. I reject the petition.

V.S./R.K. *Petition dismissed.*

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MULLICK AND ATKINSON, JJ.

Sreenath Das—Appellant.

v.

Ghanashyam Naik—Respondent.

Second Appeal No. 43 of 1917, Decided on 19th December 1917.

(a) Decree—Setting aside—Mistake—Grave mistake vitiating character of decree—Execution if permitted would amount to abuse—Suit to set aside decree is maintainable—Principles of Courts of Chancery in England should be taken as guide to grant relief.

To warrant a Court in granting relief on the ground of mistake, it ought to have regard to the principles which guided the Courts of Chancery in England in granting relief in such suits prior to the Judicature Act, 1876, and which principle still prevails. [P 187 C 1]

Where a decree has been procured by some grave mistake so as to vitiate the whole character of the decree, and to permit its execution would amount to an abuse, the Court has power to rectify the error or mistake upon which the decree is founded in an independent suit. To hold otherwise would be contrary to the elementary principles of natural justice coupled with equity and good conscience : *Case law discussed.* [P 188 C 1]

(b) Decree—Setting aside—Mere error or irregularity committed in drawing up decree—Suit to rectify mistake is not justified.

Where a Court has jurisdiction to pronounce a decree and some mere irregularity or error arises in the drawing up of the decree that, of necessity, does not justify the Court in grant-

ing relief in a subsequent suit to rectify the mistake, though it might afford some ground for supporting an application for review. [P 187 C 1]

(c) Decree— Finality— Money paid under compulsion of legal process cannot be recovered unless realized by fraud or some unconscionable dealing.

If money is paid under compulsion of legal process it cannot be recovered as money had and received unless it was realized by fraud or some unconscionable dealing on the part of the decree-holder or under a decree obtained by mistake if the mistake was of such a character as equity would relieve against. [P 189 C 2]

(d) Decree — Finality — Mortgage decree making puisne mortgagee personally liable for balance—Money paid by puisne mortgagee in several executions—Suit to rectify decree and for recovery of amount paid on ground that decree was erroneous—Decree not without jurisdiction — Plaintiff being guilty of laches, negligence and carelessness had acquiesced in decree and is entitled to no relief.

Plaintiff, a puisne incumbrancer of certain mortgaged property, was impleaded as a party to the mortgage suit brought by the mortgagee and was served with notice. He failed to appear and a decree was passed against him ex parte making him personally liable for the balance of the mortgage money which might remain unrealized after the sale of the mortgaged property. In the course of several executions, the decree-holder realized a certain amount of money from the plaintiff without protest on the latter's part. The plaintiff subsequently brought a suit to recover the amount paid by him in execution on the ground that as a puisne incumbrancer he could not be made personally liable under the mortgage decree, and that the decree was in that respect erroneous:

Held: (1) that the decree was one made by a Tribunal having jurisdiction to make it and contained a mere error; (2) that the plaintiff had been guilty of laches, negligence and carelessness and had acquiesced in the decree, and that therefore he was not entitled to have the decree rectified in a subsequent suit and to recover the money paid under it. [P 190 C 1]

S. C. Chatterjee—for Appellant.

B. N. Das—for Respondent.

Atkinson, J. — The plaintiff in the present suit seeks to rectify a decree passed in Original Suit No. 659 of 1911; and consequential upon such rectification he seeks for an order declaring him entitled to be repaid by defendant 1 the sum of Rs. 245-8-0 which was levied from the plaintiff in execution of the aforesaid decree. The facts are within a very narrow compass and may be shortly stated. Defendants 3 and 4 as mortgagors mortgaged to defendant 2 certain property. Defendants 5 and 6 were subsequent purchasers of the property; and the present plaintiff was a puisne incumbrancer upon this mortgaged property. Defendant 2 obtained as against defendants 3 and 4 a mortgage decree by way of compromise; and as against defendants 5 and 6 and the present plaintiff, defendant 2, obtained in the former suit a decree ex parte after process duly served. Defendant 1 in the present suit is the transferee or assignee of the mortgage decree originally obtained by defendant 2 in the former suit. The original mortgage suit was instituted more than six years after the due date of payment provided in the mortgage bond. The ex-parte decree was obtained as against defendants 5 and 6, and the present plaintiff; and contained an order directing the mortgage money to be realized out of the mortgaged property; and coupled with that direction, there was a further order providing that in the event of the mortgaged property realizing an amount insufficient to pay the mortgage debt in full, that then the balance was to be recovered from the original mortgagors and defendants 5 and 6 and the present plaintiff personally. The present plaintiff, as I have already said, was a puisne incumbrancer upon the mortgaged property. It is contended that the Court had no power to make a personal order to pay as against a puisne incumbrancer, and thus there was a mistake in the decree so far as the plaintiff is concerned; and that there being a mistake, the decree ought to be rectified and the plaintiff who has paid money as a consequence of that mistake, ought to have the money refunded to him.

There can be no question that the Court had jurisdiction in the mortgage suit to grant the mortgage decree. In drawing up the decree a mistake apparently was made so far as the decree imposed personal liability to pay upon the plaintiff should the mortgaged property realize insufficient to satisfy the money due on foot of the mortgage bond. The decree was one made by a Tribunal having jurisdiction and contained a mere error. Defendant 1, after he became the assignee of the original decree, proceeded to execute the decree. He filed more than one application for execution; and in the course of the several executions which were effected, he realized Rs. 245-8-0 from the plaintiff without protest on the part of the plaintiff. The plaintiff now seeks to recover that sum from defendant 1, the money having been paid under compulsion of a legal process. The plaintiff allowed the original decree so far as he is concerned, to be passed against him as ex parte, after due service of summons and all necessary formalities having been com-

plied with; and therefore no equity attaches to the plaintiff's position so far as his claim to relief in the present suit is concerned. In effect, the plaintiff's claim is to recover money paid under compulsion of legal process on the ground that the decree under which the money was paid, was wrong in form and contained an error.

The learned Judge on appeal held that the present suit was maintainable and granted the plaintiff the relief which he sought by awarding him a decree for Rs. 208 odd as against defendant 1. From that decision defendant 1 has appealed to this Court. The question we have to determine, is whether or not the view taken by the learned Judge is right in point of law. The learned Judge lays down the proposition that if there be a mistake in a decree, the Court has jurisdiction in an independent suit to rectify that mistake and grant relief. The proposition seems to us to be too wide. No doubt S. 9, Civil P. C., does confer jurisdiction on all Courts to try all suits of a civil nature, excepting suits expressly or impliedly barred; and a suit to rectify a decree on the ground of mistake, would be entertainable within the meaning of that section: *Jogeswar Atha* v. *Ganga Bishun Ghattack* (1)]. But the mere existence of a mistake does not afford a ground for granting relief in every case. To warrant a Court in granting relief on the ground of mistake it ought to have regard to the principles which guided the Courts of Chancery in England in granting relief in such suits prior to the Judicature Act of 1876, and which principle still prevails. Whether there is jurisdiction in the Courts of India to grant relief by independent suits seeking to rectify a prior decree founded on some mistake, has been the subject of diverse opinions, but whether such relief should or ought to be granted, must invariably depend upon the facts of each particular case and the equity, if any, attaching to the rights of the party invoking the aid of the Court.

If a Court has jurisdiction to pronounce a decree and some mere irregularity or error arises in the drawing up of the decree that, of necessity, does not justify a Court in granting relief in a subsequent suit to rectify the mistake though it might afford some ground for supporting an application for review. In the case of *Jogeswar Atha* v. *Ganga Bishun Ghattack* (1) the ratio decidendi for holding that a subsequent suit might be brought to rectify a mistake in an original decree, was that the original Court had no jurisdiction to include in its decree a certain denomination of property; and that it had included in a mortgage decree and directed a sale of certain property which ought to have been excluded and with respect to which it had no jurisdiction to deal. In a more recent case [*Chand Mea* v. *Srimati Asima Banu* (2)]the authorities, so far as they have laid down the principle of law applicable to this country, have been fully considered and the learned Judges say at p. 1025 as follows: "We do not understand how such a decree which was made in the presence of both the parties and which apparently is conclusive between them, and is not tainted by fraud, can be set aside by a separate suit."

I take this expression of opinion to mean not that there is no jurisdiction in a proper case to set aside, or rectify by independent suit, an original decree founded on some grave mistake or fraud, but that on the facts proved in that particular case no facts were established to justify the Court in granting the relief claimed. In support of this view, I am fortified by the observation of their Lordships at p. 1025 in which they say: "We do not think it can be so broadly laid down, as has been contended for by the learned vakil for the respondent, that any error in a decree made by a Court, may be challenged by a separate suit; for in that event there would be no finality in a judgment or a decree. Our attention however has been called to the case of *Jogeswar Atha* v. *Ganga Bishun Ghattack* (1) as laying down an opposite view of the matter; but upon examination of the facts of that case, it will be found that they are quite distinguishable from the facts of the case with which we are now concerned. There property No. 3 was not claimed by the plaintiff in the previous suit and, by some mistake or other, that property was entered in the decree in the place of property No. 4, which had been claimed, and when a suit was brought for the purpose of rectifying the decree on the ground of mistake, it was held that such a suit would lie, having regard to the provisions of S. 11, Civil P. C. It would appear that, in the previous suit, the Court had no authority to make a decree, as it did, in regard to property 3, for that was not the subject-matter of the suit. But, in the present case, as I have already

(1) [1904] 8 C W N 473.

(2) [1906] 10 C W N 1024.

pointed out, the Court had authority to make an order for ejectment in the event of the rent not being paid." This decision does not, in my opinion, negative the right to rectify an original decree grounded on mistake by a subsequent suit, but on the contrary it seems to recognize the right, if proper facts are established, to justify the intervention of the Court in granting relief.

I attach vital importance to the finality of litigation; and I would be no party to any decision which would lay down needlessly any principle which would justify the re-opening or setting aside of a decree on some mere flimsy pretext. To do so would utterly destroy the sense of finality which the law requires for the enforcement of its decrees. But I cannot refrain from expressing my opinion that it would be impossible to hold that if a decree has been procured by some grave mistake so as to vitiate the whole character of the decree, and to permit its execution would amount to an abuse, that there is no power to rectify the error or mistake upon which the decree was founded by independent suit, and most certainly to hold otherwise would be contrary to the elementary principles of natural justice coupled with equity and good conscience. In the main I agree with the summary of the law as expressed by Mr. Justice Chapman in the case of *Janakdular Saran Misser* v. *Ambica Prasad Singh* (3) and at p. 318 (of 2 *Pat. L. J.*) the learned Judge says: "In one department of this jurisdiction the Court of Chancery used formerly to interfere where the legal judgment was obtained through fraud, mistake, or accident, and there had been no negligence, laches or other fault on the part of the person seeking the assistance of the Court of Chancery, or, on the part of his agents. The Court of Chancery, even where there had been mistake or accident, would interfere only in a case in which the judgment could not conscientiously be enforced. The practice in Chancery originated at a time when the Law Courts had little or no power to grant new trials for such causes. To prevent a failure of justice, the equitable jurisdiction of granting new trials in the Court of Chancery was admitted. Since the fusion of the Courts of Law and Equity and since the Courts in England have acquired very wide powers for the purpose of amending their proceedings or of granting new trials themselves, I cannot find that the exercise of this jurisdiction has continued in England." I disagree, however, with my learned brother when he says that the jurisdiction which he has so accurately described has not continued to be exercised in England. No doubt the need for the exercise of this jurisdiction in England has become less by reason of the wide power of amendment conferred on all Courts by the Judicature Rules; but the jurisdiction to rectify a decree founded on mistake or fraud by independent suit, has never been abandoned by Courts of Equity in England. The jurisdiction still exists; the question in each case is, do the facts warrant the exercise of that jurisdiction? In my opinion, the case of *Jogeswar Atha* v. *Ganga Bishun Ghattack* (1) was not wrongly decided on its facts and the principle of law applicable thereto. Mr. Justice Roe in the case of *Janakdular Saran Misser* v. *Ambica Prasad Singh* (3), considered, and I agree with his expression of opinion, that in England there is a right to rectify a mistake in an original decree though the method of procedure at present is perhaps different from that which existed formerly. But the inherent essence of the right to correct a mistake in an original decree, exists even though in England the modern Code of procedure may have modified the character of the enforcement of that right. The learned Judge says as follows: "Upon the investigation of my learned brother into the attitude of the English Courts towards cases of this nature, I am compelled to agree with great respect that the learned Chief Justice of Bengal was to some extent in error in *Jogeswar Atha* v. *Ganda Bishun Ghattack* (1) if he really intended to say that actions are maintainable in the English Courts to give relief against one's own carelessness."

"I have discovered many cases in which such relief has been given upon motion. There would be no difficulty at all in granting similar relief under O. 47, R. 1 and very little now in stretching rule 2 to cover the point, but the instances in which actions have been maintained to rectify an error in a decree, have all been instances in which the error was due to a mutual mistake or a mistake by the opposite party." The learned Judge then sets out the cases relied upon by him support the conclusion arrived at in his judgment. Thus I take it that Mr. Justice Roe recognises that there is still power to rectify an original decree by motion and

(3) [1917] 2 P L J 313=39 I C 126.

also by suit. The policy of the Judicature Rules was to modify the old formalities required in the Court of Chancery and to abolish the rigid restrictions of the Common Law Courts; and thus it is that now cases in which mistakes occur in the drawing up of decrees, are disposed of by way of motion; but this fact has not destroyed or nullified the past and present existing alternative right and jurisdiction vested in the Courts of Equity in England to rectify a decree founded on mistake by an independent suit.

Now the original decree in this case was obtained by way of compromise as against the original mortgagors, defendants 3 and 4, and with regard to the other defendants, and the present plaintiff ex parte; and they having been duly served with the process of the Court, took no steps to safeguard or protect their interests and beyond all question the plaintiff has been guilty of laches, negligence and carelessness. Though there may have been an irregularity in the exercise of the Court's jurisdiction that in itself does not per se justify a Court in granting relief in a subsequent suit to rectify the irregularity on the ground of mistake. Therefore it would appear that the learned Judge erroneously applied the legal principle not applicable to the facts of this case. The reasoning of the judgment in *Jogeswar Atha* v. *Ganga Bishun Ghattack* (1) cannot apply, bearing in mind always that the plaintiff in this suit must be deemed to have known of the existence of the ex parte decree, and to be aware from time to time while various executions were proceeding against his property, that there was a personal decree against him; and that he took no steps to ascertain the nature or the circumstances under which that decree was pronounced; and thus in equity he is not entitled to the relief he seeks. The facts of this case do not justify the intervention of the Court in exercising its jurisdiction to grant relief by independent suit to cure a mere irregularity or error in the original decree acquiesced in by the parties. Therefore the decree of the learned Judge awarding the plaintiff Rs. 208 odd, cannot stand. For an additional reason this action should also fail. The action is really in effect framed to recover money paid under compulsion of legal process as money had and received. It is well settled now that if money is paid under compulsion of legal process, it cannot be recovered as money had and received unless it was realized by fraud or some unconscionable dealing on the part of the decree-holder, but ordinarily money paid in obedience to a legal process is irrecoverable. The principle of law laid down in the case of *Marriot* v. *Hampton* (4) has never been dissented from and has been accepted as the established law of England; and the principle laid down in that case has also been recognized to be the principle applicable to the law of India as decided by the case of *Harinath* v. *Hara Das Acharja* (5). Their Lordships in the latter case distinguished the facts of that case from the facts of *Marriot* v. *Hampton* (4) and held that in the case that they were considering that there was apparent mala fides on the part of the payee and that therefore the payer of the money was entitled to be repaid. But the general principle of law laid down in *Marriot* v. *Hampton* (4) was accepted by their Lordships. Likewise the case of *Marriot* v. *Hampton* (4) was distinguished in the case of *Ward & Co.* v. *Wallis* (6) on the ground of fraud; but the law as laid down in *Marriot* v. *Hampton* (4) has never been dissented from. But if any particular case is within the principle of the exception laid down in *Marriot* v. *Hampton* (4) relief can be granted and the money paid recovered. The exceptions stated in *Marriot* v. *Hampton* (4) are fraud and unconscionable dealing. That decision was given in the old days when there was a marked difference between the relief capable of being granted at law and equity. But since the fusion of the Courts of Law and Equity in the year 1876, the old distinctions have ceased to exist and the principles of equity must now prevail. If in equity a decree could be rectified on the ground of mistake, as I believe it could and still can, then money paid under such a decree would be recoverable in equity but not at law. Therefore as the principles of equity are to prevail over the harder and more dogmatic and inflexible rules of law, I think there may and ought to be added to the exceptions laid down by *Marriot* v. *Hampton* (4), in addition to fraud and unconscionable dealing, the case of mistake, viz., a decree obtained by mistake if the mistake was of such a character as equity would relieve against. No doubt it is true as Chapman J., observed in the case cited that "at Common Law no case can be found where money paid under compul-

(4) [1797] 7 T R 269.
(5) [1915] 43 Cal 269=29 I C 580.
(6) [1900] 1 Q B 675=69 L J Q B 423.

sion of legal process was recovered back on the ground that the legal process or judgment had been obtained by mistake.' But we have to apply equitable principles where equity conflicts with law; and thus it appears not only logical but sensible that if equity would rectify a decree obtained by mistake so money paid under such a decree would be recoverable under the existing legal procedure applicable in England provided always the mistake was of such a nature and character as would induce a Court of Equity in the exercise of its beneficient jurisdiction to grant relief. However in the present case we are satisfied that the plaintiff has not established facts to show that any mistake in fact took place in the preparation of the decree, coupled with the subsequent conduct, which would afford him any grounds of relief in equity. Therefore we think that the learned Judge was wrong in the conclusion at which he arrived. His order is accordingly set aside and this appeal decreed with costs in all Courts.

Mullick, J.—I agree.

V.S./R.K. *Appeal decreed.*

A. I. R. 1918 Patna 190

MULLICK, J.

Jugeshwar Pershad—Plaintiff—Petitioner.

v.

Ragho Misser and *another*—Defendants—Opposite Parties.

Criminal Revn. No. 6 of 1917, Decided on 23rd April 1917, against order of Munsif, Madhubani, D/- 21st December 1918.

(a) Criminal P. C. (1898), S. 195—Ex parte decree not set aside—Judgment-debtor can apply for sanction for offence under Ss. 193 and 210, I. P. C.

A defendant against whom an ex parte decree has been passed is not, merely by reason of the decree not having been set aside, precluded from applying for sanction to prosecute the plaintiff under Ss. 193 and 210, I. P. C. [P 191 C 1]

(b) Criminal P. C. (1898), S. 195—Court which passed decree can sanction prosecution though decree subsisting.

If the Court which decreed the suit is satisfied that the suit was false, it is competent to grant the sanction, notwithstanding that the decree still stands and is capable of execution. [P 191 C 1]

(c) Criminal Trial— Civil suit— Offence against public justice.

If an offence against public justice has been committed, the offenders are liable to punishment irrespective of the state of affairs in the civil Courts. [P 191 C 1]

(d) Criminal P. C. (1898), Ss. 195 and 476—Delay is material in case of private person in seeking sanction but not so when Public Prosecutor seeks it.

Ordinarily, delay on the part of a private prosecutor in obtaining a sanction in respect of offences against public justice is material as bearing upon the question of bona fides, but where Government is in fact the real prosecutor, the question of bona fides disappears. It is assumed that the Crown will not act mala fide in matters of this kind. [P 191 C 2]

Muhammad Hasan Jan and *Murari Prasad*—for Petitioner.

Manohar Lal—for the Crown.

Judgment.—One Jugeshwar Pershad, who is a resident of the Darbhanga District, brought a suit in the Small Cause Court of Madhubani, in the Darbhanga District, on 20th of August 1915, for a debt of Rs. 11 against Ragho Misser and Chitnas Misser, who are both rasidents of the Monghyr District. On 10th September 1915 the suit was decreed ex parte. It appears that about the end of 1915 or the beginning of 1916, the defendants came to know of the decree, and on 24th January 1916 made an application to the Commissioner of the Bhagalpur Division, within which is situated the Monghyr District, for an investigation into the circumstances connected with the decree. The Commissioner thereupon had an enquiry made by the Criminal Investigation Department, with the result that on 1st November 1916 an application was made by the defendants Ragho Misser and Chitnas Misser before the Munsif of Madhubani for sanction to prosecute the plaintiff Jugeshwar Pershad. On 16th December 1916 both parties applied to the Munsif for an adjournment, but the Munsif refused the application and examined the two defendants and three witnesses on behalf of the defendants. The plaintiff was not examined, and it is alleged that he had no witness in attendance. On the 21st December 1916 the Munsif made an order granting sanction for the prosecution of the plaintiff Jugeswar Pershad, for committing offences under Ss. 210 and 193 of the Indian Penal Code. The matter is now before me in revision, and my jurisdiction is limited within the scope of S. 115, Civil P. C., S. 25, Provincial Small Causes Courts Act, and S. 107, Government of India Act.

The first point taken by Mr. Muhammud Hasan Jan on behalf of the petitioner is that so long as the ex parte decree remains unreversed there can be no prosecution for obtaining a false decree and for fabricating false evidence. Now

it is true that the result of a conviction of the petitioner in consequence of the present sanction to prosecute will be somewhat inconsistent for while the Criminal Courts will hold that the plaintiff's case was false, the decree of the Civil Court passed on the footing that the case was true will stand and remain capable of execution. But this anomaly, in my opinon, is not sufficient to prohibit the prosecution of the plaintiff if the Court which decreed the suit is satisfied that the suit was false.

The defendants ought to have moved to set aside the ex parte decree within one month of the date of knowledge of the decree or at least within one month from 24th of January 1916, on which date they made the aplication to the Commissioner. The time for making the application expired on the 23rd of February 1916, and possibly their only civil remedy after that lay in bringing a suit to set aside the ex parte decree on the ground of fraud. But the law nowhere says that they were bound to set aside the decree before they could avail themselves of the remedy given by the Criminal Law. If an offence against public justice has been committed, the offenders are liable to punishment irrespective of the state of affairs in the Civil Courts, and this has been held in *Emperor* v. *Molla Fuzla Karim* (1). Mr. Muhammad Hasan Jan however attempts to distinguish that case on the ground that there the defendants resided in the Punjab and the decree was obtained in Calcutta, and that it would have been very inconvenient for the defendants to come to Calcutta for the purpose of setting aside the decree; whereas, in the case now before me, the decree was obtained in a District which adjoins that in which the defendants reside. This question of inconvenience does not appear to me to touch the principle involved in the matter. If once it is granted that the criminal remedy is independent of the civil remedy ,then questions of distance and inconvenience are wholly immaterial. I hold, therefore, that in law there was no bar to sanction being given for the prosecution of the plaintiff in the present case notwithstanding the fact that the ex parte decree still remains capable of execution.

The next ground urged on behalf of the petitioner is that there was great delay in the application for sanction. From the date of the ex parte decree till the date of the application there elapsed a period of fourteen months and from the date of the application to the Commissioner there elapsed a period of ten months.

In the application for sanction made to the Munsif the defendants said that the enquiry by the Criminal Investigation Department in the District of Monghyr was finished on the 11th of March 1916. Even then there was a delay of eight months. Making the fullest allowance for the delays incidental to setting the machinery of the Criminal Investigation Department into motion, and to getting sanction for the prosecution and the defrayal of expenses by Government, I think the delay in this case was not satisfactory; but nevertheless I do not think that I should interfere with the order that the Munsif has made. Ordinarily, delay on the part of a private prosecutor in obtaining sanction in respect of offences against public justice is material as bearing upon the question of bona fides, but where Government is in fact the real prosecutor, the question of bona fides disappears. It is assumed that the Crown will not act mala fide in matters of this kind. Therefore the main objection to delay in applying for prosecution in this class of cases on the part of the Crown disappears.

The learned Munsif appears on a review of the whole cases to have been satisfied that he ought to exercise his discretion in favour of the defendants, and, sitting in revision, I am not prepared to say that he has exercised that discretion wrongly. I trust, however, that the learned Government Advocate will in future applications of this kind bring to the notice of the authorities the desirability of concluding investigations as quickly as possible and bringing the matter before the Courts at the earliest possible moment. The difficulty of proving offences against public justice is difficult without adding to it by delay in bringing the offenders to justice. The third ground is that on the merits no sanction ought to have been given. Now this is a question on which the learned Munsif has exercised his discretion upon the evidence recorded. It is unfortunate that the plaintiff had not got any witness present in Court on the appointed day, but as he had had time to produce those witnesses, there seems to have been no material irregularity in the exercise of the Munsif's jurisdiction. I see no reason why, upon the prima facie case established, the matter should not proceed to trial in the oridinary course.

(1) [1906] 33 Cal 193.

The result is that the application for revision is dismissed. The prosecution of the plaintiff-petitioner will take its course.

V.S./R.K. *Application dismissed.*

A. I. R. 1918 Patna 192

DAWSON-MILLER, C. J. AND JWALA PRASAD, J.

Asharfi Singh and others—Plaintiffs—Appellants.

v.

Madhabeshwar Indra Narain Sahi—Defendant—Respondent.

First Appeal No. 181 of 1916, Decided on 11th April 1918, from decision of Sub-Judge, 1st Court Muzafferpore, D/- 7th August 1916.

Specific Relief Act (1877), S. 42—Declaration claimed being merely introductory to claim for possession, legislative sanction held not necessary — Suit did not fall under S. 42—Defendant not interested in property in suit is not necessary party to suit for declaration of title and for recovery of possession.

A instituted a suit for declaration of title to and recovery of possession of the estate of one *K* as his next reversionary heir after the death of *K's* grandmother, who had succeeded to his estate. *M*, a cognatic relation of *K*, was made a defendant to the suit, because in a probate proceeding relating to the will of another separated member of the family, *M* had claimed to be the nearest cognatic relation and had not admitted *A's* claim as an agnatic relation of the family. *M* claimed no interest in the property in suit, but it was alleged that he was interested in denying *A's* title to the estate of *B*, another member of the family, succession to which had not yet opened:

Held: (1) that the declaration claimed, being merely introductory to a claim for possession, was not one for which legislative sanction was required and that the suit was not one under S. 42, Specific Relief Act; (2) that *M* not having claimed any interest in the properties in suit, it would be an abuse of the process of the Court to allow him to be harassed by being made a party to litigation, the only relief claimed in which was one in which he had no interest and in which he was not directly concerned, to enable the plaintiff to support a possible claim in a future litigation which might arise. [P 193 C 1]

Sharoshi Charan Mitra—for Appellants.

Hasan Imam and *Rajendra Prasad*—for Respondent.

Dawson-Miller, C. J.—This is an appeal from a decision of the Subordinate Judge of the first Court, Muzafferpore, dated 7th August 1916. One of the issues framed was whether the plaintiffs had any cause of action against defendant 7. With consent of all parties this issue was tried separately, and it was argued and decided upon the assumption that the issue was whether the plaint disclosed any cause of action against defendant 7 and no evidence was called. The object of the plaintiffs in bringing this suit is undoubtedly to obtain possession of certain properties the succession to which reopened on the death of Mt. Malikrani Koer in 1908. She succeeded her grandson Babu Krishna Pertap Indra Narain Singh, who was the last male owner. The defendants 2 to 6 are either descendants or collateral relations of Malikrani's husband, but trace their descent through females and are, therefore, not agnates of the last male owner. Defendant 7 is also a Bandhu of the last male owner, but belongs to a more remote class than the defendants 2 to 6 and lays no claim whatever to the property in question. Defendant 1 claims to be the adopted son of Babu Kishen Kishore Narain Singh, a descendant in the female line from Bhagirath Jha, the common ancestor of himself and the other defendants, and if he can prove the validity of his adoption, will take in priority both to the plaintiffs and to the defendants 2 to 6 who lay claim to the property in question. The plaintiffs claim to be the direct descendants in the male line from a brother of Bhagirath Jha, one Bunwari. The relationship between Bunwari and Bhagirath Jha is disputed by the defendants 1 to 6. Before the plaintiffs can succeed against the defendants 2 to 6 they must prove that Bunwari and Bhagirath Jha were sons of the same father and before they can succeed against defendant 1 it must further be found that the defendant 1 was not the adopted son of Krishna Kishore Narain Singh. The relationship between the parties is made clear by reference to the genealogical trees attached to the pleadings. I have stated the above facts to show what is the nature of the questions in dispute between the parties in the suit who lay claim to the property in question. So far as these issues are concerned, the defendant 7 is not a necessary party as he has at no time claimed and does not now claim any right, title or interest in the disputed property, nor could he in the circumstances by any possibility make out a title. He only asks to be dismissed from the suit and left alone.

But the plaintiffs contend that as in their plaint they ask not only for possession of the property but also for a declaration that they are the nearest gotias to the last male owner of the property, the suit ought to be treated as a declaratory suit under S. 42 of

Specific Relief Act and they claim that they are entitled to such a declaration against defendant 7, because in the year 1916 defendant 7, in the course of probate proceedings concerning a Will propounded by the widow of Kishen Kishore Narain Singh (defendant 1's adoptive father), claimed amongst others to be the nearest heir to Kishen Kishore and did not admit the plaintiffs' claim to be the nearest gotias related to Kishen Kishore. It should be noted that defendant 7 is not interested to deny that the plaintiffs are not heirs to Krishna Pertap Indra Narain Singh and it does not appear that he had in terms done so. The cause of action in the present suit is alleged in paragraph 12 of the plaint to have arisen in 1908, when certain events arose relating to the property now claimed and as the suit is one claiming possession of that property alone with a declaration that the plaintiffs were the nearest gotias of the last male owner, it is clear that the declaration is merely claimed as an adjunct to a title suit relating to that property and is not an essential part of the claim. Moreover, no claim is made for a declaration that the plaintiffs are the nearest gotias related to Kishen Kishore.

The object of the plaintiffs in seeking to join the defendant 7 as a party in these proceedings is admittedly to assist a possible claim by them in any future litigation which may arise on the death of Rani Rajbansi Koer, defendant 7's grandmother, when the succession to the estate of her late husband will re-open. This is a matter entirely unconnected with the claim in the present suit. This is not a suit for a declaration such as is contemplated and sanctioned by S. 42 of the Specific Relief Act. The declaration claimed is merely introductory to a claim for possession and is not one for which legislative sanction is required. Moreover it is not a claim for a declaration as to the plaintiffs' relationship to Kishna Kishore, and in my opinion it would be an abuse of the process of the Courts to allow parties to be harassed in this way by being made parties to litigation in which the only relief claimed is that in which they have no interest and are not directly concerned. I agree with the conclusion arrived at in the Court below and I would therefore dismiss the appeal with costs and order that the plaint be rejected as against defendant 7.

Jwala Prasad, J.—I concur.

V.S./R.K. *Appeal dismissed.*

1918 P/25 & 26

***A. I. R. 1918 Patna 193**

ROE AND ALI IMAM, JJ.

Fouzdar Rai and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 255 of 1917, Decided on 17th December 1917, from decision of Sess. Judge, Monghyr, D/- 10th November 1917.

(a) Penal Code (1860), S. 141—Right of private defence extends to S. 141 and subsequent sections—Person seeing actual invasion of his rights to property—Invasion amounting to offence—He can resist by force provided there is no time to have recourse to police authorities.

The right of private defence extends to S. 141 and subsequent sections of the Penal Code just as much as it extends to any other offence punishable under the Penal Code. Where a person in possession of property sees an actual invasion of his rights to that property, if that invasion amounts to an offence under the Code, he is entitled to resist it by force and to collect for that purpose such numbers and such arms as may be absolutely necessary for this purpose, provided only that there is no time to have recourse to the protection of the police authorities. [P 194 C 2]

***(b) Evidence Act (1872), S. 154—Witness letting out truth in absent-minded moment is not necessarily hostile—It must be shown that statement made in favour of defence is due to enmity to prosecution.**

A witness is not necessarily hostile because in an absent-minded moment he lets out the truth. It must be shown before a witness can be declared hostile that there is good ground for believing that the statement he has made in favour of the defence is due to enmity to the prosecution. It may be an unfriendly act to let out the truth, but it is not necessarily a hostile act. [P 194 C 1]

Gour Chandra Pal—for Appellants.

Government Pleader—for the Crown.

Roe, J.—In this case the appellants have been convicted on a charge of rioting. The story told for the prosecution was that while the complainant's party was peacefully cutting crops which they had themselves grown without opposition, Fauzar Rai, mounted on a horse and carrying a garasa, attacked the complainant's party with an overwhelming force, with the result that two of the complainant's party were beaten with sticks and one was struck in the stomach with a sharp cutting weapon causing an injury which resulted in his death.

The learned Sessions Judge agreeing with the Assessors is satisfied that the story of the complainant's possession is untrue. The learned Government Pleader contests this finding. His contention is correct that the burden of proof lies on the accused to show that the crops cut belonged to them. The learned

Judge based his finding on this point on the discrepancies in the story told by the other party as to various crops sown on the land and various other matters which must have been within their knowledge if they had in fact been in possession and on direct admissions made by two of the complainant's witnesses. It is contended on behalf of the Crown that these two witnesses were hostile witnesses. There is much misconception in the minds of Public Prosecutors in the Courts below as to what constitutes a hostile witness. A witness is not necessarily hostile because in an absentminded moment he lets out the truth. It must be shown before a witness can be declared hostile that there is good ground for believing that the statement he has made in favour of the defence is due to enmity to the prosecution. It may be an unfriendly act to let out the truth, but it is not necessarily a hostile act. In this case there is nothing to show any hostility in the witnesses who have made these damaging admissions. I am satisfied that the learned Judge was correct in holding that the crop, which was being cut by the complainant's party, had been grown by the accused.

There seems to be also much misconception as to the real meaning of the decisions in *Kabiruddin* v. *Emperor* (1), *Maniruddin* v. *Emperor* (2). In *Kabiruddin* v. *Emperor* (1) the learned Sessions Judge had summed up the law to the Jury as follows: "There can be no right of private defence, either on one side or on the other, where both parties are evidently aware of what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons who expecting to be attacked go out of their way to court an attack. When the parties of the complainant and accused are prepared to fight, it is immaterial who was the first to attack, unless it be shown that the accused were acting in the exercise of the right of private defence". The sole question before the High Court was, therefore whether the Sessions Court had in thus stating the law misdirected the Jury. The finding of the High Court was that this was a correct statement of the law. The facts in *Maniruddin* v. *Emperor* (2) were dissimilar. There had been a partition of certain land of which the disputed plot formed a part. There was a dispute as to the share to which the disputed plot had fallen on partition. Maniruddin collected a large number of lathials before being attacked by the other side. He took these lathials armed with deadly weapons to the land and on the way called out to his adversary. "Come out, haramjada, you and your sons. I am going to the filed." In the circumstances of these two cases there was an obvious point which deprived the accused of the right of a private defence. They had in the one case courted and in the other provoked an attack by the other side. But because of these decisions it seems to be the opinion of many Courts below and of all Police Officers that there can be no right of private defence if there has been a riot. This is not the law. The right of private defence extends to S. 141 and subsequent sections, just as much as it extends to any other offence punishable under the Indian Penal Code. Where a person in possession of property sees an actual invasion of his right to that property, if that invasion amounts to an offence under the Code, he is entitled to resist it by force and to collect for that purpose such numbers and such arms as may be absolutely necessary for this purpose, provided only that there is no time to have recourse to the protection of the Police authorities. In the case before us there is nothing to suggest that the accused courted or provoked attack or knew that an attack was imminent. Had they gone to the thana to make a complaint, after the attack had begun, their crops would have been removed long before the Police could arrive on the scene. I cannot hold that the accused were at any time members of an unlawful assembly. They cannot therefore be convicted of rioting.

That the right of private defence was exceeded by some members of this body of rioters is obvious. The right of private defence of property does not extend to striking a man in the stomach with a sharp cutting instrument. But, as the learned Judge has found, the charge that Fauzdar Rai himself caused this wound is obviously untrue, and since there was no unlawful assembly, the accused cannot be punished under S. 149. I would acquit all the accused and direct that they be discharged from their bail.

Imam, J.—I am in entire agreement with the views expressed by my learned brother on the points raised by the learned vakil on behalf of the appellants. It is quite clear on the evidence that the private prosecutor Munsif Kumar brought a number of men exceeding five to the land in possession of the

(1) [1908] 35 Cal 368.
(2) [1908] 35 Cal 384.

appellant Fauzdar Rai and started cutting crops that were undoubtedly raised by the accused. There was resistance by the accused, which resulted in injuries on both sides. It may be that the breach of the peace was the direct result of this encounter, but we have to consider which of these two parties was in the wrong. The accused Fauzdar Rai must have the sympathy of the Court inasmuch as he was in possession and the crops were raised by him. The private prosecutor was undoubtedly an aggressor and was trying by force to cut and remove crops belonging to the accused. In the circumstances it is evident that at one point of time or another the right of private defence accrued to the accused. The question then is, when did this right begin? There being absolutely no evidence on the record to show or suggest that the appellants had any previous information of the intended visit of the private prosecutor with his men to the field, it cannot be held that the accused had notice of the trespass contemplated by Munshi Kumar. In this case the moment the trespass was committed the right in the appellants to resist that trespass and to save the crop commenced. That right was the right of private defence of property. After this the appellant Fauzdar Rai gathered together a number of his friends and adherents and went to his land to stop the aggression and resist the cutting of his crops. It cannot be said that in the view of the law taken in *Kabiruddin* v. *Emperor* (1) would be applicable to the present case. I feel no hesitation in holding that in this case there was the right of private defence in the appellants and that in the exercise of that right when they came to the field they were not members of an unlawful assembly. The assembly not being an unlawful one the charge of rioting under Ss. 148 and 147, I. P. C., as against the appellants must necessarily fail. The conviction and sentence in this case must therefore be set aside.

V.S./R.K. *Conviction set aside.*

A. I. R. 1918 Patna 195

MULLICK, J.

Government Advocate and *Public Prosecutor*—Applicants.

v.

Maharaj Singh—Opposite Party.

Criminal Revn. No. 5 of 1917, Decided on 23rd April 1917, against order of Munsif, Patna, D/- 29th July 1916.

Criminal P. C. (1898), S. 195—Delay in case of private person indicates want of bona fide—But in case of Public Prosecutor delay of seven months is not material—No party of whatever position can be excused for delay in applying for sanction.

Generally a delay by a private person to apply for sanction to prosecute in the interests of public justice indicates want of bona fides or culpable negligence or laches. [P 196 C 1]

But where the real applicant is the Government and inquiries have to be made from various departments before any application for sanction can be preferred, a delay of seven months does not point to want of bona fides or to wilful negligence.

A party, whatever his position, is not to be excused for wilful negligence in matters of sanction. [P 196 C 1]

S. Sultan Ahmad—for the Crown.

Horibusan Mukerji—for Opposite Party.

Judgment.—On 7th April 1915, Maharaj Singh, resident of Balia, but serving in town of Patna as the Police constable, brought a suit in the Court of Small Causes, upon an alleged debt for Rs. 40 against Mahabir Tewary and his son Nanjadik Tewary, who are also residents of Balia. The suit was defended; but on 6th October 1915 the plaintiff withdrew it, alleging that he was unable to get any witness to prove his claim. It appears that the defendants had invoked the aid of Government, and that the Criminal Investigation Department had been instructed to undertake or, at any rate, to look after their defence. One of the reasons advanced by the plaintiff for withdrawing the suit was that, owing to pressure applied by the Criminal Investigation Department, none of his witnesses were willing to came and depose. However that might be, the suit was allowed to be withdrawn on 6th October 1915. On 26th May 1916 the defendants applied to the Munsif in the Court of Small Causes for sanction to prosecute the plaintiff for bringing a false case; that application was rejected on 29th July 1916. The defendants then preferred an appeal to the District Judge, but coming to realise subsequently that the District Judge had no jurisdiction, they allowed it to be dismissed for default on 23rd October 1916. The present application to this Court was made on 19th March 1917.

I am now asked, in exercise of my powers under S. 115, Civil P. C., and S. 25, Privincial Small Cause Courts Act, and under my powers of superintendence under S. 107, Government of India Act, to revise the order of the Munsif and to direct him to hold an enquiry as to whether or not sanction should be granted for the prosecution of the plaintiff. The main ground upon which the learned Munsif has refused

sanction to prosecute is that of delay. He considers that a delay of seven months in applying for sanction is not reasonable, and that it disentitles the applicants to the relief for which they asked.

Now, no doubt that would be so if this was an application by a private person acting as such. Generally a delay by a private person to apply for sanction to prosecute, in the interests of public justice, indicates want of bona fides or culpable negligence or laches; but in this case the real applicant before us is the Government; and, having regard to the fact that enquiries had to be made by the Criminal Investigation Department of the Province of Bihar and Orissa from the Criminal Investigation Department of the United Provinces, and that a reference had then to be made to the Legal Remembrancer of this Province before any application for sanction could be preferred, I cannot see that the delay was such as to point to want of bona fides or to wilful negligence. A party, whatever his position, is not to be excused for wilful negligence in matters of sanction; but in this case I am not satisfied that, having regard to the steps which it was necessary for the Criminal Investigation Department to take before an application in Court could be made, the delay was such as to justify the Munsif in throwing out the application. The same remarks apply to the delay in filing the application for revision before this Court. Here, again, there was a delay of something like five months after the dismissal of the appeal in the Court of the District and Sessions Judge. The result, then, is that the order of the learned Munsif, dated 29th July 1916, will be set aside and he will proceed to hold an enquiry as to whether sanction ought to be granted or not to the defendants. He is requested to dispose of the matter within two months of the record reaching him.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 196

DAWSON-MILLER, C. J. AND ALI IMAM, J.

Har Prasad Rai and *others*—Appellants.

v.

Brij Kishen Das and *others*—Respondents.

Privy Council Appeals Nos. 67 and 68 of 1917, Decided on 6th May 1918, for consolidating two appeals preferred to Privy Council.

(a) Civil P. C. (1908), O. 45, R. 4—Power of High Court to consolidate cases is not limited to R. 4 alone.

It was not intended by O. 45, R. 4, to limit the powers of the High Court to consolidate cases to the purposes mentioned in that rule alone. [P 197 C 1]

(b) Civil P. C. (1908), S. 151 and O. 45, R. 4—Power of consolidation is inherent power of High Court—It can be exercised in consolidating appeals to Privy Council.

The power of consolidation is an inherent power of the High Court, which can be exercised in consolidating appeals to the Privy Council for the purpose of security for costs and to save expenses. [P 197 C 1]

Ganesh Dutt Singh—for Appellants.

Parmeshwar Dayal—for Respondents.

Order. — This is an application for consolidation of two appeals to the Privy Council which arise out of the same judgment. The cases were tried together in the Court below and the appeal in this Court was heard and determined in both cases at the same time and one judgment alone was delivered. The questions in dispute in each of these appeals are substantially the same the appellants in one case being the adult members of a family and the appellants in the other case being the minor members of that family. The only difference in the questions for determination in these two appeals is whether assuming that the adult members of the family fail to make out their case, it is still open to the minor members to contend that the sale which it is sought to have set aside is not binding upon them as they were not properly represented. We have been asked in this case, in order to save expense to all parties, to consolidate these appeals which arise out of the same judgment and decide substantially the same questions and at the same time to order that one security bond of not Rs. 4,000, which is in the usual case of these appeals, but of Rs. 6,000 should be lodged to cover the costs of the respondents in these two appeals.

It has been contended by the respondents that under the rules which govern appeals to His Majesty in Council there is no provision made for consolidating appeals except in the one case provided in O. 45, R. 4, where power is given to consolidate appeals for the purposes of pecuniary valuation. The object of that rule is that where you have appeals from one judgment involving substantially the same question for determination before the Privy Council, although each of these appeals separately may not amount in value to the appealable minimum, yet if in the aggregate they do amount to

that sum, they may be consolidated so to bring the amount up to Rs. 10,000 and as that is the only instance which is specifically mentioned in O. 45, it is said that we have no jurisdiction to consolidate such appeals for any other purpose. After considering the arguments which have been put before us in this case and after considering the other sections of the Code which must be read together and especially S. 151, it seems to us that the power of consolidation is an inherent power of this Court, as has been decided in the case of *Nand Kishore Sing* v. *Ram Golam Sahu* (1). We think that it was not intended by O. 45, R. 4, to limit the powers of this Court to consolidate cases to the purposes mentioned in that rule alone. In the present case, where, as I have already said, these two appeals are although in form in substance practically one, we think that in the interests of justice and to save unnecessary expense the appeals ought to be consolidated. There will therefore be an order that these two appeals be consolidated and tried together, and further having regard to the fact that in ordinary cases Rs. 4,000 is considered sufficient security for the costs of the respondent we think that justice will be met in this case by ordering that security be given to the extent of Rupees 6,000 by the appellants jointly to meet the costs of the respondents. The result of that will be that that security of Rs. 6,000 will be available to the respondents as against each of the appellants in the present consolidated appeal, so that if it should turn out that the respondents are successful against only one set of appellants then the whole of that security will be available to them for their costs. Let the security bond filed in this appeal be sent down to the District Judge to test and report thereon.

V.S./R.K. *Order accordingly.*

(1) [1913] 40 Cal 955=18 I C 207.

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* A. I. R. 1918 Patna 197

MULLICK AND JWALA PRASAD, JJ.

Mewa Lal and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 283 of 1917, Decided on 7th August 1917, from order of Sess. Judge, Mozufferpore, D/- 9th July 1917.

(a) Criminal P. C. (1898), S. 145—Proceedings under S. 145—Magistrate can in case of emergency attach subject in dispute but cannot appoint Receiver.

Under S. 145 a Magistrate has in cases of emergency the power to attach the subject in dispute, but he has no power at that stage to appoint a Receiver. [P 198 C 2]

(b) Criminal P. C. (1898), S. 145—Proceedings under S. 145—Object is to confirm party in actual possession—Magistrate cannot dispossess party by appointing Receiver.

Where a Magistrate takes proceedings under S. 145, Criminal P. C., the object of the law is that he shall confirm the party in actual possession. He is not competent to dispossess such a party by appointing a Receiver and the order of attachment which the law empowers him to make has no greater force than any civil Court attachment the effect of which is generally to restrain alienations. [P 198 C 2]

(c) Criminal P. C. (1898), Ss. 145 and 146—Proceedings under S. 145—Appointment of Receiver can be made when Magistrate is unable to decide possession.

A Receiver can be appointed only where the Magistrate is unable to decide which of the parties is in possession and has a right to remain in possession, and considers it necessary that the property should vest in some person appointed by the Court under S. 146. [P 200 C 2]

(d) Penal Code (1860), S. 448—There must be intention to insult, annoy or intimidate owner of property.

The essence of an offence under S. 448 is that there should be an intention to insult, annoy or intimidate the owner of the property or such person as is acting on behalf of the owner [P 199 C 1]

Where a person who is a rival claimant to some property comes on the premises in good faith with the intention of guarding the property, he is not guilty of criminal trespass. [P 199 C 1]

*** (e) Criminal P. C. (1898), S. 537—Holding trial at place where accused is totally incapable of making proper defence amounts to material irregularity.**

A Magistrate exercises his jurisdiction with material irregularity if he holds a trial at a place where the accused is totally incapable of making a proper defence. [P 199 C 1]

Manuk and *Jaigovind Singh* — for Petitioners.

Fakhruddin—for the Crown.

Mullick, J.—On the 14th of June last a lady named Dulhin Jagat Rup Kuer died in Mouza Lowahi. It appears that an application was made to the Sub-Divisional Magistrate of Sitamarhi by Mt. Gulab Kuer claiming the house and the moveable and immovable properties of the lady. In consequence of that application the Sub-Divisional Magistrate went to Lowahi and recorded proceedings under S. 145, Criminal P. C., calling upon Mt. Genda Kuer, first party, Mt. Gulab Kuer, second party, and four other persons described as the third party, to appear before him on the 1st July to support their respective claims to the immovable properties. At the same time the learned Sub-Divisional Magistrate attached the house under the provisions of S. 145 and appointed a gentleman, named Mr. Everett,

who was the Manager of Mt. Dulhin Jagat Rup Kuer, as Receiver. On the 16th June, Mr. Everett appears to have sent a telegram to the Sub-Divisional Magistrate making certain complaints against the servants of Mt. Dulhin Genda Kuer, the first party. That telegram is not on the record, but it is alleged that the complaint was that the servants of Mt. Dulhin Genda Kuer were attempting to loot the properties of the deceased lady. Thereupon the Sub-Divisional Magistrate passed the following order on the Sub-Inspector of Police: "Mr. Everett informs me that peon and amlas have been sent to Lawahi by Babu Sarjug Prasad. Go to Lowahi and turn them out and report their names to me. You will obtain Mr. Everett's signature on this paper in token of this having been done to his satisfaction and return this paper to me by tomorrow."

On the 18th of June the Sub-Inspector of Police proceded to Lowahi and was unsuccessful in inducing the servants of Mt. Dulhin Genda Kuer to leave the premises, and he submitted the following report to the Sub-Divisional Magistrate: "Sir, I proceeded to Lawahi immediately on receipt of the order with the constables available in the Police Station. Babu Brijbihari Singh, who was present there with his peons, did not obey the orders and wrote down a note of disobedience which I herewith attach. I recommend for their prosecution under S. 188, Penal Code, and submit a separate report."

The note of disobedience is to the following effect: "The Magistrate's order to withdraw has been read over to me today 18th June 1917, at 10-30 a. m. at Lawahi, which I refuse to obey till the proper attachment of the property is done and list prepared."

On the Sub-Inspector's report the Sub-Divisional Magistrate himself proceeded to the house of Mt. Dulhin Jagat Rup Kuer on 19th June 1917, and finding the seven petitioners, who appear to be servants of Mt. Dulhin Genda Kuer, on the premises he arrested them of his own motion and took proceedings for their prosecution under S. 448, Penal Code. He held a summary trial on the spot and after examining three witnesses for the prosecution convicted the petitioners under S. 448, Penal Code, and sentenced them to rigorous imprisonment for one month each. An application was made to the Sessions Judge against these convictions and sentences but without success. The petitioners have accordingly come to this Court.

Now the first question that arises is whether the appointment of the Receiver was a legal appointment in this case. Under S. 145, Criminal P. C., as amended, a Magistrate has in cases of emergency the power to attach the subject in dispute, but it does not appear that he has any power at that stage to appoint a Receiver. There is authority for the proposition that he cannot appoint a Receiver except under S. 146, *Srinivasa Pillay* v. *Sathayappa Pillay* (1) and the reason for this is quite clear. Where the Magistrate finds that nobody is in possession or that the evidence is so conflicting that it is impossible to find who is in possession, the Magistrate is empowered to attach and to appoint a Receiver, who will take physical possession of the property; but that state of affairs does not exist before the enquiry has been made. When the Magistrate takes proceedings under S. 145 the object of the law is that he shall confirm the party in actual possession. He is certainly not competent to dispossess such a party by appointing a Receiver, and the order of attachment which the law empowers him to make has no greater force than any civil Court attachment, the effect of which is generally to restrain alienations. The allegation is that Mt. Dulhin Genda Kuer had immediately after the death of Mr. Dulhin Jagat Rup Kuer proceeded to the house and performed the sradh ceremony, but of this we have no evidence before us. It is an undisputed fact, however that her servants were in possession of at least one outhouse at the time when the Magistrate made his order of attachment and that Mr. Everett was not competent at that stage of the proceedings to eject them. Therefore unless they committed any Criminal act after that date, it does not appear that there was any ground for proceeding against them. The Magistrate in his explanation suggests that there was a fear that the petitioners would loot the house. It does not appear from Mr. Everett's evidence or indeed from any other evidence on the record that this was the case. When the Sub-Inspector of Police appeared on the scene on the 18th of June, the conduct of Brijbihari Singh was no doubt contumacious, but I am unable to say upon the evidence before us that either he or his subordinates were guilty of any Criminal offence. He stated that he would not vacate the out-

(1) [1912] 14 I C 759.

house until a proper attachment had been made and until a list of the property had been prepered.

Now the essence of an offence under S. 448 is that there should be an intention to insult, annoy or intimidate the owner of the property or such person as was acting on behalf of the owner. Even assuming that Mr. Everett had been duly appointed to act on behalf of the owner, it does not appear from the conduct of the petitioners that they in any way interfere with his possession or with due performance of his duties. It is stated by the Sub-Inspector of Police in the enclosure to his report of the 18th of June that the petitioners were armed with lathis, but it appears from Mr. Everett's evidence that the lathis were in the kutchery and that the petitioners did not show any intention of using them. On the contrary the conduct of the petitioners was, in my opinion, quite consistent with the plea that they acted in good faith and with the sole object of preventing rival claimants from carying away any moveable property from the house. From Mr. Everett's evidence it is clear that the house was not securely locked and it is in evidence that the learned Sub-Divisional Magistrate on the 18th of June found a sum of Rs. 20,000 in cash which he carried away to the local treasury.

In these circumstances I think that the plea of bona fides has been made out and that as the petitioners were there merely for the purpose of guarding the property or assisting Mr. Everett in guarding the property, no offence under S. 448 has been made out. Then as regards procedure, I agree that the trial was irregular. The learned Sub-Divisional Magistrate, inspite of the protests of the accused, tried the case at the house of the deceased lady without giving the petitioners the opportunity of being represented by legal practitioners or calling defence witnesses. The learned Sub-Divisional Magistrate was certainly competent to arrest the accused and to put them on their trial. But in my opinion he exercised his jurisdiction with material irregularity in holding the trial at a place where the accused were totally incapable of making a proper defence. It does not appear that there was any particular reason why the accused could not either have been taken forthwith to the learned Sub-divisional Magistrate's headquarters or enlarged on bail and tried in accordance with law after being accorded the assistance which they required. An objection has been taken by Mr. Manuk as to the jurisdiction of the learned Magistrate to try the case himself. It is urged that he acted under S. 190 (c), Criminal P. C., and that he was not competent to hold the trial himself.

Now although the Magistrate's reason for going to the place of occurrence on the 19th of June was in the first instance prompted by the telegram received from Mr. Everett on the 16th June, I think the report of the Sub-Inspector of Police of the 18th June may be taken to be a report stating facts which constitute the offence of Criminal house-trespass. It is true that the Sub-Inspector of Police himself asked for a prosecution under S. 188, Penal Code, only, but the learned Magistrate was competent on the perusal of the report to put the accused on trial for an offence under S. 448, Penal Code, if that offence was disclosed upon the facts alleged in the report. Therefore so far as this ground of objection is concerned, I do not think the learned Counsel for the petitioners has made out his case, but upon the substantial part of his case I agree with him and hold that the convictions and sentences were illegal and should be set aside. The petitioners will be discarged from their bail.

Jwala Prasad, J. — I agree to the order proposed by my learned brother that the convictions in this case should be set aside. The petitioners cannot possibly be said to be guilty under S. 448, for the simple reason that it has not been shown from the evidence on the record that there was any intention on thier part to intimidate, insult or annoy any person in possession of the property. This is an essential ingredient for an offence under S. 448. The whole case against the petitioners is due to refusal to obey the order of the Sub-Divisional Magistrate conveyed to them by the Sub-Inspector of Police on the 18th June 1917. Babu Brij Bihari Singh, the Manager of Musammat Dulhin Genda Kuer, who is said to have been acting as the head of the petitioners at that time, refused to obey the order upon the ground that he would remain upon the premises "till the proper attachment of the property had been done and a list prepared." This shows the intention of Babu Brij Bihari Singh and his men. The house in question belonged to Musammat Dulhin Jagat Rup Kuer who died on the 14th of June, that is, only for four days before the order of the Sub-Divisional Magistrate was passed upon the

petitioners to leave the premises. She was possessed of large property, moveable and immovable, as the proceeding under S. 145 shows. The house itself is said to have contained very valuable property, so much so that when the list was made by the Court of Wards a large sum of money was found in the house, which was removed to the Sitamarhi Sub-Treasury. Musammat Dulhin Genda Kuer, on whose behalf Brij Behari Singh and the petitioners were acting, treated this property as belonging to her adopted son. On the 15th June when the Sub-Divisional Magistrate arrived on the spot the only thing that was done was to put some seals here and there, but the proper inventory of the properties was not made and the custody of all moveable property in the house was not taken. The decision of the learned District Judge uder the Curators Act (19 of 1841) disposing of the claim of the contending parts to the properties of Mt. Dulhin Jagat Rup Kuer shows that the adopted boy of Mt. Genda Kuer was held to be the rightful owner of the estate left by the deceased lady, and that he was in rightful possession of the property. This subsequent event I have mentioned only with a view to show what must have been the intention of the petitioners at the time when they refused to obey the order of the Sub-Divisional Magistrate. The petitioners refused clearly and boldly, what the Sub-Inspector says sternly, to obey the order of the Sub-Divisional Magistrate, because Brij Bihari Singh was at that time conscious of his possession and was fully aware of the danger of leaving the property as it was; and because in the interest of his mistress and the rightful owner of the property he thought he was entitled to remain on the premises and to guard the properties from being removed by the rival claimants or by strangers or from any change of misappropriation. The petitioners were also interested in a proper list being made of the properties so that no possible charge of theft or misappropriation be brought against them, for just two or three days before the petitioners with their mistress had been in the house after the death of the Mt. Dulhin Jagat Rup Kuer.

All that has been proved in the evidence in this case is that the petitioners were in an outhouse of the premises and that they had some lathis in that room. This is consistent with the conduct of persons intent on guarding the properties supposed to belong to them. There is no charge made against them by any of the witnesses, even by Mr. Everett that the petitioners ever attempted to use violence or ever attempted to force themselves into the house or to remove or touch any of the properties in the house. If we are to judge the intentions of the petitioners by their overt acts, there is only one inference, that the petitioners believed themselves and were acting bona fide in order to guard the properties. This is sufficient to dispose of the present application of the petitioners. S. 448 is not at all applicable to this case. I have no doubt in my mind as to the impropriety of the order passed by the Magistrate under S. 145 at that stage, still more uncalled for was the order of attachment and the appointment of the Receiver at that stage. If the Magistrate thought, and I think that he had reason to think, that there was likelihood of a breach of the peace among the rival claimants to the property of Mt. Dulhin Jagat Rup Kuer, the proper and effective action was under S. 144 of Criminal P. C., made to give the Magistrate time to take necessary measures under S. 107 or 145, Criminal P. C. The order under S. 144 would have all the desired effect of preventing a breach of the peace and of preventing the property being interfered with or removed by any of the rival claimants. Mr. Everett, as has been clearly shown by my learned brother, was not the properly constituted Receiver under that Act. He had no right to dispossess or to turn out a person who was in possession of the house.

In the present case some of the servants of Mt. Dulhin Genda Kuer were in one of the outhouses before proceedings under S. 145 were instituted. What would have been the effect of the order under S. 145 passed on the spot attaching the property and appointing a Receiver thereof if Mt. Dulhin Genda Kuer had herself been on the premises ? Probably the Receiver armed with that order would have as he had done in this case, attempted to turn out the lady from the premises. This is to illustrate how premature was the action of the Sub-Divisional Magistrate in appointing a Receiver at that stage. A Receiver is appointed only when the Magistrate is unable to decide which of the parties is in possession and has a right to remain in possession, and considers it necessary that the property should vest in some person appointed by the Court under

S. 146. During the pendency of S. 145 proceedings the Magistrate can attach the property the subject-matter of dispute, but there is no provision in S. 145 for the appointment of a Receiver consequent upon attachment, as in S. 146. As said by my learned brother, an attachment under S. 145 may have the same effect as an attachment under the Civil Procedure Code. It may possibly amount to something more than that, that is to say, after attachment the Magistrate may take steps for proper care and custody o fthe property and prevent the removal of the property by any of the rival claimants or strangers. In the present case the petitioners were not trying to remove, or in any way interfere with the properties attached but were simply guarding them. For all these reasons I agree that the convictions and sentences should be set aside and the petitioners discharged from there bail.

V.S./R.K. *Convictions set aside.*

A. I. R. 1918 Patna 201

MULLICK AND THORNHILL, JJ.

Ram Bhagwan and *others*—Accused —Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 45 of 1918, Decided on 27th May 1918, from decision of Sess. Judge, Patna D/- 28th February 1918.

(a) Criminal Trial—Trial by jury—Document not per se inadmissible admitted without formal proof of execution—Omission by accused to object—Accused cannot in appeal impeach verdict of jury on ground that document was admitted without formal proof.

Where a document, which is not per se inadmissible, is admitted by the Court in a criminal trial without formal proof of execution, and the accused having sufficient opportunity at the trial to call for formal proof omits to take any objection, he cannot afterwards, in appeal, impeach the verdict of the jury on the ground that the document had been admitted without formal proof. [P 202 C 2]

(b) Criminal P. C. (1898), Ss. 297 and 298—Parcha slip in course of survey proceedings is inadmissible to prove title or possession—Judge can draw jury's attention to its being granted to particular person as fact relevant to question of possession.

A parcha slip granted in the course of survey proceedings is not a public document and is not in any way recognized by law. It is therefore inadmissible in evidence to prove title or possession. In a criminal trial however the Judge is competent to draw the attention of the jury to the fact that the parcha slip was granted to a particular person as a fact relevant to the question of possession. [P 203 C 1]

(c) Criminal P. C. (1898), S. 297—Presumption under S. 103-B, Ben- Ten. Act, discussed by counsel—Jury not under misconception about it—Omission by Judge to draw jury's attention to presumption does not constitute serious error.

The omission to draw the attention of the jury to the provisions of S. 103-B, Ben. Ten. Act, and the presumption arising therefrom does not constitute a serious error on the part of the Judge, where the point has been thoroughly discussed by counsel and the jury are under no misconception regarding it. [P 203 C 1]

(d) Criminal P. C. (1898), S. 297—Absence of evidence on particular matter—It is error on part of Judge to lay down law to jury on that matter.

Where there is no evidence of a particular matter, it would be an error on the part of the Judge to lay down the law to the jury on that matter, which is not a matter legally and properly before the jury. [P 205 C 2]

(e) Criminal P. C. (1898), S. 297—Ability of counsel for defence does not relieve Judge of duty of fully and fairly charging jury—Judge should also take into account skill of counsel.

The ability of the counsel engaged in the defence does not relieve the Judge of his task, which the law imposes upon him, of fully and fairly charging the jury. At the same time it is reasonable that the Judge should take into account the elaboration and the skill of counsel. [P 209 C 2]

(f) Criminal P. C. (1898), S. 307—Admission of evidence which should have been rejected—High Court can consider whether rest of evidence is sufficient to sustain verdict.

Per *Thornhill, J* —If in a criminal trial evidence has been admitted which should have been rejected, it is competent to the High Court to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict. [P 209 C 1, 2]

Hasan Imam, P. C. Manuk and *Indu Bhusan Biswas*—for Appellants.

Government Advocate — for the Crown.

Mullick, J.—The appellants have been convicted under Ss. 148, 326 and 149, I. P. C., for committing a riot with deadly weapons in Mauza Khairatoli, in prosecution of the common object of which, namely, to assault the prosecutor Jauhar Ali and to forcibly carry away his paddy, severe injuries were caused to Jauhar Ali and one Makdum Box, who came to his assistance, was killed on the field in dispute, which is said to be plot No. 35 and to be situated to the west of the village and to measure 16 cottahs. The evidence is that Jauhar Ali, having cut part of the paddy on this plot on Thursday, the 8th November last and on the morning of the 9th November and stored the same in the house of Makdum Box, returned to the field about 3 p. m. of that day with four labourers;

that after cutting had been resumed the appellants, with a mob numbering 50 or 60 headed by one Indra Dewan and Ram Bhagwan and armed with spears, swords and lathis, came and objected to the cutting on the ground that Indra Dewan had purchased the plot; that they attacked the prosecutor's men and that after killing Makdum Bux, cut and carried away the remainder of the paddy. A telegram announcing the riot reached the Sub-Inspector of Phulwari Thana at 11 p. m.

Meanwhile in consequence of information given by Rameswar, one of the Chaukidars of the village, at 6-30 p. m. at the Phulwari Police Station, Sub-Inspector Ali Hosain had deputed Sub-Inspector Kuldip Narain Singh and some constables to proceed to the spot. This Sub-Inspector arrived at the place at 10 p. m. and at 11-45 p. m. recorded the information given by Jauhar Ali. Sub-Inspector Ali Hosain took up the investigation on the following day with the result that Indra Dewan, his Gomastha Ram Bhagwan and Rafiq, from whose father Jauhar claims to have bought plot No. 35 and 13 others were sent up for trial. In the Sessions Court the accused, who were defended by Mr. Hasan Imam, declined to give any explanation for the injuries to Jauhar Ali and Makdum Bux, but suggestions were made in cross-examination that the occurrence took place on plot No. 111, which is to the north of the village and the respect of which there is a dispute between Jauhar and Salim on the one side as owners and Indra Dewan on the other who claims as ijaradar. In support of this reliance was placed on the information given given by Rameswar Chaukardar at 6-30 p. m. and by Dalsinger Chaukidar at 7 p.m. The case of the prosecution was that these informations were lodged after the riot in order to make a case for the defence.

The Jury appear to have accepted the case put forward by the prosecution and while acqutting Indra Dewan and seven others, found the appellants before us guilty. The present appeal is preferred by the appellants on the ground of improper admission of evidence and non-direction and misdirection on the part of the Sessions Judge in his charge to the Jury. The complaint on the ground of improper admission of evidence relates to a sale-deed alleged to have been executed on the 27th March 1906 by Amanat Ali, the father of the accused Rafiq in favour of Jauher Ali's son Sadrul Huq in respect of plots Nos. 35 and 40. It does not appear that the document was formally proved. It is alleged to have been tendered by the prosecution on the 18th of February in the Sessions Court and marked by the presiding Judge on the 19th. It was referred to by the learned Judge in his charge to the Jury on the 28th of February, on the footing that there was no objection to its admission.

It is contended by Mr. Hasan Imam, who appears for all the appellants before us except Ram Bhagwan, that the document was marked by the Court without his knowledge and consent and that though present at time of the delivery of the charge to the Jury, he did not notice that the learned Judge was referring to this document. The list of the exhibits contains an entry to the effect that the document was admitted without objection, and it is asserted by the learned Government Advocate who appears on behalf of the Crown that formal proof was waived by the defence. In my opinion it was the duty of the defence to discover between the 18th and the 28th February that the Court had admitted this document and marked it as an exhibit although it had not been formally proved, and the omission to make any objection appears to me to support the allegation that the defence did not consider it worthwhile to demand legal proof. It is unfortunate that during the delivery of the charge, while the Judge was preferring to this document for the purpose of drawing an inference as to the possession of Jauhar Ali no one on behalf of the defence considered it necessary to make any protest. In my opinion the circumstances under which the document was admitted by the Court establish that the accused had sufficient opportunity at the trial to call for formal proof and that having omitted to raise any objection then it is not open to them now, the document not being per se inadmissible, to impeach the verdict of the Jury on the ground of any formal defect.

The second error of law complained of is that as the Record of Rights shows the name of Amanat as the tenant of the plots Nos. 35 and 40, the Sessions Judge should have drawn the Jury's special attention to the provisions of the Bengal Tenancy Act, which require that the Court shall presume the entry to be correct until the contrary is shown. It appears that a parcha slip was given to Jauhar Ali showing an entry in his favour, but for some reason or other the finally published Record of Rights was

in Amanat's favour. The learned Judge drew the attention of the Jury to the parcha slip and in regard to the Record of Rights the only observation he made was "that no evidence of possession of Rafiq had been given except the finally published record." Now the parcha slip was clearly inadmissible in evidence in proof of the title and possession of Jauhar Ali. It is not a public document and it is not in any way recognised by law, but what the learned Sessions Judge appears to have done was to draw the attention of the Jury to the fact that the parcha slip was granted to Jauhar Ali. This he had every right to do. It was a fact relevant to the question of possession. It does not seem that the slip was admitted by the learned Judge as a document of title.

As regards the finally published record, namely, the khatian, it is true that the learned Sessions Judge did not in terms tell the Jury of the presumption raised by the law, but we have been told by the learned Government Advocate that the law was in fact fully explained to the Jury and that the Jury were under no misconception on this point. The case of *Brij Behari Singh* v. *Sheo Sankar Jha* (1) was fully discussed by the prosecution in the course of the trial. The judgment of the High Court in that case in clear terms lays down the proposition that a Record of Rights, though not creating or extinguishing any title, is good evidence of possession, which requires to be rebutted and I observed from the cross-examination of Jauhar Ali by Mr. Hassan Imam that Jauhar Ali understood that legal position in this sense. Having regard to the constitution of the Jury, which consisted of the Principal of the Law College at Patna, a non-practising vakil and three other educated gentlemen, I am satisfied that the omission to draw the attention of the Jury to the provisions of section 103 of the Bengal Tenancy Act did not in this case constitute a serious error on the part of the Judge.

The third error as regards the documentary evidence is said to lie in the Judge's not drawing the attention of the Jury to Ex. 11, which was a decree obtained by Musa, the superior landlord, against Amanat for rent. It is urged that the Judge should have also drawn attention to the fact that Jauhar had produced no rent receipts, although he had said in his evidence that he had receipts at home. It is also urged that the Judge was wrong in telling the Jury that there was no evidence of Rafiq's possession except the Record of Rights. Now with regard to Ex. 11, the document was before the Jury and they were at liberty to draw any inference they liked from it. Jauhar Ali had in his cross-examinatioin said that the decree was a collusive decree between Musa and Amanat and that he had been throughout in possession for 11 years and had been paying rent to Musa. The Jury were aware also that Jauhar Ali had produced no documentary evidence to support his possession except Ex. 9, the deed of sale. Having regard to the fact the case was in the hands of so able an Advocate as Mr. Hasan Imam, it does not seem to me that the omissions complained of were of prime importance.

As to the omission to tell the Jury that Rameshwar Chaukidar had in his evidence stated that Amanat Ali's field had come into Rafiq's possession, it appears that Rameshwar Chaukidar's information was based upon hearsay and the learned Judge was right in not treating it as a piece of evidence in favour of the defence. With regard to the occurrence itself various grounds of non-direction and mis-direction have been taken, with which I will now proceed to deal. Grounds Nos. 8, 13 and 14 relate to the cutting of the paddy which is alleged to have been standing on plot No. 35 on the day of occurrence. The case for the defence as suggested in the cross-examination is that there was no paddy on plot No. 35 and that there was paddy on plot No. 111 and that the occurrence took place on an attempt by Jauhar Ali to cut the latter. It is urged that the learned Judge should have brought to the attention of the Jury the evidence of Rameshwar Chaukidar, prosecution witness No. 19, to the effect that the paddy of plot No. 35 was cut 4 or 5 days previously. In my opinion the omission was not material.

Remeshwar was a throughly unreliable witness. He was declared hostile by the prosecution and his evidence in regard to the information laid before the Police was discussed by the Sessions Judge at p. 15 of his charge in the paper book. The learned Sessions Judge also put before the Jury the evidence of prosecution witness No. 21, and discussed the question whether from the appearance of the field it was possible to state with any degree of certainty whether the crop was cut within 2, 3 or 4 days, and he left them to draw their own conclusions.

(1) [1917] 2 P L J 124=39 I C 85.

A similar objection is taken in regard to the Judge's omission to tell the Jury that no paddy was found on the way by which the rioters were alleged to have returned. This is also a minor matter. It is next urged that the Judge should not have told the Jury that the occurrence took place at 4-30 p. m. It seems that what the Judge did tell the Jury was that according to the prosecution story the riot took place at 4-30 p. m. (see p. 12 of the charge). He also refers to the fact that in the first information the riot is entered by the Police as having taken place at 4-30 p. m. The learned Judge told the Jury that Jauhar Ali and his labourers arrived at 3 p. m. and that according to Jauhar Ali the assault took place at 4-30 p. m. He asked the Jury to consider whether or not the cutting of the paddy took place during the interval. In my opinion there was no non-direction or mis-direction in regard to this point. Grounds Nos. 9, 10, 11, 12, 15, 16, 18, 25 and 26 relate to the place of occurrence.

It is contended by Mr. Hasan Imam that the Sub-Inspector Kuldip Narain Singh has been guilty of tampering with the diaries and that when he set out from Phulwari at 7 p. m. on 9th November, he made an entry in his diary to the effect that the occurrence had taken place in a field on the north side of Khairatoli, but that at 11-45 after recording Jauhar Ali's statement he made an interpolation by adding the words "in Gahua Khanda." The Sub-Inspector states that what the Chaukidar told him was that the place of occurrence was on the north side of Khairatoli in Gahua Khanda. As plot No. 111 is not and plot No. 35 is in Gahua Khanda the interpolation, if it was an interpolation, would to some extent favour the prosecution. In this connection it is not quite clear what the defence is. Is it suggested that the Sub-Inspector went on that night to plot No. 111, and that it was there that he found Jauhar Ali and Makdum Bux's corpse and that the Sub-Inspector caused a case to be manufactured on plot No. 35 after removing Jauhar Ali and the corpse of Makdum Bux to that plot? Or is it suggested that the Sub-Inspector did not go to plot No. 111 at all but that a false case had been manufactured before the Sub-Inspector arrived and that he was taken to plot No. 35 immediately upon his arrival? In my opinion the whole evidence was before the Jury and the learned Judge seems to have discussed it in connection with the two informations given by the two Chaukidars and in connection with the suggestion that the riot took place on plot No. 111. The omission to draw the Jury's special attention to the evidence given by Kuldip Narain with regard to the entry in his diary does not appear to me to be serious. The same may be said with regard to the point that the Jury's attention was not called to the fact that in the map prepared for the purpose of this case no mention is made of the fact that blood was found on plot No. 35. The evidence in the case is that there were copious marks of blood on this plot and the condition of the ground was such as to be consistent with the theory put forward by the prosecution. The omission of any entry in the map as to the place where blood was found does not seem to me to be very material.

Then as regards the fact that there was paddy on plot No. 111, it was unnecessary to tell the Jury this, but it is contended that the learned Judge should have asked the Jury to consider why the paddy of plot No. 35 should have been stored in Mukdum Bux's house.

The explanation given by Jauhar Ali was that this was done because Jauhar Ali's house had fallen down. In my opinion it was not necessary to draw the Jury's special attention to this explanation or to the fact that only 16 bundles were found in Mukdum's house. The explanation may have been false, but it was open to the Jury to believe it or not as they liked. Then it is contended that the learned Judge in drawing attention to the fact that Mukdum Bux though dead was found lying on khatia with a pillow under his head should have suggested the inference that the whole case for the prosecution was false. It is suggested that the placing of a pillow under the head of a dead man is a clear sign of a concocted case. Attention was drawn to this point in cross-examination and the Jury were in full possession of the facts. The evidence is that two pillows were brought, one for Jauhar Ali and the other for Mukdum Bux, and the person who brought the pillow for Mukdum says that if he had known that Mukdum was dead he would not have brought it. In my opinion the learned Judge was not guilty of any error in leaving the evidence to the Jury and in omitting to suggest the inference that the occurrence took place on plot No. 111. I find he did

make mention of the circumstance about the pillow and there was sufficient compliance with the law in leaving the Jury to draw their own conclusion in these circumstances.

Ground No. 12, which is to the effect that there was an omission in not telling the Jury that the foot-prints on plot No. 35 might have been caused by the reapers, ground No. 15, which relates to an incident connected with a man called Surju Saran, who told the Police during the enquiry that he was inspecting plot No. 111, because that was the place of occurrence, and ground No. 26, which relates to the delay of the Police in inspecting the place of occurrence, have not been pressed before us. In my opinion, therefore, so far as the above grounds are concerned, the learned Judge has not been guilty of any serious error either of non-direction or misdirection. But it has been very strongly urged by Mr. Hasan Iman that the learned Judge should have told the Jury in clear terms what the consequences would be of a finding that the occurrence took place not upon plot No. 35, but upon plot No. 111. It is suggested that the Jury may have thought that although the occurrence took place on plot No. 111, still as one man had been killed and another had been severely injured it was immaterial where the occurrence took place. It is contended that the right of private defence would have arisen in regard to plot No. 111, assuming that Indra Dewan was in possession, and therefore the charge that the accused were members of an unlawful assembly could not have been supported.

Now the reply to this is that the case for the prosecution was clear and simple. It was that the occurrence took place on plot No. 35, that Jauhar Ali was in possession and that the appellants in trying to take forcible possession of that plot committed the various offences with which they were charged. The accused at no stage of the case raised the explicit defence that a fight took place on plot No. 111, or that there was a right of private defence. The case for the prosequtions was that if the Jury refused to believe that the occurrence took place on plot No. 35, then the accused were entitled to an acquittal. There was no alternative case that even if the occurrence was found to have taken place on plot No. 111, the accused would be guilty of one or other of the offences charged. In this connection it is only necessary to draw attention to the case of *Emperor v. Upendra Nath Das* (2), where their Lordships held that where there was no evidence of a particular matter, it would be an error on the part of the Judge to lay down the law to the Jury on that matter, which was not a matter legally and properly before the Jury, and their Lordships cited with approval the following observations in *Jamsheer Sirdar's* case (3): "No accused person can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases. It must be by proof of actual facts." Therefore in this case if there was no direct and legal evidence of the occurrence having taken place on plot No. 111, and in my opinion there was not, the learned Judge was perfectly right in omitting to discuss the consequences of the occurrence having taken place in connection with that plot. In my opinion the Jury were fully aware of the fact that if they found that the occurrence took place in the latter plot, then the accused would be entitled to an acquittal. It becomes immaterial therefore to consider Mr. Hasan Imam's further objection that the learned Judge should have discussed in greater detail the contents of Ex. D, which was a plaint lodged by one Chota Jabbar in respect of plot No. 111 against one Fasiuddin and others. This document was admissible for the purpose of showing that there was a dispute with regard to plot No. 111, but as a matter of fact the learned Sessions Judge has clearly drawn the attention of the Jury to the unsatisfactory evidence given by Jauhar Ali in connexion with this plot. In some places Jauhar Ali has claimed the plot and in others he has not, and the learned Judge has been guilty of no error in respect of this part of the case. The Jury were in full possession of the unsatisfactory nature of Jauhar Ali's testimony with regard to his claims in this matter.

It remains to consider grounds Nos. 19, 20, 21, 22 and 23, which relate to the alibi set up on behalf of Indra Dewan and Ram Bhagwan. A vakil named Bimala Charan Sinha deposed that on 10th November 1917, he appeared for Indra Dewan in a civil suit before the fourth Munsif of Bankipur, that on the previous day both Indra Dewan and Ram Bhagwan came to him at 5 or 5-15 p. m. to consult him about the case, and remained with him till 6-30 p. m. and that he made a note

(2) [1915] 30 I C 113 (F B).
(3) [1878] 1 C L R 62.

to that effect in his diary of the 9th. Indra Dewan also furnished evidence tending to show that he was in his class at the Bihar National College up to 2-30 p. m. The Jury believed this evidence and acquitted him. Ram Bhagwan called the Head Comparing Clerk of the Patna District Judge's Court to prove that he must have been present at the Civil Court from 2 to 2-30 and then again at 3-30 p. m. for the purpose of receiving from the Court the copies of two documents for which he had made applications on 1st November. The evidence in this case showed that both Indra Dewan and Ram Bhagwan were in the habit of riding bicycles, and in his charge the learned Sessions Judge told the Jury after they had themselves visited the scene of occurrence and were able to judge the distance that it was possible to walk from Bankipur to the place of occurrence in 40 minutes. The Jury disbelieved the evidence given on behalf of Ram Bhagwan and found him guilty.

Now the first point that has been made by Mr. Manuk is that the learned Judge should not have treated the evidence of Jung Bahadur Singh, the Head Comparing Clerk, so lightly and he should have discussed it in greater detail and told the Jury that there was no reason for disbelieving this witness, The matter turned upon the two applications for copy filed on 1st November. It is alleged that a counterfoil is usually given to the applicant with a direction to call on a certain day and that in this case Ram Bhagwan presented his counterfoil to the Head Comparing Clerk on 9th November between 2 and 2-30 p. m. It is said that the copies were ready on 7th and 8th and that Ram Bhagwan came himself between 2 and 2-30 and gave a receipt upon the counterfoil for the copies, which he took away with him between 3-30 and 4-30 p. m. In cross-examination the Head Comparing Clerk admitted that if an applicant presented his counterfoil on 9th July receipted under that date and then went home and did not return till 20th November and then demanded his copies, the date "9th November" would still remain upon the receipt and also in the endorsement at the back of the copies, which contains a column showing the date on which the copy is delivered to the applicant. The Head Comparing Clerk adds however that such a case has never occurred, and Mr. Manuk's complaint is that this qualification should have been specially brought to the notice of the Jury. The learned Judge was evidently under the impression that the whole of the evidence of the witness was inconclusive and that it did not establish definitely and beyond doubt that Ram Bhagwan was actually present at the Civil Court up to 3-30 p. m. I share in that opinion, and I think that having regard to the fact that the witness was examined on 26th February and the argument of counsel was heard on 28th February, the somewhat meagre discussion of the witness' evidence did not in the circumstances amount to a misdirection or lead to a miscarriage of justice. Moreover, accepting every word of the Head Comparing Clerk's evidence, it would still be open to Ram Bhagwan to have been at the place of occurrence at 4-30 p. m. on the day in question. It was open to the Jury to believe the witnesses who deposed in favour of Indra Dewan and disbelieve those who deposed in favour of Ram Bhagwan. Mr. Manuk has characterised the finding of the Jury in this respect as perverse. When there was evidence which they could have believed as to the guilt of Ram Bhagwan and when it was open to them to disbelieve the evidence offered by the accused in his defence, I cannot see that the charge of perversity can be supported.

Then our attention has been drawn to a passage in the learned Sessions Judge's charge in which he refers to the circumstance that Bimola Charan Sinha had produced documents in support of his story in Court. The charge as it stands after correction on 1st March states that the witness had produced documents, but Mr. Manuk says that what the learned Judge told the Jury was that the witness had produced no documents and that the Judge had made this a point of attack against the credibility of the witness. I think we must take the charge as it stands and in the absence of any evidence to the contrary, we must hold that the Judge told the Jury that there were documents to support the alibi, probably referring to the records produced in the Civil Court on 10th November. Mr. Manuk then draws attention to the fact that in the course of his address the Public Prosecutor drew attention to the fact that the vakil had not produced his personal diary of the 9th in which he said he had entered the hour of Ram Bhagwan's visit. Mr. Manuk strongly characterises the conduct of the prosecution as unfair in not asking the witness immediately to go to his house and to bring the book, and he submits

that no conclusion adverse to the defence should be drawn from the non-production of this piece of documentary evidence. In my opinion it was open to the prosecution to make the suggestion that they did, and the defence could even at that late stage have asked the permission of the Court to adduce the evidence in question. The Jury had the evidence of the witnesses before them and they were competent to draw what inferences they liked upon the facts. I do not think that it was the duty of the prosecution to stop the trial in order to give the witness an opportunity of producing the diary.

Mr. Manuk next criticizes the charges on the ground that the learned Judge should have brought to the notcie of the Jury the fact that in connection with the Salarpur murder case Jauhar Ali had implicated Ram Bhagwan. Now the history of that case is this. A Muhammadan named Naziruddin disappeared about a month before the riot at Khairatoli. He was not in any way connected either with Khairatoli, or with Jauhar Ali, but four or five days after his disappearance his father Wajid lodge an information at the Bankipur Police Station saying that Bikam Pargash (father of Ram Bhagwan) and Shankar had probably murdered him. While the Police investigation was going on he met Jauhar Ali, who was a stranger to him, in a bread shop in the Civil Court compound at Bankipur and Jauhar Ali on hearing him talk about the disappearance of his son said that he had seen Naziruddin being thorwn into a canal by some Hindus. It does not appear from the evidence of Abdul. Wajid that in this bread shop Jauhar Ali named Ram Bhagwan as one of the murderers, but Abdul Wajid states that he went off at once to the Police Station and told the Sub-Inspector what Jauhar Ali had told him. Mr. Manuk states that the learned Judge should have told the Jury that Jauhar Ali had named Ram Bhagwan in the baker's shop. This does not appear to be the case from Abdul Wajid's evidence nor does it appear from the evidence of the Sub-Inspector Kuldip Narain, who was in charge of the case. At page 39 of his deposition in this trial Jauhar Ali says that Pragash and others were the accused. At page 49 he says that he does not think that Ram Bhagwan's name was mentioned in the baker's shop and that it was Abdul Wajid who gave the name of Pragash. At page 47, however, he states that he recognised Pragash and Ram Bhagwan among the murderers, and Mr. Manuk insists that it was the duty of the learned Judge to bring this statement prominently to the notice of the jury.

The learned Government Advocate on the other hand suggests that this inclusion of Ram Bhagwan's name was unintentional, and that Jauhar Ali was giving his evidence in great pain while lying on a charpay in Court and that he did not in fact implicate Ram Bhagwan at any previous stage of the investigation in the Salarpur murder case. It is admitted that the Police found no evidence against anyone in that case and refused to prosecute. The learned Judge appears to have discussed Jauhar Ali's evidence fully (see charge at page 14). At page 18 he asks the Jury to treat the evidence with caution. At page 15 he draws attention to the hostility between the parties as evidence by the Salarpur murder case, and the only omission of which he can be found guilty is his failure, while telling the Jury that there was hostility with Pragash, also to add that there was hostility with Ram Bhagwan, the son of Pragash. In my opinion the omission to inform the Jury that in one solitary passage in his testimony Jauhar Ali had added the name of Ram Bhagwan does not seem to me to have been an omission of such prime importance as to vitiate the verdict.

This disposes of all the points so ably and forcibly argued before us by Mr. Hasan Imam and by Mr. Manuk, It is true that the ability of Counsel engaged in the defence does not relieve the Judge of the task which the law imposed upon him of fully and fairly charging the Jury. At the same time it is reasonable that the Judge should take into account the elaboration and the skill of Counsel. On this point a number of authorities have been cited to us in the course of the argument, but it is not necssary to discuss them all. I desire, however, to draw attention to *Queen* v. *Nim Chand Mukerjee* (4), in which their Lordships of the Calcutta High Court so far back as 1873 made the following observations :

"What a Judge says to a Jury on the law is an absolute and binding direction upon them. What he addresses to them upon the facts are only such observations as he thinks it necessary and proper to make in assisting them to arrive at a conclusion upon the evidence, which it is wholly in their province to deal with as they think

(4) [1873] 20 W. R Cr 41.

proper, and the observations which a Judge would make to a Jury upon the facts would be determined by circumstances which must vary, one may almost say ,in every case and in every tribunal in the country. They would vary in a very great degree according to the intelligence of the Jury whom the Judge was addressing; they would also vary very much, according as the case had or had not been fully discussed both for and against the prisoners by Counsel prior to his addressing them. Had there been no discussion of a case in Counsel, it would undoubtedly be necessary for the Judge to point out many things which, after the case had been fully discussed on both sides, both for the Crown and for the prisoner might well seem to him unnecessary. And on the other hand a Judge has very often to caution a Jury against accepting without very careful consideration some of the suggestions that are made to them. When we are called upon to say whether or not the Judge has done his duty in addressing the Jury on the facts, we must look to his summing up as a whole, and see that the case has been fairly laid before them." .In the case of *Emperor* v. *Malgowda* (5), upon which counsel in the present case have relied, their Lordships of the Bombay High Court do not disapprove of the above principles, but they make the reservation that the Judge shuld not omit matters of prime importance merely because they have been discussed by the advocate.

In my opinion taking the charge as a whole, it is not open to the imputation of partiality to the Crown. It was impossible for the learned Judge not to make allowance for the ability with which the defence was conducted before him and not to leave to the Jury who were a body of unusually intelligent men, much that he would not have left them if they had been less educated or less experienced. The omissions of which the learned Judge has been guilty were not omissions of prime importance in the circumstances of this case and to interfere with the verdict on the ground urged would be to convert a trial with the aid of a Jury into a trial with the aid of assessors. If the institution of trial by Jury is to be maintained at all and is to flourish in this country, the superior Courts must be jealous to see that nothing is done to weaken the Jury's sense of responsibility in matters of fact, and unless there is clear and unmistakable evidence that the Jury were misled by the Judge into a miscarriage, I think we should decline to interfere. The appeal will be dismissed.

Thornhill, J.—I have had the advantage of reading the judgment of my learned brother with which I fully agree. It, therefore, appears unnecessary for me to discuss in detail the various grounds of objection set out in the appellant's petition. They are mostly based on non-direction by the learned Sessions Judge. It must be remembered that 25 witnesses were examined for the prosecution and cross-examined at considerable length. It appears to be assumed that the headings of the charge to the Jury made under S. 367, C. P. C., contain a verbatim account of the Judge's summing up, and it would appear further that the present grounds are made out by comparison of the recorded evidence with the headings of charge and where any evidence might be construed in favour of the accused and mention of it is omitted from, or is not fully referred to in, the headings of charge, objection is taken. The remarks of their Lordships of the Privy Council in *Channing Arnold* v. *Emperor* (6) would appear most appropriate: "A charge to a Jury must be read as a whole. If there are salient propositions of law in it, there will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the Jury, it must needs be that the view of the Judge may not coincide with the view of others who look upon the whole proceedings in black type. It would however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the Jury's province."

It is clear from the cross-examination of the prosecution witnesses and from some of the written statements that a good deal of attention of the defence was concentrated upon showing that the riot did not take place in field No. 35, but may have taken place in field No. 111, or elsewhere. In this respect two grounds of objection relating respectively to the admission of a sale-deed and the presumption arising under S. 103B of the Bengal Tenancy Act demand special attention. The prosecution case was that field No. 35 was in possession of the complainant Jauhar

(5) [1903] 27 Bom 644.

(6) A I R 1914 P C 116=41 Cal 1023=23 I C 661=41 I A 149 (P C).

Ali, while on behalf of the accused it was sought to show that Rafiq, son of Amanat Ali, was in possession. The following extracts relating thereto and taken from one of the headings of the charge have been severely attacked:

" As to the title to and possession of plot No. 35 the prosecution have produced a sale-deed, Ex. 9, executed by Amanat Ali in favour of Jauhar Ali, on 27th March 1906. Jauhar Ali was granted the area slip and parcha but in the finally published Record of Rights his name did not appear but the name of Amanat Ali is shown" ....."No evidence of possession of Rafiq has been given, except in the the name of Amanat Ali is shown."

The sale-deed, Ex. 9, above referred to, was produced on the 18th of February and handed over to the officers in charge of Exhibits. It was marked on the 19th. No objection was in fact made to its admission in the Sessions Court. But the learned Counsel who appeared for the accused in that Court states that he was unaware it had ever been made an Exhibit and that he certainly intended to object to it. It is a document which Jauhar Ali produces when he alleged possession for the last 10 or 12 years. The objection made is that its execution has not been formally proved and that the Judge in performing the duties prescribed by S. 298, Criminal P. C., should have rejected it whether it was or was not objected to by the parties. In my opinion there is a considerable difference between evidence which is inadmissible on account of its inherent nature and evidence such as the document complained of, which would be admissible on formal proof of its execution. Here the document was innocently admitted on the supposition that formal proof of it was waived. Even assuming that it was wrongly admitted though not objected to, it seems clear from the authorities that it is not the admission of every inadmissible evidence which vitiates trials by Jury and that it is the duty of the appellate Court first to consider whether the evidence improperly admitted is material and such as is likely to have exercised a prejudicial influence on the mind of the Jury.

Now the sale-deed of 1906 could not have proved present possession, and it does not appear to me that, had it been objected to and rejected on the ground that it had not been proved, the case for the defence would have been advanced in face of the abundant evidence of possession given by the witnesses mentioned in the Judge's charge. There is authority to show that if evidence has been admitted, which should have been rejected, it is competent to the High Court to consider whether, after excluding the evidence wrongly admitted, the rest of the evdence is sufficient to sustain the verdict: *Emperor* v. *Waman* (7). Cases also have been cited indicating where a verdict is vitiated owing to misdirection the appellate Court should not go into the facts and substitute its own decision for the verdict of the Jury.

In my opinion the accused have not been prejudiced by the admission of the document in question and the circumstances and fact of its admission do not constitute any material misdirection or error demanding a retrial. It is also urged that notwithstanding how strongly counsel for the accused may have relied on and explained the entry in the Record of Rights showing the name of Amanat Ali, father of Rafiq, to have been recorded, it was the bounden duty of the Judge to have drawn the attention of the Jury to the presumption of correctness attached to the entry arising under S. 103-B of the Bengal Tenancy Act. It would appeal to me, where this presumption was never denied and where no question was raised which the Court was called upon to decide (see S. 298, Criminal P. C.), it was not incumbent upon the Judge to dwell upon a matter such as this, arising during the course of the trial, unless there was some indication that the jury misunderstood it or were ignorant as to its effect. The Jury was an unusually intelligent one. They had heard Jauhar Ali cross-examined as to the importance of the Record of Rights and his admissions relating thereto. The Jury had likewise the benefit of being addressed by the learned counsel for the accused on the subject. The tone of the Judge s remarks in his headings of charge seems to me to indicate that he was dealing with a matter, namely, the Record of Rights, the presumption under which was thoroughly appreciated by the jury he was addressing. To my mind the fact that the learned Judge did not pointedly call the attention of the jury to the provisions of S. 103B did not influence their finding in the least. Mr. Manuk on behalf of Ram Bhagwan, while relying on the joint grounds put forward by all the appellants, further raised objection to the way in which the evidence relating to the alibi pleaded by his client was presented to the jury. My

(7) [1903] 27 Bom 626.

learned brother has likewise dealt in detail with this. No doubt the Judge might have presented the evidence of the Comparing Clerk in a more amplified from, but considering this witness was one of the last examined and his evidence was therefore fresh in the minds of the Jury, I do not think the fact of the Judge exercing his discretion in dealing concisely with his evidence is a good ground for complaint.

In conclusion I would remark that while mindful of the interesting and able arguments of Mr. Hasan Imam and Mr. Manuk on behalf of their clients, a careful examination of the evidence and the headings of the learned Judge's summing up has led to me to the opinion that he has well fulfilled the requirements of law and discharged his duty to the Jury. He appears to me to have dealt with all the important and salient features of the case and to have presented them fairly and honestly to the Jury. I therefore agree with my learned brother that this appeal should be dismissed.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 210

ROE, J.

T. K. Rowlins—Appellant.

v.

Lachmi Narain Jha and *others* —Respondents.

First Appeal No. 104 of 1916, Decided on 5th May 1916.

(a) Court-fees Act (1870), Ss. 12 and 17—Sch. 1, Art. 1—Mortgage suits—Appeals or cross-objections—In original appeals court-fee should be levied on sum due at date of original decree—In second appeals it should be levied on sum due at date of decree of lower appellate Court.

In the case of appeals or cross-objections in suits for redemption or foreclosure in all cases whether a decree for interest has been made in them or not, in which the court-fee declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objection should be valued and future interest should not be taken into account, i. e., in all original appeals the court-fee should be levied on the sum due at the date of the original decree and in all second appeals it should be levied on the sum due at the date of the decree of the lower appellate Court. [P 210 C 2]

(b) Court-fees Act (1870), Sch. 1, Art. 1—Appeal against costs—Court-fee must be paid ad valorem on costs.

When an appeal against costs is distinct and separate from the other parts of the appeal, court-fee must be paid ad valorem on the costs decreed. [P 211 C 1]

(c) Court-fees—Appeal—Deficiency when can be ordered—Default in payment of court-fee in Court below—If appellant in default, appeal will not be heard till deficiency is made up—If respondent, decree shall not be executed until deficiency is made up.

When it is the appellant who failed to pay sufficient court-fees in the Court below, his appeal will not be heard till the deficiency has been made good.

Where it was the respondent who was in default, no decree shall be executed in his favour until the deficiency has been made good. [P 211 C 2]

(d) Court-fee—Determination—Decision of Taxing Officer is final.

The decision of the Taxing Officer in the matter of court-fees is final. The court-fee fixed by him must be paid. [P 210 C 2]

Naresh Chandra Sinha—for Appellants.

Order.—Three questions have been referred to me.

1. On what principle should fees be levied in appeals in mortgage suits in which a decree for interest has been made? 2. What is the correct court-fee when relief is sought with regard to costs independently of the result of the main contest between the parties? 3. What are the Taxing Officer's powers under S. 12, Court-fees Act? An application has also been made to me in Court to either refer the matter to a Division Bench, or pass an order that will be open to appeal under the Letters Patent.

The attention of the Bar may be drawn to the case reported as *Khachera* v. *Kharag Singh* (1). A Division Bench has no power to deal with a stamp reference even when made by the taxing Judge. Nor in my view will it avail the Bar to refuse to pay the court-fees fixed by the taxing Officer, and then apply to the Division Bench, before whom the case is laid for orders, to revise the order of the Taxing Officer, *Koer Karan Singh* v. *Gopal Rai* (2). The decision of the Taxing Officer is final. The Court-fee fixed by him must be paid. My decisions on the points submitted after hearing the points fully argued are:

1. In the case of appeals or cross-objections in suits for redemption or foreclosure, in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objection should be valued and future interest should not be taken into account. See *Raghbir Prosad* v. *Shankar Bux Singh*

(1) [1910] 33 All 20=7 I C 315.
(2) [1909] 32 All 59=4 I C 123.

(3) and compare *Vithal Hari Athavle* v. *Govind Vasudeo Thosar* (4) with *reference under Court-fees Act,* 1870 (5). The effect of this will be that in all original apeals the Court-fee will be levied on the sum due at the date of the original decree. In all second appeals the court-fees will be levied on the sum due at the date of the decree of the lower Appellate Court. 2. This case falls under S. 17. When the appeal against costs is distinct and separate from other parts of the appeal, Court-fees must be paid ad valorem on the costs decreed. 3. The position of the Court in these cases is clearly defined in *Narain Singh* v. *Chaturbhuj Singh* (6). When it was the appellant who failed to pay sufficient fees in the Courts below, his appeal will not be heard till the deficiency has been made good. Where it was the respondent who was in fault, no decree shall be executed in his favour, until the deficiency has been made good.

V.S./R.K. *Order accordingly.*

(3) A I R 1914 All 520=21 I C 723=36 All 40.
(4) [1893] 17 Bom 41.
(5) [1906] 29 Mad 367.
(6) [1898] 20 All 362.

A. I. R. 1918 Patna 211 (1)

CHAPMAN AND ROE, JJ.

Kharet Pahan—Plaintiff—Appellant.

v.

Bisra Pahan and *others*—Defendants—Respondents.

Appeal No. 3030 of 1914 Decided on 1st March 1917, against appellate decree of J. C., Chota Nagpur, D/- 19th July 1914.

(a) Custom—Pahan—Election of.

The custom governing the election of a pahan is that some villager carries on his head a basket blindfold and the house before which he stops indicates the family whom the spirits desire to be their priests. [P 211 C 2]

(b) Custom—Pahan—Privilege of.

Until an old pahan has been superseded by a new pahan no landlord, not even the Government, has any power to give his lands to other persons. [P 211 C 2]

(c) Custom—Pahan—Duties of.

The duty of a pahan is to exorcise spirits and prevent them from attacking the cattle and people of the village. [P 211 C 2]

Fakhruddin and *Bimala Charan Sinha*—for Appellant.

Atul Kirshna Roy—for Respondents.

Roe, J.—The plaintiff in this case claims to have been elected pahan of the village in which lie the lands in suit. These lands are admittedly the remuneration of the pahan, whose duty is to exorcise spirits and prevent them from attacking the cattle and people of the village.

There are two points in issue in the case, (1) what was in this village the custom governing the election of a pahan; and (2) was the plaintiff elected in accordance with that custom? It has been found concurrently by the lower Courts that the custom in the village is that some villager shall carry on his head a basket; he is blindfolded and the house before which he stops indicates the family whom the spirits desire to be their priests. This I regard as a finding of fact and it is based upon good evidence; in fact one of the witnesses relied upon to prove the custom is the plaintiff's own witness. It is not contended that the plaintiff has been appointed in accordance with this custom, but by a general election from among the villagers which election has been confirmed by a Deputy Collector. It is suggested that because this Deputy Collector sanctioned these proceedings as manager on behalf of the Government to whom the estate, in which lies this village, belongs, the plaintiff should be regarded as having an interest in this land granted to him by the landlord. In this contention there is no substance whatever. Until the old pahan has been superseded by a new pahan no landlord, not even the Government, has any power to give his lands to other persons. Upon the finding of fact with regard to the custom of election to the office of pahan, I would hold that this appeal is concluded and should be dismissed with costs.

Chapman, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 211 (2)

JWALA PRASAD, J.

Bhairo Prasad Sahu and *another*—Defendants—Appellants.

v.

Ram Chandra Prasad and *another*—Defendants—Respondents.

Appeal No. 452 of 1917, Decided on 14th March 1918, from Appellate decree of Dist. Judge, Mozufferpore, D/- 8th February 1917.

(a) Hindu Law—Guardianship—Mother is natural guardian in absence of father, whether family is joint or separate.

Under the Hindu law the mother is the natural guardian of a minor in the absence of the father, irrespective of the family being joint or separate. [P 213 C 1]

(b) Civil P. C. (1908), O. 32, R. 3 (4)—Notice for appointment of guardian ad litem should be served upon natural guardian.

Order 32, R. 3 and Cl. 4 requires that a notice for the appointment of a guardian ad litem

should be served upon the natural guardian of the minor. [P 212 C 2]

(c) Civil P. C. (1908), O. 32, R. 3—Guardian-ad-litem of minor defendant guilty of negligence—Decree will not bind minor.

Where a guardian-ad-litem of a minor defendant is guilty of negligence and no attempt is made by him to protect the interests of the minor in the suit, the decree obtained in the suit will not bind the minor. [P 213 C 2]

(d) Decree—Setting aside—Fraud—Decree not capable of being split up set aside at instance of one judgment-debtor — Entire decree must be set aside.

Where a decree which cannot be split up is set aside on the ground of fraud at the instance of one of several judgment-debtors, the entire decree must be set aside. [P 214 C 1]

Saroshi Charan Mitter—for Appellants.

Rajendra Prasad and *Audh Behari Chaubey*—for Respondents.

Judgment.—The defendants are the appellants in this case. This appeal arises out of a suit brought by the plaintiff-respondent to set aside two ex parte decrees obtained against him by the appellants on the ground of fraud and gross negligence on the part of the guardian. The plaintiff is a minor. The decrees sought to be set aside are (1) dated the 8th of June 1912 and (2) 18th of November 1914. Prior to the obtaining of the aforesaid decrees the defendants-appellants had brought a suit in 1907 against the father of the present plaintiff for rent in respect of the property in suit, alleging that the rent was at the rate of Re. 1-7-0 per annum. The plaintiff's father contested the suit and the suit of the defendants-appellants was dismissed on merits on the 13th January 1908. The decrees sought to be set aside are for assessment of rent on the 30th September 1909, being suit No. 1322 of 1909 against the father of the plaintiff and his uncle Anjani Kumar. The appellants claimed assessment at the rate of Rs. 48 in place of their claim in the former at the rate of Rs. 1-7-0 per annum. The defendants in that case, namely, the plaintiff's father and his uncle, filed written statements taking pleas similar to those taken in the former suit of 1907, namely, that the land in dispute was the lakheraj of the defendants and that there was no relationship of landlord and tenant between the parties. The case after several adjournment was filed for hearing on the 27th of May 1910, but on the 16th of May 1910 the father of the present plaintiff died and the appellants applied for substitution of the plaintiff in place of his deceased father and named defendant No. 2, his uncle, as guardian ad litem. The defendant No. 2, was subsequently appointed guardian ad litem of the present plaintiff.

It has been held by the Courts below that no notice was served upon the natural guardian of the minor, viz., his mother, and that the uncle of the plaintiff did not give his consent for his appointment as the plaintiff's guardian ad litem. Ultimately the plaintiff's guardian defaulted and did not prosecute the suit, which was decreed ex parte on the 8th June 1912 in favour of the appellant.

The second decree concerned in this appeal which the plaintiff seeks to set aside was obtained in a suit brought by the appellants against the plaintiff-respondent and his uncle in 1913, being No. 542 of that year. This suit was for recovery of rent for the years in suit from the plaintiff and his uncle on the basis of the aforsaid ex parte decree, dated the 8th June 1912. The uncle was not made guardian in this case, but one Babu Mathura Prasad was appointed guardian ad litem for the plaintiff. The said guardian ad litem filed a written statement in consultation with the mother of the plaintiff impugning the claim of the appellant as false and fraudulent, yet the case of the plaintiff was not prosecuted and the pleader guardian also made default, the result of which was that the suit was decreed ex parte against the plaintiff and his uncle on the 18th November 1914.

The Courts below have concurrently held that the guardian of the plaintiff in respect of the decree obtained in June 1912 was guilty of fraud and gross negligence and that absolutely no attempt was made by the guardian to defend the action of the appellants against the minor and to protect his interests. The lower Courts have also held that the requirements of O. 32, R. 3, clause 4, and rule 4, clause 3, were not complied with in the appointment of the guardian in the case. There is a further finding that the defendants-appellants were guilty of fraud in obtaining the appointment of the guardian and the decree. On the basis of those findings of facts the Courts have concurrently held that the decree obtained by the appellants was tainted with fraud and liable to be set aside.

On behalf of the appellants it has been strenuously contended that the irregularities in the appointment of the natural guardian were not material in

this case inasmuch as the family was a joint Mitakshara one in which the uncle of the plaintiff as the karta represented the interest of the minor and was, therefore, properly appointed a guardian by the Court. The contention is obviously without any substance. The guardian of an infant has been expressly named in the Mitakshara to be the parents and that the father has preference over the mother and after the death of the father, the mother is the natural guardian of the infant. The guardianship of an infant is irrespective of whether the family is joint or separate. The learned Vakil for the appellants has not been able to show any driect authority on the point for his contention that the mother in a joint Hindu family is not the natural guardian of the minor. O. 32, R. 3, clause 4, requires that the notice for the appointment of a guardian ad litem should be served upon the father "or other natural guardian of the minor," the reason being that the natural guardian is the best person to have a voice in the appointment of the guardian ad litem. Again the first Court held that the minor's father was separate from his uncle. This finding was not upset by the lower Appellate Court. Thus on the finding of the first Court the uncle was not the karta of the minor plaintiff. The mother was the only guardian of the minor. I agree with the view of the Courts below that the rule of the Code of Civil Procedure has been contravened. Again there can be no doubt, and in fact it has not been seriously contested, that O. 32, R. 3, clause 4, has not been at all complied with in this case, inasmuch as no consent of the guardian was obtained for his appointment. This provision newly added to the present Code of Civil Procedure is wholesome and is intended to safeguard the interests of the minor by obtaining the actual consent of the guardian ad litem for his appointment and thus ensuring that he has taken upon himself the onerous duty of defending the interests of the minor.

It has then been contended that the aforesaid non-compliance with the provisions of the Code amounts only to irregularities which would not vitiate the decree obtained in the case. Reliance has been placed on *Walian* v. *Banke Behari Pershad Singh* (1), but that authority does not at all help the appellant. In that case it was expressly held that the interests were duly protected and all possible care that a diligent person would take was taken by the guardian and hence the mere irregularities in the appointment of the guardian would not vitiate the proceedings. But where the guardian is guilty of negligence and no attempt has been made by him to protect the interests of the minor, the decree so obtained will not bind the minor. This is reiterated in the recent case of *Bhagwan Dayal* v. *Param Sukh Dass* (2). It has to be seen in the circumstances of the present case whether there has been any negligence on the part of the guardian appointed. The decision between the parties in the former litigation, dated the 13th January 1908, referred to in the early part of the judgment, will clearly show that the appellants' claim for rent against the father of the plaintiff was dismissed on contest. That was a good and substantial defence to be put forward in any Court of Justice. The guardian in this case did not attempt to put forward that defence and to place the judgment in that case before the Court but suffered the case to be decreed ex parte against the minor. This is sufficient to show that there was the greatest possible negligence on the part of the guardian ad litem of the minor plaintiff. The appellants are guilty of the procurement of the appointment of such a guardian without any notice to the natural mother as required by law.

The result is that I agree with the view of the Courts below and I hold that the appellants are guilty of fraud and that the guardian is guilty of negligence and that the decree is not binding upon the plaintiff-respondent and is liable to be set aside.

The second decree of 1914 is a decree for rent based upon the fraudulent decree of 1912. The pleader guardian of the minor plaintiff also did not produce the most valuable evidence afforded by the aforesaid decision of the inter-party case, dated the 13th January 1908. Then the mother of the plaintiff in this case was not at all informed and no notice was served upon her for the appointment of the proposed guardian. Thus the minor's interests in this case also were not protected. This decree, based as it is upon the fraudulent decree of 1912, should also be set aside.

It is next contended by the learned Vakil for the appellants that the entire decrees cannot be set aside and that only the decrees against the minor

(1) [1903] 30 Cal 1021=30 I A 182 (P C).

(2) A I R 1915 All 62=27 I C 623=37 All 179.

should be set aside keeping them in fact as against the uncle of the minor, Anjani Kumar, who was also defendant in the aforesaid cases. The liabilities of the defendants under the decrees are indivisible. Therefore, the decrees are not liable to be split up, and if they are set aside as against one of the defendants, they must be set aside as against the other. The principle has been well laid in the case of *Bhura Mal* v. *Har Kishan Das* (3) and later in the case of *Jadubansa Narain* v. *Mohunt Hari Charan Bharati* (4).

Lastly it is argued on behalf of the appellants that the suits should be revived and tried de novo on the plaintiff's guardian ad litem having been properly appointed. I am unable to accept this contention. There is no provision in the Code of Civil Procedure for such a procedure. The decrees in question are set aside as having been tainted with fraud and gross negligence of the guardian. The analogy of O. 9, R. 13, Civil P. C., and the other cognate rules in that Chapter does not apply when a decree is set aside in a regular suit on the ground of fraud. The applications for the setting aside of ex parte decrees and for the restoration of suits dismissed for default are made in the same Court and give rise only to miscellaneous proceedings in the same suit. The setting aside of an ex parte decree or of the order dismissing a suit for default naturally revives the original suit. Such cannot be the result when a final decree is set aside on the ground of fraud or gross negligence by means of a separate and independent suit.

The result is that all the contentions of the learned vakil for the appellants fail and the appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(3) [1902] 24 All 383.
(4) [1907] 6 C L J 226.

A. I. R. 1918 Patna 214

MULLICK AND THORNHILL, JJ.

Ram Sunder Rai—Objector—Appellant.

v.

Ram Dheyan Ram—Petitioner—Respondent.

Misc. Appeal No. 150 of 1917, Decided on 15th May 1918, from order of Dist. Judge, Shahabad, D/- 11th June 1917.

(a) Insolvency—Court can only issue injunction to stay pending litigation under Civil P. C. (1908), O. 39, R. 1.

The Provincial Insolvency Act does not authorize an insolvency Court to stay every pending litigation and the Court can only issue an injunction if the circumstances enumerated in R. 1, O. 39 or any of them are proved to exist. [P 215 C 2]

(b) Civil P. C. (1908), O. 39, R. 1—Court has no jurisdiction to issue injunction upon person not party to suit—Insolvency.

Under O. 39, R. 1 a Court has no jurisdiction to issue an injunction upon a person who is not a party before it. An insolvency Court can therefore only issue an injunction upon the debtor and the creditor who are parties to the insolvency proceeding. [P 215 C 1]

The appellant filed a suit against the respondent and on 25th September 1916 attached, in anticipation of judgment, a certain sum in the hands of the District Board which was owing to the respondent. On 12th April 1917 the latter filed an insolvency petition before the District Judge. Appellant obtained a decree on 2nd June 1917 and on 6th June the Subordinate Judge executing that decree issued a precept to the District Board to pay over the money to the decree-holder. The precept reached the District Board on the same day. On the following day the respondent applied to the District Judge that an injunction might issue directing the District Board to stop payment. The District Judge, after disallowing the appellant's objection, directed the issue of an injunction as prayed for:

Held: (1) that the District Board not being a party to the insolvency proceedings, the Court had no jurisdiction to issue an injunction upon it; (2) that on a direction being issued by the execution Court to the District Board to pay over the money to the appellant, the money became the appellant's money, and the District Board held it merely as trustees on his behalf. [P 215 C 2]

(c) Civil P. C. (1908), O. 39, R. 1—Conditions requisite to issue order of injunction laid down.

In order to justify an order under O. 39, R. 1, it must be shown that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors. [P 215 C 1]

Sushil Madhab Mullick—for Appellant.

S. N. Sahay—for Respondent.

Judgment.—This is an appeal preferred by an objector in an insolvency proceeding in consequence of an order made by the District Judge of Shahabad on 11th June 1917, directing the District Board of Arrah to refrain from paying over to the appellant Ram Sunder Rai, the sum of Rs. 1,673-15-2, which was due, to the petitioner in the insolvency proceedings from the District Board. It appears that the appellant instituted a suit against the respon-

dent in August 1916 and on 25th of September 1916 attached the amount in the hands of the District Board in anticipation of judgment. On 12th of April 1917 the respondent filed an insolvency petition before the District Judge. On 2nd June 1917 the appellant got his decree and on 6th June 1917 a precept was issued by the Subordinate Judge executing the said decree directing the District Board to pay over to the decree-holder the amount in deposit at the credit of debtor. The precept was received by the District Board on 6th of June 1917. On 7th of June 1917 the debtor made an application to the District Judge asking that an injunction might issue directing the District Board to stop payment. On 11th June 1917 the learned District Judge, disallowing the objection of the decree-holder, issued an injunction as prayed for. The present appeal has been filed after leave in accordance with the provisions of the Insolvency Act.

The first question is whether under S. 47, Provincial Insolvency Act, the Insolvency Court could have in the present case issued an injunction. S. 47 enacts that the Court "shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction." The question then arises as to whether under the Civil Procedure Code the Court was competent to issue the injunction. Now it is quite clear that under O. 39, Civil P. C., the Court had no jurisdiction to issue an injunction upon the District Board which was not a party before it. It could only issue an injunction upon the debtor and the creditors who were parties to the insolvency proceeding. Therefore the order upon the District Board was without jurisdiction. Even accepting the contention of the learned vakil for the respondent that this was merely a technical error and that the Court's real intention was to issue an injunction upon the appellant Ram Sunder Rai who was one of the creditors before it, it does not seem that the order was one which the learned Judge was competent to make under R. 1, O. 39, Civil P. C. In order to justify such an order it must be shown that the property in dispute was in danger of being wasted, damaged or alienated by any party to the suit or wrongly sold in execution of a decree or that the defendent threatened or intended to remove or dispose of his property with a view to defraud his creditors. In this case, upon the finding of the learned Judge himself it does not appear that any of these conditions existed. The Provincial Insolvency Act does not authorise the Insolvency Court to stay every pending litigation and the Court can only issue an injunction if the circumstances enumerated in R. 1, O. 39, Civil P. C., or any of them are proved to exist. Reference has been made to a decision of their Lordships of the Calcutta High Court in *Abdul Razab* v. *Basiruddin Ahmed* (1), where the learned Judges acting under S. 151, Civil P. C., issued an ad interim stay pending the hearing of the appeal against an order under the Insolvency Act. Now that decision is not material to the case before us. In the present case even if the order of the District Judge restraining the creditor from taking the money from the District Board was made under S. 151, Civil P. C., it must be shown that the making of that order was in accordance with the principles of justice, equity and good conscience. I am unable to see that there are any facts in the present case which indicate that justice, equity and good conscience require that the decree-holder who instituted his suit long before the insolvency petition was filed, should be kept out of his money. The decision of their Lordships of the Allahabad High Court in *Anurudh Kunwar* v. *Kesho Das* (2) is very much to the point and Ss. 34 and 35, Insolvency Act, really have nothing to do with the present case, where no adjudication of insolvency has been made nor a Receiver appointed.

In the view that we take it becomes unnecessary to discuss the meaning of the phrase "assets realised" in S. 34, Provincial Insolvency Act, but if it were necessary to do so we think that in this case the assets were realised. There was no order of the Civil Court upon the District Board to send the money to the Court and therefore the authorities which hold that where money has been ordered to be deposited as assets it cannot be considered to have been realised till it reaches the Court, do not apply. In this case the District Board were directed on 2nd of June to pay the money to the decree-holder and from that time the money became the decree-holder's money and the District Board mere trustees on behalf of the decree-holder. The assets, so far as the judgment-debtor was concerned, became assets realised by the decree-holder in the possession of the

(1) [1910] 6 I C 95.
(2) [1917] 39 All 547=39 I C 783.

District Board on behalf of the decree-holder. This case is therefore distinguishable from the case of *Debi Prasad* v. *Chiene* (3), where the money was ordered to be paid to an officer of the Civil Court and it was held that till it had reached the officer, it could not be considered to be an asset realised within the meaing of the Provincial Insolvency Act. But as I have said before, it is not necessary to determine for the purposes of the present case whether the assets were or were not realised within the meaning of S. 34, Provincial Insolvency Act. In our opinion that section does not apply to the present case. We are of opinion that the order of the Insolvency Court was made without any authority in law and must, on that ground, be set aside. We direct that the money in the hands of the District Board be paid to the appellant upon his applying for the same to the District Board. The appeal succeeds and is decreed with costs—hearing fee Rs. 32.

V.S./R.K. *Appeal decreed.*

(3) [1912] 16 I C 84.

A. I. R. 1918 Patna 216

ROE AND JWALA PRASAD, JJ.

Chandrika Prasad Singh—Appellant.

v.

Kesho Prasad Singh—Respondent.

Appeal No. 247 of 1917, Decided on 24th October 1918, from original oder of Sub. Judge, Shahabad.

Decree—Execution—When can trespasser execute decree obtained on behalf of estate stated—Trespasser.

The question of the right of a trespasser to execute a decree obtained on behalf of an estate depends largely upon the nature of the decree and of the objection taken by the judgment-debtor to the proceeding instituted by the trespasser. Where a decree is due to an estate the person who for the time being is recognized as the proprietor of the estate is the proper person to execute the decree. [P 216 C 2]

Sivasaran Lall and *Tribhunath Sahai*—for Appellant.

Krishna Sahay, Nirsu Narain Sinha and *D. N. Sircar*—for Respondent.

Judgment.—In this case the judgment-debtor, by litigation terminated by a decree of the High Court of Calcutta in 1904, became indebted to the Dumraon Raj in two sums representing the cost of the litigation, namely, Rs. 502 the cost of the High Court, and Rs. 451 the cost of the Subordinate Judge's Court, and in addition to these to an unascertained sum to cover mesne profits pending the period of the trespass to remedy which the litigation was directed. The question of mesne profits was taken up in the Subordinate Judge's Court, in accordance with the directions of the High Court. A compromise petition was filed, in which it was stated that the mesne profits should be taken to be Rs. 1,320 and that the decrees made by the High Court and by the Subordinate Judge for costs should not bear interest. The then decree-holder, the Maharani of Dumraon, took various steps in execution of this compromise decree. She died in December 1907. She was succeeded temporarily by a son, who it was alleged she had adopted. Litigation followed and on the 18th September 1911 the present Maharajah of Dumraon obtained possession of the estate. The present application for execution of the decree was made on the 14th April 1917 and was preceded by application made on the 3rd July 1914 and disposed of on the 28th April 1915. That again was preceded by an application made on the 3rd July 1911 and disposed of on the 15th September 1911. It is conceded that if the application of the 3rd July 1911 was a genuine step taken in aid of execution, the present proceedings are not barred by the three years' rule. It is, however, contended that they are barred by the twelve years' rule.

The ground upon which it is urged that the application of the 3rd July 1911 was not a genuine step taken in aid of execution is that this step was taken by the alleged adopted son, who was in possession of the estate under the Court of Wards from 1907 to 1911. We are of opinion that the question of the right of a trespasser to execute a decree obtained on behalf of the estate will depend largely upon the nature of the decree and of the objections taken by the judgment-debtor to the proceedings instituted by the trespasser. The Court of Wards took possession of the estate immediately after the Maharani's death and was in possession of it for four years. If the contention of the judgment-debtor be sound that any steps taken by the Court of Wards to execute the decree due to the estate during this period were not genuine steps taken in aid of execution but were steps invalid by reason of the fact that they were taken by a trespasser, then the whole of the decrees due to the estate prior to the year 1907 would have been wiped off by the trespass. We are of opinion that where a decree is due to an estate, the person who for the time being is recognised as the proprietor of the estate is the

proper person to execute the decree due to the estate and that in this case the Court of Wards was, as representative of the estate, the proper person to take out execution. This was acknowledged by the judgment-debtor himself in proceedings beginning on the 10th July 1908 and terminating on the 10th February 1911. He allowed payment orders for Rs. 51 and Rs. 600 to be given to the Court of Wards on behalf of the trespasser. It is not open to him to say now that these proceedings were not genuinely taken in aid of the execution. Nor is it open to him to say that the debt due upon this decree was not a debt due to the estate but a personal debt of the Maharani, for we find him allowing in 1911 these payments to be made to the ward who was the adopted son not of the Rani but of her husband, the late Maharajah. The objection, therefore, that the whole decree is barred by limitation by reason of the three years' rule cannot be sustained.

The objection as regards the decrees for costs under the twelve years' rule must be upheld. It is strenuously urged by Mr. Nirsu Narain Sinha that the compromise decree was substituted for the original decrees for costs. In the first place the Subordinate Judge had no jurisdiction to accept any compromise decree in substitution for the decree either of the High Court or of its own Court previously passed. All that the compromise decree could do with regard to the decrees for costs was to limit the manner of their execution. The compromise decree is not a new decree for costs but merely an embodiment in a document of an agreement to execute these decrees in a particular way. The debts under the decrees remained untouched. These debts were both prior to 1904 and the decrees for costs were, therefore, barred by the twelve years' rule of limitation in 1917. The decree for mesne profits stands on a different footing. We have seen the judgment of the High Court of Calcutta and note that specific directions were given to the Subordinate Judge to ascertain the mesne profits in the course of the execution proceedings. The compromise decree, therefore, was the first valid ascertainment of the mesne profits and as this, the only decree for mesne profits, bears date 1907 it is not barred. The sums paid, amounting in all to Rs. 651, may equitably be debited to the decrees for costs. The decree for costs was prior to the decree for mesne profits and it is an equitable rule that in allocating payment to a number of debts, the debts should be satisfied in order of priority. The result, therefore, is that the decree-holder is entitled to bring the property in suit to sale in execution of that part of the compromise decree which has reference to the mesne profits. In the circumstances of the case we make no order as to costs in this Court or of the Court below made in this case.

Jwala Prasad, J.—I agree to the order made in this case.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 217

MULLICK AND ATKINSON, JJ.

Hari Lal Sahu—Plaintiff—Appellant.

v.

Ranchi Ministerial Officers Urban Co-operative Credit Society and *others*—Defendants—Respondents.

Second Appeal No. 160 of 1917, Decided on 5th November 1917, from decision of J. C., Chota Nagpur, Ranchi.

Specific Relief Act (1 of 1877), S. 42—Objection by real owner to attachment of decree in name of benamidar dismissed—Amount in deposit—Suit for declaration of title to deposit and invalidity of attachment were proper reliefs claimed—Relief for payment of amount was not required to be claimed.

One *A* obtained a decree against one *R*, who satisfied it by depositing the decretal amount in Court; defendants then obtained a decree against *A* and in execution of it attached the decree obtained by *A* against *R*. Plaintiff then filed a claim under O. 21, R. 58, Civil P. C., objecting to the attachment, but his claim was rejected. He then brought a suit purporting to act under O. 21, R. 63, for a declaration that *A* was his benamidar, and that he was the real beneficiary entitled to the money deposited in Court: he also asked for a declaration that the attachment obtained by the defendants was invalid:

Held: that the suit was not barred by the proviso to S. 42 inasmuch as the plaintiff was not bound to sue for the payment of the money to him, and that the consequential relief which it was possible for him to claim had in fact been claimed. [P 218 C 2]

Ray Guru Saran Prasad—for Appellant.

Atul Krishna Roy and *S. N. Palit*—for Respondents.

Mullick, J. — Defendant 4 sued one Ramgobind Singh and his two brothers upon a mortgage-deed and obtained a decree on the 22nd of December 1913, which was made absolute on the 23rd of March 1914. Ramgobind and his brothers thereupon satisfied the decree by depositing a sum of Rs. 1,588-1-6 in the Court of the Subordinate Judge of Ranchi. Defendants 2 and 3 subsequently brought a money suit against defendant 4 on the 15th of May 1914; and attached in execution of their decree the decree obtained by defen-

dant 4 against Ramgobind and his brothers. Subsequently again another suit was brought by the Ranchi Ministerial Officers Urban Co-Operative Credit Society, who are the first set of defendants in the present suit, through their Honorary Secretary, Babu Hira Lal Ghose, against defendant 4, and the decree of the 22nd of December 1913 obtained by defendant 4 against Ramgobind and his brothers was attached before judgment. The present plaintiff then appeared on the scene and on the 30th of July 1914 filed a claim under O. 21, R. 58, Civil P. C. objecting to the attachment made by defendants 2 and 3 on the 27th of July 1914 of the decree obtained by defendant 4 against Ramgobind and his brothers. That claim was dismissed on the 2nd of September 1914.

The plaintiff thereupon, purporting to act under O. 21, r. 63, brought the present suit for a declaration that defendant 4 was his benamidar and that he was the real beneficiary entitled to the money deposited in Court; he also asked for a declaration that the attachment obtained by defendants 2 and 3 was invalid. The suit was contested by defendants 2 and 3 as well as by defendant No. 1. Defendant 4 did not enter appearance. The Subordinate Judge found as a fact that defendant 4 was not the benamidar of the plaintiff. He further held that a suit such as this was not maintainable and that upon the principle enunciated in *Godhan Ram Bhakat* v. *Jaharmal* (1) a Court of Justice cannot be made the medium of benami transactions. The case then went in appeal before the Judicial Commissioner of Chota Nagpur. The learned Judicial Commissioner did not investigate the facts, but upon the point of law he found against the plaintiff holding that although the Indian Trusts Act (2 of 1882) did apply to the Province of Bihar, the suit was not maintainable by reason of the provisions of S. 42 of the Specific Relief Act which require a plaintiff to claim consequential relief. The learned Judicial Commissioner accordingly dismissed the appeal.

The present second appeal is presented by the plaintiff. The first question which arises is whether the suit offends against the provisions of S. 42 of the Specific Relief Act. It is urged by the learned Vakil for the appellant that S. 42 has no application at all in suits of this class, for which special sanction is given by the terms of the Civil Procedure Code in O. 21, R. 63. It is contended that a suit under this rule is in the nature of one for setting aside a decision of the Civil Court and that all that the claimant is concerned to ask is that the attachment be declared invalid and be released. Without deciding the broader question whether S. 42 of the Specific Relief Act is at all applicable, it appears to me that even if that section is applicable, the plaintiff has complied with its terms in the present suit. He asks that the attachment of 27th of July 1914 may be declared to be invalid and that his right to be substituted in the place of defendant 4 as the real decree-holder may be affirmed. This carries with it, ipso facto, the cancellation of the attachment made by defendants 2 and 3, and assuming that S. 42, Specific Relief Act, does apply, I consider that the consequential relief which it was possible for the plaintiff to claim has, in fact, been claimed.

The plaintiff asserts that it is unnecessary for him to ask for recovery of the money; that, armed with a decree declaring that the attachment is invalid he will be competent to go to the executing Court and have his name substituted in the place of defendant 4 and get an order for the withdrawal of the decretal amount. Whether the Court will then permit the plaintiff to withdraw the money or not is not a matter with which we are concerned. The suit as framed does not, in my opinion, offend against the terms of S. 42, Specific Relief Act, and the mere fact that the plaintiff has not asked for the recovery of the money is no bar to his obtaining the declaration which he seeks and which involves the setting aside of the attachment. In this view of the case it is unnecessary to consider whether we should go as far as the decision of the Madras High Court in *Kristnam Sooraya* v. *Pathma Bee* (2), where the learned Judges, dissenting from *Kunhiamma* v. *Kunhunni* (3) and following *Ambu* v. *Ketlilamma* (4), held that the proviso to S. 42, Specific Relief Act, does not operate so as to take away from a party, against whom an order has been made under Ss. 280, 281 or 282, Civil P. C. of 1882, the special right conferred on him to sue for a declaration of his title only so far as he is affected by the order which he seeks to impeach. Possibly there may be

(1) [1912] 40 Cal 335=16 I C 583.

(2) [1906] 29 Mad 151.
(3) [1893] 16 Mad 140.
(4) [1891] 14 Mad 23.

some difficulty in a case where subsequent to the attachment there has been a sale and the property has passed into the hands of a third party. In the case of *Kunhiamma* v. *Kunhunni* (3) their Lordships of the Madras High Court held that it was incumbent upon the plaintiff to sue for recovery of possession as well. In the case now before us the difficulty does not arise, because here the plaintiff has in fact claimed consequential relief and has brought himself within the terms of S. 42, Specific Relief Act.

It has been urged by the learned vakil for the respondent that the plaintiff should have asked for an injunction. In the present case an injunction would have been useless and quite unnecessary because once the plaintiff establishes that defendant 4 had no title in the decree, any transfer of the rights of defendant 4 to defendants 2 and 3 would only convey the right, title and interest of defendant 4 and would not in any way affect the plaintiff's title to the money in suit. The learned Judge in the Court below was therefore in my opinion, wrong in holding that S. 42, Specific Relief Act, was a bar to the present suit; and the case must accordingly be remanded to him in order that he may consider the further question whether or not defendant 4 was the benamidar of the plaintiff. The learned Subordinate Judge has gone into the facts and has come to the finding that there was no benami. It is urged by the learned vakil for the appellant before us that defendant 4 was a trustee and the learned Judge in the Court below must consider whether having regard to the provisions of the Indian Trusts Act, which applies to this Province, the plaintiff has established upon the evidence on the record that there was a trust. If the learned Judge's finding is in the affirmative then, in accordance with the decision of their Lordships of the Madras High Court in *Sethurayar* v. *Shanmugam Pillai* (5), the plaintiff will be entitled to a declaration that he was the rightful owner of the decree and that defendant 4 has no right therein. At the same time the plaintiff will be liable to repay to defendant 4 the costs incurred by him in obtaining that decree. Although in the present case defendant 4 does not contest the suit, defendants 2 and 3 having obtained a decree against defendant 4 will be entitled to credit in respect of such sum, if any, as may be found to be due to defendant 4 from the plaintiff.

The result therefore is that the decree of the lower appellate Court is set aside and the appeal is remanded to him for disposal in accordance with law, bearing in mind the directions given in this judgment. It is necessary to note that the learned vakil for defendants 2 and 3 before us has submitted that under the provisions of S. 4, Trusts Act, the plaintiff is not entitled to a declaration that defendant 4 was a trustee. The learned Judicial Commissioner will, no doubt, take this point into consideration when considering the provisions of the Trusts Act. With regard to defendant 1 the suit must fail. The suit is based upon the provisions of O. 21, R. 63, and the foundation of it is the dismissal of claim. It appears however that, so far as the attachment before judgment made by defendant 1 subsequent to the attachment obtained by defendants 2 and 3 is concerned, the plaintiff did not file any claim under the provisions of O. 21, R. 58. The present suit therefore, so far as it is based upon O. 21, R. 63, is not maintainable against defendant 1. The plaintiff might, no doubt, have sued defendant 1 independently for the establishment of his title, but that he has not chosen to do; and we cannot now allow him to join a different cause of action in the present suit so as to maintain it against defendant 1 also. The suit therefore is dismissed so far as defendant 1 is concerned with costs in all Courts. With regard to the costs of this hearing before us, the appellant will get his costs against defendants 2 and 3.

Atkinson, J.—I agree.

V.S./R.K. *Appeal partly allowed.*

(5) [1898] 21 Mad 353.

A. I. R. 1918 Patna 219

ROE, J.

Ram Narain Lal—Defendant— Appellant.

v.

Hari Kishen Prasad Narain Sahi—Plaintiff—Respondent.

Second Appeal No. 1358 of 1916, Decided on 15th August 1916.

Civil P. C. (5 of 1908), O. 41, R. 1—Two appellate decrees in two cross-appels passed in one judgment—Appellant in second appeal wishing to challenge both must file two appeals.

Where two appellate decrees are passed in one judgment in two cross-appeals arising out of the same case and the appellant in second appeal wants to challenge both of them, he must file two appeals. [P 220 C 1]

Rajendra Prasad—for Appellant.

Facts.—In one suit there were filed two appeals in the Court of the Dis-

trict Judge, one by the plaintiff and the other by the defendant. The District Judge decided both the appeals in favour of the plaintiff by one judgment. The defendant preferred an appeal to the High Court and filed only one appeal as against both the decrees in the Court below. The Stamp Reporter submitted that there should have been two appeals, one against each of the decrees in the Court below. He said that an appeal lay from a decree, not from a judgment. S. 100, Civil P. C., provided that an appeal lay from every decree. In O. XLI, R. 4, he submitted, the Code required an appeal to be preferred in the form of a memo, of appeal accompanied by a copy of the decree. It would follow from these provisions in the Code that if there were two or more appellate decrees in a case and if the appellant wanted to challenge all of them in second appeal, he would have to file as many appeals as there were decrees. If the appellant was allowed to challenge two decrees by one memo. of appeal the express provisions of the Code would be infringed. Besides there would be a direct loss to the state in the shape of Court-fees, etc. He relied on *Chathu* v. *Kunhamed* (1) and *Zaharia* v. *Debi* (2). The Taxing Officer placed the matter before the Taxing Judge for orders.

Order.—Having seen the Stamp Reporter's note I am of opinion that two appeals should be filed. Let the vakil be informed.

V.S./R.K. *Order accordingly.*

(1) [1888] 11 Mad 280.
(2) [1910] 33 All 51=7 I C 156.

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* A. I. R. 1918 Patna 220

DAWSON-MILLER, C. J. AND JWALA PRASAD, J.

Uttim Sahu and *others*— Plaintiffs —Appellants.

v.

Arzani and *others* — Defendants —Respondents.

Appeal No. 406 of 1915 decided on 7th May 1918, from original decree of Sub-Judge, Saran, D/- 9th July 1915.

* **(a) Civil P. C. (1908), O. 23, R. 1—Compromise of suit—Repudiation by some parties before decree—Court is empowered to give effect to compromise and pass decree accordingly—Bengal Tenancy Act (8 of 1885), S. 147-A (2).**

A Court is empowered to enquire intoand give effect to a lawful compromise, adjustment or satisfaction of a suit by the parties even where one of the parties repudiates or recedes from it in Court.

Clause (2), S. 147-A empowers a Court to give effect to a compromise and to pass a decree accordingly even if the parties subsequently retract from it. [P 224 C 1]

(b) Record of Rights—Entries in — Value of—Claim that entry is wrong barred by limitation—Suit for consequential relief is not barred by wrong entry—Court can determine that entry is wrong.

A claim is not necessarily barred merely by reason of the fact that the Record of Rights contains entries which, if produced in evidence and unrebutted would be fatal to the relief claimed. [P 220 C 2]

The fact that a claim for a declaration that a certain entry in the Record of Rights is wrong is barred by limitation, would not prevent the Court from determining that the survey entry is wrong, provided it is essential for the main or consequential relief claimed by the plaintiff. [P 224 C 1, 2]

Harnarayan Prasad—for Appellants.

Khurshed Husnain and *J. M. Mukherjee*—for Respondents.

Dawson-Miller, C. J.--The plaintiffs are the proprietors of Mouza Parsa includants 14 and 15 respectively entered into defendants 1 to 15 are the tenants who untill 1912 also held Zarpeshgi rights over the land in question which they acquired from the plaintiffs' predecessors. In 1912 the plaintiffs purchased their interest, in the same year deposited in Court the ammount due under the Zarpeshgi by way of redemption and they now sue the defendants for the price of the certain trees and bamboo clumps which they allege the defendants improperly cut and appropriated. Incidentally they claimed a declaration that the defendants 1 to 13 are not tenants of 46 bighas 1 cottah 4 dhurs at a fixed rate of rent and that defendants 14 and 15 are not tenants of 14 bighas 10 cottahs 15 dhurs at a fixed rate of rent as recorded in the survey Khatian, but that the nature of their tenancy is kaemi. The defence is, first, a denial that the defendants cut any trees at all and secondly, that they are tenants at fixed rates with regard to a portion of the lands in question and are, therefore, entitled to cut trees on that portion. The defendants further contend that the suit will not lie, as it asks for a declaration that the entries in the Record of Rights made more than 6 years ago are erroneous. If this were merely a suit asking for such a declaration it would, no doubt, be barred by limitation and even if it were essential to the plaintiff's claim for damages that he should first have the entry declared erroneous, his suit would probably fail. But it is now well established that a claim is not necessarily barred merely by reason of the fact that the Record of Rights contains entries which, if produced in evidence and urebutted would be fatal to the relief claimed. As was remarked by Mul-

lick, J., in *Brij Behari Singh* v. *Sheo Sankar Jha* (1): "An entry in Record of Rights neither creates nor extinguishes rights, it is merely a rebuttable place of evidence." In the present case the plaintiffs are clearly not entitled to the declaration asked for as to the entry in question, but that does not preclude the Court from basing its judgment on a finding of facts at variance with the entry, if it is satisfied that the evidence in the case is sufficient to rebut the presumption created by the entry. In support of this part of their case rent receipts were produced by the defendants which shew a uniform rate of rent from the year 1884 to about 1900, the date of the survey, but between the years 1872 and 1883 the rent is by no means uniform but varies on two occasions and there is nothing to shew any alteration of area. If it were necessary to decide this question, it would be difficult to find that the land in question was held at a fixed rate, notwithstanding the presumption created by the Record of Rights which was made at a time when the tenants held a proprietary interest in the village as Zarpeshgidars and had, therefore, every opportunity of obtaining the insertion of entries in the Record of Rights without opposition from the Maliks. I have referred to this matter because by the judgment of the Court below there is a finding that the defendants are tenants at fixed rates and, in my opinon, this part of the judgment should be set aside. It is not, however, in my view necessary to decide the status of the tenants. The trees are alleged to have been cut in seven different survey plots. In two only of these do the plaintiffs claim tenant rights and in one only, viz, plot No. 120 do they claim to be tenants at fixed rates. The trees alleged to have been cut in this plot were 3 bamboo topes and according to the survey (at page 40 of the paper-book) these are recorded as being in the possession of the proprietors. This is one of the main items of the claim, the bamboos being valued by the plaintiffs at Rs. 500 to Rs. 600 out of the total claim of about Rs. 1,000.

The Subordinate Judge found that there was no sufficient evidence of the cutting of the trees, but on a careful review of the evidence I am unable to agree entirely with him in this finding. It may be that the plaintiff's evidence is exaggerated and in so far as the Survey Khatian does not shew any trees in 1900 on the plots where they are alleged to have been cut, I am not inclined to differ from the finding of the learned Judge. This would dispose of the claim so far as plots other than Nos. 56, 379, 197 and 120 are concerned, and as the only tree alleged to have been cut in plot No. 379 is one of two Babool trees which according to the survey were in the raiyats' possession, it only remains to consider plots Nos. 56, 197 and 120. On these plots there were 1 mango trees, 1 Shishum tree and 3 bamboo topes belonging to the proprietors. I have considered the evidence on both sides and I cannot believe that that of the plaintiff' witnesses is entirely false and malicious. It consists of 3 witnesses, cultivators holding lands in the village ,and they agree in the main features of their evidence. One of them Dhani Dushadh says that the reason given to him by Rahim the Tahsildar of the defendants for cutting the trees was that the village was going into the hands of others (that is the plaintiffs) and as the defendants' Zarpeshgi rights were about to be redeemed, it is not difficult to understand that they thought the opportunity a good one for appropriating some of the trees. Rahim was not called as a witness by the defendants to deny this conversation. Two of the defendants were called. One denied cutting any trees at all; the other said he had cut none for 6 or 7 years. A servant of one of the defendants was also called, who said the defendants cut no trees within the last 6 or 7 years and added that even before that they never cut any trees.

In April 1915 during the course of the proceedings in the Court below the defendants 1 to 4 and the defendants 14 and 15 respectively entered into a compromise with the plaintiffs which was reduced to writing, and in each case a petition was signed by them and filed in Court on behalf of those defendants. These petitions admitted the cutting of trees by these defendants and they agreed to pay in the one case Rs. 87-8-0 and in the other Rs. 175 by way of settlement of the claim and costs, the receipt of which was acknowledged by the plaintiffs. Some 2 months later on the 25th June 1915 on the second day of the trial the defendants 1 to 4 filed petition praying that the compromise be rejected. The Subordinate Judge rejected both these compromises, on the ground that they were not willingly entered into by the defendants and that they were contrary to

(1) [1917] 2 P L J 124=39 I C 85.

the provisions of S. 147A of the Bengal Tenancy Act. It was not disputed that the compromises were made and it was not until the trial had begun that it ever occured to the defendants 1 to 4 to suggest that they were in any way coerced or influenced in signing and filing the petition. The pleader for the defendants 14 and 15 was engaged for the express purpose of drafting the compromise made by the defendants 1 to 4. He was called as witness, and from his evidence which I accept it is abundantly clear that the defendants willingly agreed to the terms. Moreover, it is almost inconceivable that these defendants should have admitted cutting the trees two months before the trial if in fact they had never done so, and whether the compromise be rejected or not on other grounds it forms strong corroborative evidence of the truth of the plaintiffs' allegation as to the cultivating of the trees. The defendants 14 and 15 were not called and produced no evidence relating to their compromise. It must be assumed, therefore, that they did not dispute it, and they have not appeared at the trial or in this appeal. It is true the compromise includes matters outside the scope of the present action and so far as these matters are concerned the Court is not bound to record it. The only part of the compromise which the Court can record is that which deals with the liability to pay damages. I cannot accede to the proposition that once a lawful compromise is come to and filed by the parties, that one of the parties can afterwards turn round and repudiate the agreement at any time before judgment is entered. This contention which was urged by the respondents is at variance with the decision of a Full Bench of the Calcutta High Court in *Brojodurlabh Singh* v. *Ramanath Ghose* (2), where the wording of S. 375, Civil P. C. of 1882, similar to that of S. 147-A of Bengal Tenancy Act, was considered, and there are many other decisions to the same effect. It is not necessary however to deal with this question further, as I have come to a clear decision on the facts that the defendants are liable.

On the question of damages I have no doubt that the amount claimed is exaggerated. I have already dealt with the number of trees that have been improperly appropriated by the defendants but I cannot accept the value as stated by the plaintiffs. In my opinion the amounts already recovered from the defendants 1 to 4 and 14 and 15 are enough to satisfy the plaintiffs' claim and these sums appear to have been paid to the plaintiffs. The plaintiffs however were obliged to bring this appeal to have the decree of the lower Court set aside. It will accordingly be decreed that the judgment and decree appealed from be set aside and judgment will be decreed for the plaintiffs for the sum of Rs. 87-8-0 against defendants 1 to 4 and Rs. 175 against defendants 14 and 15 in accordance with the terms of the compromise. If these sums have already been paid to the plaintiffs it is not intended that they should recover them twice. The costs here and in the Court below, except in so far as they are dealt with in the compromise, will be borne by each party.

Jwala Prasad, J.—The plaintiffs 1 to to 5 acquired proprietary interest in respect of 14 annas share of Mouza Parsa including Chaur Chandauli, Pargana Dangsi, bearing Touzi No. 2074, by means of two sale-deeds dated 15th May and 6th August 1912. Defendants 1 to 15 are tenants of the village. They were in possession of the entire village as mortgagees and thicadars. The mortgages were two Zarpeshgi deeds of 28th January 1885 executed by the predecessors-in-interest of the plaintiffs. On 23rd September 1912 after their purchase of the proprietary interest the plaintiffs redeemed the aforsaid mortgages of 1885 and deposited the amount due thereunder in Court. The case of the plaintiffs is that the defendants, taking advantage of their possession of the entire village, got their names fraudulently and falsely entered in the Survey Record of Rights as tenants at fixed rate in respect of the lands specified in Sch. 1 of the plaint, which were held by them merely as occupancy tenants, and that after the plaintiffs purchase the defendants cut and misappropriated several bamboo clumps, shishum, mango and other big trees in the village which belonged to the plaintiffs as proprietors of the village and that the plaintiffs are entitled to the price of the said trees as damages. The plaintiffs therefore pray for (1) a declaration that the defendants 1 to 15 were only occupancy tenants and not tenants at fixed rates entered in the survey and (2) for a decree for Rs. 1,075 as damages from defendants 1 to 13 in respect of the price of the trees said to have been cut and misappropriated by them, or from defendants 14 to 15, or from any

(2) [1897] 24 Cal 908 (F B).

other defendants who may be proved to have cut the trees.

There is an intimation of the intention of the plaintiffs to institute separate suits in respect of the proprietors kasht of defendnats 1 to 15 in the karht of defendants 1 to 15 in the survey and also in respect of a house said to have been built by defendant 1 on the plaintiffs' land without any right. Defendants 16 to 22 were Zarpeshgidars in respect of some shares in the village. Their interest has since been purchased by plaintiffs 6 and 7 and therefre they are pro forma defendants and no particular relief is claimed against them. Defendants 1 to 15 resist the claim of the plaintiffs, on the ground that they are tenants at fixed rates in respect of the lands recorded in their name as such in the survey Record of rights and that they have not cut the trees in question. The learned Subordinate Judge, who tried the suit, dismissed the plaintiffs' claim in toto by his judgment dated 9th April 1915. Hence this appeal by the plaintiffs.

During the pendency of the suit two compromise petitions were filed before the Subordinate Judge, one on 7th April 1914 by the plaintiffs and the defendants 14 and 15, and the other on 20th April 1915 by the plaintiffs and defendants 1 to 4. These petitions were however disposed of. After the hearing of the suit commenced, defendants 1 to 4 by their petition of 20th June 1915 repudiated the compromise alleged that the petition of 20th April was filed under compulsion and without their consent and knowledge. The compromise petitions have been disposed of by the Subordinate Judge in his final judgment of 9th April 1915. The learned Subordinate Judge has refused to give effect to the compromise on the ground that it was not willingly entered into by defendants 1 to 4 and that it was invalid under S. 147-A, Bengal Tenancy Act. It has been conclusively proved by the evidence of the witness 5, Babu Girdhar Gopal Singh, Pleader, who filed the compromise, and witness No. 6, Hari Har Prasad, the plaintiffs' karpardaz, that the terms of the compromise petition were fully considered by defendants 1 to 4, and their allegation that they were ignorant of the terms or that the compromise was entered into under compulsion appears to be wholly without any foundation. Defendants 14 and 15 however have not repudiated the compromise of 7th April 1914. It must therefore, be held that the compromise was duly entered into by defendants 1 to 4 and 14 and 15, and the learned Subordinate Judge is wrong in holding otherwise. These compromise petitions dealt with several matters that were neither actually in dispute nor in any way related to the suit. There may be reason for the parties to have settled all their disputes on account of the threat given in the plaint that the plaintiffs intended to bring further suits relating to them, but as those matters were foreign to the scope of the suit the Subordinate Judge is right in holding that they could not be given effect to in a decree in this case. The parties have agreed by the compromise that the character of the holdings in the suit was not that of fixed rates but merely kaemi (or occupancy). This, no doubt, was a matter directly in issue in the suit and the parties were well within the purview of law to adjust the dispute with regard to it by means of a lawful compromise. But as the defendants 5 to 13 have not joined in the compromise, their rights in the holdings cannot be affected by the compromise entered into between the plaintiffs and defendants 1 to 4 and 14 and 15. The compromise petition so far has contravened Cl. 4, S. 147-A of the Bengal Tenancy Act and as such cannot be given effect to. Besides, it would be anomalous to declare that the status of some of the defendants in the same holding was that of occupancy tenants, whereas of the rest of the tenants at fixed rates.

Then remains the adjustment between the parties to the compromise relating to the damage claimed by the plaintiffs in respect of the trees said to have been cut and misappropriated by them. The parties to the compromise have definitely come to terms as to the claim of the plaintiffs for damages and have stated that the defendants 1 to 4 and 14 and 15 have paid to the plaintiffs their respective shares out of that claim, namely, the defendants 1 to 4 Rs. 83-15-9 and defendants 14 and 15 Rs. 167-15-6. The defendants are tortfeasors and there is nothing to prevent some of the defendants admitting the plaintiffs claim and paying a part of the damages. This portion of the compromise should have been given effect to by the Court and a decree passed accordingly. The Court is wrong in not doing so.

The contention of the defendants that no decree can be passed in accordance with the compromise, inasmuch as the defendants 1 to 4 receded from the petition filed by them at the

hearing before the decree was passed, appears to be without any substance. Reliance has been placed upon Cl.. 2 of S. 147-A for the aforesaid contention. The terms of this clause are exactly as those in S. 375 old Code of Civil Procedure of 1882. Under that section of the Code it was held concurrently by the High Courts of Calcutta, Bombay and Madras that the Courts were empowered to enquire into and give effect to a lawful compromise, adjustment or satisfaction of a suit by the parties even where one of the parties repudiated and receded from it afterwads in Court [*Brojodurlabh Sinha* v. *Ramanath Ghose* (2), *Goculdas Bulabdas Manufacturing Company* v. *James Scott* (3), *Samibai* v. *Premji Pragji* (4), *Sridharan Somayajipad* v. *Puramathan Somayajipad* (5) and *Appasami Nayakan* v. *Varadachari* (6)]. No doubt the Allahabad High Court took a different view [*Bandhu Bhagat* v. *Shah Muhammad Tagi* (7)]. I agree with the view taken by the majority of the Courts in India and hold that Cl. 2 of S. 147-A clearly empowers the Court to give effect to a compromise and pass a decree accordingly even if the parties subsequently retract from it. The judgment of the Subordinate Judge on this point should, therefore, be set aside and the decree passed as regards the damages claimed by the plaintiffs, so far as the defendants 1 to 4 and 14 and 15 are concerned, in terms of the aforesaid compromise petitions.

As to the claim of the plaintiffs for a declaration that the defendants 1 to 15 are occupancy tenants and not tenants at fixed rates in respect of the lands entered in the Survey Record of Rights, the Subordinate Judge is right in holding that the claim is barred by limitation under Art. 120, Limitation Act, as having been brought more than six years after the final publication of Record of Rights which took place in 1900. The present suit was instituted on 6th November 1913 more than 13 years after the final publication of the Record. The plaintiffs are not entitled to any declaration in respect of the charactor of the holdings. It may be conceded, as is contended by the learned vakil on behalf of the appellants, that the fact that the claim for declaration is barred by limitation, would not prevent the Court from determining that the survey entry is wrong, provided it was essential for the determination of the main or consequential relief as to the damages claimed by the plaintiffs. The survey entry, no doubt, raises only a rebuttable presumption and does not affect any title. But in the present case the claim for damages on account of the trees has nothing to do with the declaration sought by the plaintiffs as to the status of the defendants in respect of the lands recorded in the survey as at fixed rates. Defendants 1 to 13 have been recorded in the survey as tenants holding at fixed rates in respect of the 46 bighas, 1 cottah and 4 dhurs of lands in survey Khatas 5, 6 and 21 of Mouza Parsa and in Khatas 3 and 5 of Chaur Chandauli, and defendants 14 and 15 have been recorded as tenants at fixed rates in respect of 14 bighas, 10 cottas, 15 dhurs in respect of Khatas 3 and 4 of Mouza Parsa and in the survey Khata 2 of Chaur Chandauli. The claim of the plaintiffs for the price of the trees is in respect of those standing on the plots in Khatas 63, 65, 26, 30, 64 and 6. There is no claim for price of the trees in respect of any land recorded as appertaining to the holding at fixed rates of the defendants, except some bamboo clumps on plot No. 120, Khata 6. This plot, no doubt, has been recorded in the name of Sheikh Lalmir, ancestor of defendants 1 to 15, as appertaining to his holding at fixed rates, but the bamboo clumps have been entered as in possession of the proprietors.

The adjudication of the defendants' status does not appear to be at all necessary in order to determine the relief regarding the damages for the trees said to have been cut and appropriated by the defendants. There was no necessity for the Court to record any finding on the status of the defendants. In spite of this the Court below has held that defendants 1 to 15 are tenants at fixed rates in respect of the holdings in question. This decision is based on the presumption under S. 50, Cl. 2, Bengal Tenancy Act, that the defendants held the lands at the same rate of rent for 20 years. The Court below had relied upon rent receipts filed by the defendants from 1279 to 1306. The rent receipts (Ex. A to A56) however do not shew that the rate of rent was paid uniformly for 20 years. On the other hand, the rents have been varying from time to time—1279 to 1283 Rs. 47-12-0—1284 to 1290, Rs. 49-4-0—1291 to 1292,

(3) [1892] 16 Bom 202.
(4) [1896] 20 Bom 504.
(5) [1902] 23 Mad 101.
(6) [1896] 19 Mad 419.
(7) [1892] 14 All 350.

Rs. 55-2-0. The areas in the receipts are not mentioned. The ground for the presumption of the Court below therefore fails. The presumption afforded by the Survey Record of Rights is rebutted by the very receipts filed by the defendants which go to shew that the rents were not at uniform rates. The decision of the Court below that the defendants were tenants at fixed rates is clearly wrong and cannot be supported. As observed above, there was no necessity of determining the status of the plaintiffs and the decision of the Court below on this point should therefore be set aside. It was enough to hold that the plaintiffs' remedy was barred by limitation as not having been brought within six years from the final publication of the Record of Rights.

As to the principal relief sought by the plaintiffs, namely, damages in respect of the trees said to have been cut and misappropriated by the defendants, I would for the sake of appreciation give below a comparative statement showing the claim of the plaintiffs and the entries in the Survey Record of Rights and the report of the Commissioner deputed to hold local enquiry. This report is dated 8th December 1914.

Plaintiffs' claim and Sch. 2 of the plaint.				Entry in the Survey Record of Rights finally published on 18th April 1900 (Kx. 5).			Per Commissioner's Report dated 8th December 1914, at pp. 184-186 of the Paper-book.
Khata No.	Survey No.	Name of trees.	Price.	Tenant's name in Survey Number.	Trees.	Name of the person entered as in possession.	
			Rs.				
63	379	Two Babool...	10	Sheikh Lalmir	Two Babool trees.	In possession of tenant.	One Babool tree standing. No trace or roots of the other Babool tree were found on the spot when dug about two feet, alleged by the plaintiffs to have been cut by the defendants.
65	300	One Pipal ...	25	Ditch ...	No Pipal tree.	Ditch ...	No trace of root of any big Pipal tree was found on the spot pointed out by the plaintiffs as recently cut.
65	67	One Bargaj tree.	40	Pathway ...	No Bargaj tree.	Pathway ...	No trace of Bargaj tree on the spot pointed out by the plaintiffs.
65	67	One bamboo clump.	100	Do. ...	Nil ...	Do. ...	No trace of bamboo clump having been cut.
26	197	One Shishum tree.		Sheikh Inayat son of Sheikh Gulam Ali.	One Shishum tree.	In proprietor's possession.	No trace of any tree on the spot pointed out by the plaintiffs.
30	56	Ten Mango trees. Old ... 1 New ... 9	100	Kari, son of Neor.	One Mango tree.	Do. ...	Do. do.
64	195	One Bargaj, three Shishum trees.	100	Gair Majruha	One Bargaj tree: no Shishum tree.	Kabool Sheikh and others.	Do. do.
6	120	Three bamboo clumps old.	600	Sheikh Lalmir	Three bamboo clumps.	In possession of proprietors.	No trace of two bamboo clumps. The field was over-grown with wild plants. There were 13 bamboo clumps standing and khoonts of 51 were found. The clumps were old.

It would at once appear from the statement that the plaintiffs can have no possible claim to the trees in plots Nos. 397 and 195, which in the survey were recorded as in possession of the tenants, nor to the trees claimed in plots Nos. 300 and 67 and the 9 mango tress in plot No. 56, as there is no mention of them in the survey record, nor has it been shewn that they were since planted or that they stood there at any time or at the time of the alleged cutting.

The claim of the plaintiffs with respect to a Shishum tree in plot No. 197 and an old mango tree in plot No. 56 and three bamboo clumps in plot No. 120 appear to be well founded, as they have been recorded in the survey as in possession of the proprietors. The Commissioner's report supports this and also that they have disappeared except 13 bamboos from one clump on plot No. 120. There were also seen roots of 51 bamboos cut from that clump. The evidence in the case has clearly established that the defendants cut the trees away and the reason given by the Court below for disbelieving the evidence appears to be insufficient and based upon misapprehension. I therefore disagreeing with the view of the Court below hold that the defendants cut the trees and the plaintiffs are entitled to the damages caused to them by the defendants' misappropriating the same. In the zarpeshgi deed of 1885, Ex. 2, whereby the defendants were led into possession of the village as zarpeshgidars, it is clearly stated that

> "the zarpeshgidars should not be allowed to plant or cut any trees, nor should they allow anybody else to do so and in case of their cutting by themselves or by any other person they should be liable to pay the proper price therefor together with damages."

The rights in the zarpeshgi deeds were vested in the plaintiffs by virtue of their purchase in 1912 and the plaintiffs are therefore entitled to the price of the trees cut by the defendants themselves or through others. The defendants are thus liable for damages. It is however difficult to assess the exact amount of damages. The prices of the trees as stated by the plaintiffs in the plaint are as follows:

	Rs.
(1) One Shishum tree on plot No. 197 ...	100
(2) The price of one old and nine new mango trees on plot No. 56, put down together at Rs. 100, and therefore of one old mango tree probably comes to ...	10 or 12
(3) Three bamboo clumps on plot No. 120 ...	600

The plaintiffs have not given enough material upon which the price could reasonably be fixed by the Court and the evidence on the point is too vague. There is no evidence as to the number of bamboos that were cut by the defendants. The clump, the trace whereof the Commissioner found, consisted of 51 cut and 13 standing bamboos, making a total of 64 bamboos in that clump. There is nothing to shew that the other two topes had more bamboos in them than this one. The total bamboos cut would therefore not exceed 200 in number. The price of the bamboos cut would thus not exceed Rs. 100. The price of the old mango tree has not been clearly stated either in the plaint or in the evidence and may roughly be put as Rs. 10, and the price of the Shishum tree is stated by the witnesses to be Rs. 90. This is all guess. It is however clear that the plaintiffs have exaggerated their claim and have failed to substantiate the figures mentioned in the plaint.

The plaintiffs have realised by means of compromise from defendants 1 to 4 Rs. 83-15-9 as proportionate share of the price of the trees and bamboos claimed by them, as per compromise petition dated 20th April 1915, at p. 19 of the paper book, and from defendants 14 to 15 their proportionate share Rs. 167-15-6 as per compromise petition dated 7th April 1914, at p. 186 of the paper book. The plaintiffs have thus realized from the defendants the sum of Rs. 251-15-3 according to the aforesaid compromise petitions. This amount would probably appear to represent the entire amount of the damages the plaintiffs were entitled to get from all the defendants. Taking this view of the case the plaintiffs have already realised from some of the defendants the price of the trees that were cut by the defendants and are not therefore entitled to realise anything from the remaining defendants. I therefore agree

to the order proposed in the case by the Hon'ble Chief Justice.

V.S./R.K. *Decree set aside.*

A. I. R. 1918 Patna 227

MULLICK AND THORNHILL, JJ.

Paltu Singh and *others* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No 228 of 1918, Decided on 2nd July 1918, against order of Sess. Judge, Bhagalpur, D/- 3rd May 1918.

(a) Penal Code (45 of 1860), Ss. 147, 149 and 325—Separate convictions and sentences under S. 325 read with S. 149 and under S. 147 are illegal.

In addition to a conviction under S. 147, an accused who has himself caused grievous hurt to the opposite party cannot be separately convicted under S. 325 of the Code. [P 228 C 1]

Separate convictions and sentences therefore under S. 325 read with S. 149, I. P. C., and S. 147 of the Code are illegal. [P 228 C 1]

(b) Precedents—Patna High Court will not depart from decisions of Calcutta High Court.

Where there is a long course of decisions by the High Court of Calcutta upon a particular point, the Patna High Court will not depart from that settled course. [P 228 C 1]

P. R. Das and *Abani Bhusan Mukherjee*—for Petitioners.

Manohar Lall—for the Crown.

Mullick, J.— The petitioners Paltu, Sarju, Jinpal and Jahar Singh have been sentenced for rioting with the common object of committing theft in respect of the crops of the complainant Juglal. Juglal and his brother Hitlal were injured on Juglal's side, while Paltu was injured on the side of the petitioners. The trial Court found all the petitioners guilty of rioting under S. 147, and of grievous hurt under S. 325 read with S. 149, I. P. C., and sentenced them to six months' rigorous imprisonment for each offence, the punishments taking effect consecutively. On appeal the learned Sessions Judge has affirmed the convictions and two of the sentences, observing that Sarju and Jinpal had been shown by the evidence to have taken part in the assault and that in their case the application of S. 149, I. P. C., was not necessary. In regard to the other two appellants before him the learned Sessions Judge observed that although they were not shown to have themselves struck any one separate sentences were not illegal. The learned Judge has relied on *Queen-Empress* v. *Bana Punja* (1), but reduced the sentences on Paltu and Jahar to one month's rigorous imprisonment for the offence under Ss. 325 and 149, I. P. C. Now the only question that has been argued before us is whether separate sentences are legal. The learned Sessions Judge has not altered the convictions recorded by the trying Magistrate, and we take it that Sarju and Jinpal still remain convicted, not of the substantive offence of grievous hurt under S. 325, I. P. C., but of a constructive offence under that section by reason of the application of S. 149, I. P. C. Obviously the learned Sessions Judge could not have set aside the convictions under Ss. 325 and 149, I. P. C., and substituted a conviction under S. 325, I. P. C., because these two petitioners were not charged with the substantive offence in the trial Court, nor would it be proper for us in revision to convict them of this offence in the absence of any opportunity to plead to a charge in respect of it.

We will therefore only consider whether the separate convictions and sentences under S. 325 read with S. 149, I. P. C., against all the petitioners are legal. Here upon the facts it is not clear whether the offence of rioting was complete before grievous hurt was caused to Juglal and Hitlal. It may be that the blows which caused these injuries were themselves the acts which turned the unlawful assembly into a riot. As has been observed in *Queen-Empress* v. *Bisheshar* (2), it is not generally possible in a riot of this kind to say that the offence of rioting was complete before the grievous hurt was caused. It is contended however that assuming that the grievous hurt was itself the act which turned the unlawful assembly into a riot, the law justifies separate sentences. I think it is clear that the weight of authority in the High Courts of Allahabad and Bombay is in favour of the view that not only can separate convictions be recorded under S. 146, I. P. C., and S. 325 read with S. 149, I. P. C., but separate punishments may also be imposed. On the point whether the punishments are controlled by S. 71, I. P. C., the opinion in the Allahabad Court is in the negative while no clear decision exists in the Bombay Court: see *Queen-Empress* v. *Ram Sarup* (3) and *Queen Empress* v. *Bana Punja* (1).

(1) [1893] 17 Bom. 260.

(2) [1887] 9 All. 645.

(3) [1885] 7 All. 757.

In the High Court of Calcutta the view now accepted is that separate convictions and therefore also separate sentences are illegal and that in any event S. 71, I. P. C., applies: *Nilmony Poddar* v. *Queen-Empress* (4). This view seems to be based upon the consideration that although the acts may constitute offences falling under two separate definitions, it is unfair to convict a man for two offences for the same acts.

In regard to the point whether in addition to a conviction under S. 147, I. P. C., an accused who has caused grievous hurt himself can be convicted under S. 325, I. P. C., the recent cases in the High Court of Calcutta are against a separate conviction: see *Ramdihal* v. *Empress* (5), *Hridoy Mondal* v. *Jagananda Das* (6). On the other hand the Allahabad and the Bombay Courts seem to be of opinion that separate convictions are legal and that the punishment is not controlled by S. 71, I. P. C.: *Queen Empress* v. *Dungar Singh* (7), *Queen-Empress* v. *Bana Punja* (1). It is to be noted that the opinion of the Bombay High Court upon this point was an obiter dictum, and that in the present case, upon my view of the learned Sessions Judge's order, the question of a separate sentence under S. 325, I. P. C., does not arise.

Following the view accepted by the High Court of Calcutta, I think that in the present case the convictions under Ss. 325 and 149, I. P. C., cannot be sustained. In this Court we have adopted the principle that where there is a long course of decisions by the High Court of Calcutta upon a particular point, this Court will not depart from that settled course. Separate convictions and sentences, therefore under S. 325 read with Ss. 149 and 147, I. P. C., cannot be sustained. We will however follow the course which was adopted in *Hridoy Mondal* v. *Jagananda Das* (6) by Prinsep and Stanley, JJ., and treat the sentence in regard to each prisoner as a consolidated sentence, and while setting aside the conviction under S. 147, I. P. C., we sentence the petitioners before us under S. 325, I. P. C., read with S. 149, I. P. C., to rigorous imprisonment for one year each in the case of Sarju and Jinpal and 7 months in the case of Paltu and Jahar.

Thornhill, J —I agree.

V.S./R.K. *Order modified.*

(4) [1889] 16 Cal. 442.
(5) [1899] 3 C. W. N. 174.
(6) [1900] 4 C. W. N. 245.
(7) [1885] 7 All. 29.

A. I. R. 1918 Patna 228

JWALA PRASAD, J.

Bansi Singh and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 352 of 1917, Decided on 9th November 1917, from order of Dist. Magistrate, Gaya, D/- 20th August 1917.

(a) Criminal P. C. (5 of 1898), S. 145—Dispute as to possession—Proceedings under S. 145 is proper but where one party is already in possession protracted enquiry under S. 145 against him is unjustifiable.

Where there is a dispute as to the possession of property between the parties, S. 145, Criminal P. C., is the proper section which would, in a proper enquiry, determine once for all the rights of possession of the party to the property in dispute; but in cases where the possession of the property is with any of the parties, it would be equally hard to institute a protracted enquiry under S. 145 against him. [P 229 C 1]

(b) Criminal P. C. (5 of 1898), Ss. 144 and 145—One party in possession—Other party must be restrained under S. 144—Magistrate has to decide as to who was then in possession—High Court can interfere only if there is no material.

If the Magistrate is satisfied that one of the parties is in possession and that an imminent danger of a breach of the peace is impending, it is incumbent upon the Magistrate to maintain the party in possession and forbid the party who is not in possession by an order under S. 144. The question is one for the Magistrate to decide which party was in possession at that stage. If there is no material before the Magistrate, then the High Court can interfere upon the ground that there was no material before the Magistrate to decide possession in favour of one of the parties, and to take action against the other party under S. 144; but if there is material before the Magistrate he is the only Judge as to whether the material is sufficient or not, and if upon the materials placed before him he is satisfied that one of the parties is in possession, the order under S. 144 against the party interfering with his possession is not without jurisdiction at all.

[P 229 C 2]

G. C. Pal—for Petitioners.

Asst. Government Advocate—for the Crown.

Judgment.—This is an application against an order of the District Magistrate of Gaya, dated 20th August 1917, affirming an order of the Sub-divisional Officer of Gaya, passed under S. 144, Criminal P. C. The order of the Magistrate of 16th August 1917 was passed under the following circumstances: On the report of the Police of an imminent

danger of a breach of the peace impending between the petitioners and the opposite party, a notice under S. 144, Criminal P. C., was issued by the Sub-divisional Magistrate on 19th July 1917. In obedience to that notice the parties showed cause. The Sub-divisional Magistrate, upon the materials that were placed before him, came to the conclusion that the land in dispute was in the possession of the opposite party. He accordingly discharged the notice under S. 144 against that party and made the notice absolute against the petitioners. Against that order of the Sub-divisional Magistrate, the petitioners moved the District Magistrate. The District Magistrate also came to the same conclusion. After setting forth the reasons, the District Magistrate concluded that the crop of 1916 was grown by the mohunt and possession had rightly or wrongly remained with him ever since. Accordingly the order of the Sub-divisional Magistrate was affirmed by him.

There is no question regarding the jurisdiction of the Magistrate to pass the order under S. 144. In this case the order passed by the Magistrate is therefore not subject to revision by this Court. It has been contended by the learned counsel for the petitioner that the order of the District Magistate is bad, inasmuch as it decided possession in a proceeding under S. 144, and that the proper proceeding to be instituted in this case was under S. 145, Criminal P. C. Certain authorities have also been placed before me by the learned counsel for the petitioner in support of his contention, that in a case where a dispute was regarding the possession over a property the proper section to be adopted is S. 145 of the Code and not S. 107 or 144 of the Code. After reviewing the authorities cited to me, I do not think that any hard and fast rule can be laid down upon this point. It has to be determined in the circumstances of each case what section is the proper section to be adopted. No doubt, when there is a dispute as to the possession of the property between the parties, S. 145 is the proper section which would, in a proper inquiry, determine once for all the right of possession of the party to the property in dispute: but in cases where the possession of the property is with any of the parties, it would be equally hard to institute a protracted inquiry under S. 145 against him The party in possession is entitled to be maintained in possession and to invoke the aid of the Magistrate to prevent disturbance of his possession by all possible means provided for in the Criminal Procedure Code. If the Magistrate is satisfied that one of the parties is in possession and that an imminent danger of a breach of the peace is impending, it is incumbent upon the Magistrate to maintain the party in possession and forbid the party who is not in possession by an order under S. 144, Criminal P. C.

The question is one for the Magistrate to decide which party was in possession at that stage. If there is no material before the Magistrate, then the High Court can interfere upon the ground that there was no material before the Magistrate to decide possession in favour of one of the parties, and to take action against the other party under S. 144: but if there is material before the Magistrate he is the only Judge as to whether the material is sufficient or not, and if upon the materials placed before him he is satisfied that one of the parties is in possession the order under S. 144 against the party interfering with his possession is not without jurisdiction at all. In the present case the report of the Police was to the effect that the opposite party was in possession of the land; that the crop was grown by him in the year 1916; and that the land was cultivated by him in the present year. Upon that report the Magistrate did not think it desirable to hold that the possession was with the opposite party. He issued notice upon both parties in order to give them an opportunity to appear before him and to show whether the report of the Police was correct or not in favour of the opposite party. The cause was shown, as I have said before, and from the summary of the materials that the Magistrate has given in the judgment, it appears that in about May or June 1916, the land in dispute along with the entire village in which the land is situate was in the possession of the opposite party by means of a thicca which was to expire in the year 1323, corresponding to 1916, May or June. The lease expired and possession of the village was surrendered to the petitioners who are the proprietors of the village. This was about May or June 1916.

In November 1916, a report was made to the Police by the daffadar of the circle that the opposite party, the Mohunt, was cutting the crop of the land in dispute. The land in dispute was recorded in the survey as in possession of the opposite party, but his status was entered as that of a thiccadar whereas he claimed to be the jagirdar of the land in dispute. The Magistrate therefore had before him the fact that the opposite party was in possession of the land prior to the year 1916 and that he continued in possession of it in November 1916 after the lease had expired, although the village was surrendered to the opposite party. Upon these materials he was satisfied that there was clear possession with the opposite party over the land in dispute. There was thus material before the Magistrate; but whether it was sufficient or not it is not for me to say. We cannot interfere in revision with the findings of possession arrived at under S. 144 for the purpose of taking action under that section. Whatever be the effect of that finding it is not for me to discuss it here. It is sufficient for the purpose of disposing of this Rule to say that the Magistrate had jurisdiction and that he had materials before him to enable him to come to a certain conclusion regarding the party in whose favour the order under S. 144 was passed. In the circumstances I decline to interfere. The application is rejected.

V.S./R.K. *Application rejected.*

A. I. R. 1918 Patna 230

ROE AND COUTTS, JJ.

Bishandayal Singh and *others*—Defendants—Appellants.

v.

Mt. Jaiseri Kuer and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 41 of 1916, Decided on 26th June 1918, against original decree of Sub-Judge, 3rd Court, Patna, D/- 25th February 1916.

(a) Hindu Law—Succession — Bandhu — Bandhu is defined as Bhinna Gotra Sapinda—Sister's son is Bandhu.

The term "Bandhu" has been defined in the Mitakshara as a Bhinna Gotra Sapinda, that is to say, sprung from a different family but connected by common corporeal particles, or by consanguinity. [P 231 C 2]

A sister's son is a Bhinna Gotra Sapinda and is therefore a Bandhu. [P 231 C 2]

(b) Hindu Law — Alienation — Widow—Necessity—Performance of Gaya Shradh constitutes necessity for alienation provided income is proved insufficient.

The performance of the Gaya Shradh ceremony of a deceased Hindu is a legal necessity. In order however to make it binding upon the estate, so as to enable the widow of the deceased to raise money on the security of the estate, it must be proved that there was no sufficient income from the estate to meet the expenses of the ceremony. [P 234 C 1]

(c) Civil P. C. (5 of 1908), O. 6, R. 17—Written statement raising new point after issues are framed cannot be allowed.

Where more than a year after the settling of issues in a suit, when the case was completely ready for hearing, the defendant sought to be allowed to put in a fresh written statement raising a completely new point about which the defendant had no real information :

Held : that he could not be allowed to do so. [P 233 C 1]

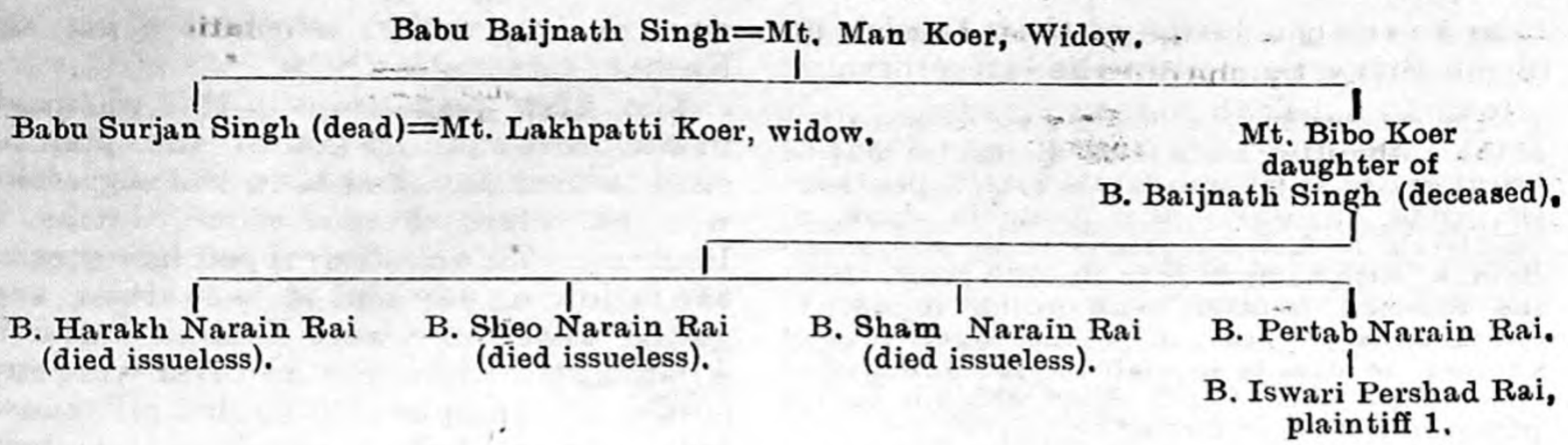
(d) Benami—Sale—Proof—Ostensible purchaser not in possession—Coupled with other circumstances it proves that sale is benami.

Where from the circumstances surrounding a sale it is probable that the transaction is a benami one, the probability becomes a certainty when it is found that the ostensible purchaser is neither in possession of the property nor of the sale-deed. [P 233 C 2]

Purnendu Narayan Sinha, Ganesh Dutt Singh, Naresh Chandra Sinha, Krishna Sahay and *Jalgobind Prasad Sinha*—for Appellants.

Pugh, Gangadhar Das, Sivanandan Rai and *Chandra Sekar Banerji*—for Respondents.

Coutts, J.—This was a suit for recovery of possession with mesne profits of Mouzah Jamalpur Burhya, Perganna Gyaspur, Touzi No. 132. Plaintiff 1, Ishri Prasad Rai, brought the suit as reversionary heir of one Surjun Singh, and plaintiffs 2 and 3 were made parties as plaintiff 1 has mortgaged a part of the property sued for in order to defray the expenses of the suit. It is necessary shortly to state the facts which have led up to the institution of the suit. The following genealogy will show the relationship of the plaintiff to Surjun Singh: (*For genealogy see p.* 231). This genealogy was disputed at the trial of the suit, but it is now admitted to be correct. Baijnath Singh died leaving as his survivors Surjun Singh, a minor, Mt. Man Koer, his widow, and Mt. Bibo, his daughter. Surjun Singh died leaving Mt. Man Koer and Mt. Lakhpatti, his wife, who succeeded to his property. In 1881 Mt. Bibo died leaving Pertab Narain and other sons who died childless. On 3rd March 1912 Pertab Narain died leaving plaintiff 1 only, Ishri Prasad, the other



sons of Mt. Bibo having by this time died. This history of the family may also be taken as now undisputed. The plaintiff alleges that the property in suit was acquired by Mt. Man Koer during the minority of Surjun Singh and from the income of his estate.

The first point taken in this appeal is, that the Subordinate Judge has wrongly refused to accept written statements which were filed by the defendants on 23rd February 1915. The importance of these written statements, which it is desired to bring in, is that in them for the first time an allegation was made by the defendants that the property in dispute was not the property, either ancestral or acquired, of Surjun Singh, and that therefore the plaintiffs have no right to sue. The learned Subordinate Judge refused to accept them, on the ground that the defendants could not be allowed to set up a new and inconsistent defence at such a late stage of the case, and, in my opinion, he has done so rightly. The suit was filed on 5th January 1914, and in para. 4 of his plaint, the plaintiff stated that

"the property was one of the properties appertaining to the estate of Babu Surjun Singh and it had been acquired during his minority through Mt. Man Koer out of the income of his estate. Babu Surjun Singh held and enjoyed possession of the said property as owner."

This is a very distinct statement as to how the property was acquired, and in the original written statements filed by the defendants in April 1914 there is no suggestion or allegation that this statement made in the plaint was untrue. Issues were framed on 5th May 1914 but it was not until nearly a year later that the defendants asked to be allowed to put in these new written statements. By this time the case was completely ready for hearing and the hearing was actually to begin on the following day. It would obviously have been unfair to allow the defendants to raise a completely new point at this stage, and more particularly so when the wording of the written statement shows clearly that the defendants had no real information on the matter. Reference has been made to the ruling in *Sri Rang Behary Lal* v. *Ranchheyya Lal* (1), but this is clearly against the appellants.

The second point which has been urged is that the plaintiff has not proved his heirship, and in regard to this two arguments have been advanced. The genealogy put forward by the plaintiff has now been accepted by the appellants and this genealogy shows that the plaintiff is the sister's son of Surjan Singh, but it is contended that a sister's son is not a Bandhu and that therefore the plaintiff is not an heir. This contention is, in my opinion, untenable. The term Bandhu has been defined in the Mitakshara as a Bhinna Gotra Sapinda, that is to say, sprung from a different family but connected by common corporeal particles, or by consanguinity. This has been held in a long series of rulings, namely: *Lallu bhai* v. *Mankuvarbai* (2), *Lallubhai Bapubhai* v. *Cassibai* (3), *Umaid Bahadur* v. *Udoi Chand* (4), *Babu Lal* v. *Nanku Ram* (5), and *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (6), and the enumeration of Bandhus has been given in the Mitakshara but it has been authoritatively settled that this enumeration is not exhaustive. The law was very fully considered in *Babu Lal* v. *Nanku Ram* (5) and in *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (6), and I need only

(1) [1912] 13 I. C. 128.
(2) [1877-78] 2 Bom. 388.
(3) [1880-81] 5 Bom 110 = 7 I. A. 212 = 4 Sar. 164 (P C).
(4) [1881] 6 Cal. 119.
(5) [1895] 22 Cal 339.
(6) A I R 1914 P. C. 1 = 42 Cal. 384 = 25 I. C. 290 = 41 I. A. 290 (P C).

refer to the conclusion of their Lordships of the Privy Council in the latter case:

"The conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows: (a) that the Sapinda relationship on which the heritable right of collaterals is founded, ceases in the case of the Bhinna Gotra Sapinda with the fifth degree from the common ancestor, and (b) that in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are sapindas of each other, which is only a paraphrase of Manu's rule."

Applying this principle to the present case, the plaintiff is a Bhinna gotra Sapinda well within the degree laid down in this ruling and the further test that the plaintiff and Surjun Singh are sapindas of each other is also satisfied. It is next argued that even if this is so, the plaintiff cannot succeed if there is any Gotia between him and Surjun Singh, and that he is bound to establish by reasonable evidence that he is the nearest heir. I am not satisfied that in the present case there is any such onus on the plaintiff. In his plaint he clearly stated that he claimed the property as a Bandhu and made a distinct statement as to how this claim arose. The defendants in their original written statement simply contended that the genealogy was false, but that even if it were true a sister's son was not a Bandhu and could not succeed: they made no suggestion that there was any intervening gotia between the plaintiff and Surjun Singh. If they had wished to raise this point, it was, in my view, necessary for the defendants to have stated it distinctly. The matter however is not of great consequence, because I am satisfied that even assuming that the plaintiff was bound to establish by reasonable evidence that he was the nearest heir, he has succeeded in doing so. It appears that Surjun Singh was of the Keshab Gotra and the contention of the learned Rai Bahadur is that the plaintiff should have established that there was no Keshab Gotra in existence who can be preferred to him. To require the plaintiff to search throughout India for a Keshab Gotra would be unreasonable, and what he did do was, I consider, sufficient. He says that he knew of no Keshab Gotra except in Patna and he was satisfied that they could not be preferred to him. There is no contradiction of this and we must accept his statement on this point. Up till a very late stage there was no suggestion of there being any Keshab Gotras elsewhere.

The first suggestion of this was made in the cross examination of the plaintiff on the first day, and then the suggestion was that there were Keshab Gotras in Benares. This was dropped however on the following day and it was then suggested that there were Keshab Gotras in Allahabad. No names however were suggested and the plaintiff denied all knowledge of there being such Keshab Gotras. Subsequently the defendants developed this portion of their case and brought forward an alleged Keshab Gotra, Beni Madhub. This man was produced by one of the defendants' witnesses, Bishendayal. The evidence given by both these witnesses, as has been clearly shown by the learned Subordinate Judge, is false. There is nothing therefore to show that there is any intervening Gotra in existence and the plaintiff has, in my opinion, done all that was necessary to show that there is no such Gotra in existence. The next point on which arguments have been addressed to us is the purchase by Nand Kishore. It is now admitted that Nand Kishore was the servant of the family of defendants 1 to 17, but it is argued that, although this is so, the purchase from Mt. Lakhpatti was a bona fide purchase by him and not made benami on behalf of these respondents. This question of benami has been very fully and carefully dealt with by the learned Subordinate Judge.

The only witnesses to the deed who have been examined are Basant Lal and Paryag Singh. The former was a servant of the defendants from before the time of the execution of the deed and Paryag Singh has been reckless in his statements in support of the defendants' case. The learned Subordinate Judge has therefore rightly not relied on the oral evidence. Certain documents however have been shown to us to show that Nand Kishore dealt with the property after the sale. Transactions however were bound to be made in the name of Nand Kishore shortly after the sale and these documents do not carry us much further. In the absence of reliable evidence we must be guided by the circumstances of the case, and having regard to these circumstances, there is no doubt, in my mind, that the sale was a benami one. The property was sold on 15th July 1884 for a considera-

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

tion of Rs. 21,454. Now it has been established that Nand Kishore's private income at that time was only about Rs. 150 a year. There is no evidence, nor is there any suggestion, that he borrowed money to make this purchase and it is impossible to believe that he could have done so from his own funds. If however he had managed to do so, it cannot be doubted that he would have done all in his power to keep the property, yet we find that three years after the purchase there was a default in payment of revenue and the property was sold for the small arrear of Rs. 13-2-11. Of the arrear and of the sale Nand Kishore had full notice. There can also be no doubt that the purchase-money was not withdrawn by Nand Kishore. The balance of the purchase-money amounted to Rs. 16,000, yet three years later we find that Nand Kishore was reduced to borrowing a sum of Rs. 1,000 for which a bond (Ex. 56) was executed in 1910 from which it appears that up to that date he had not been able to repay the amount.

To meet these difficulties the defendants have attempted to set up a new case, namely that the purchase was by Nand Kishore jointly with another member of his family, Nand Lal. There is nothing however to support this case which was not made in the written statement, and as many years before the sale Nand Kishore and Nand Lal separated, there seems no doubt that the story is an afterthought. That the purchase was made by Nand Kishore is therefore in the highest degree improbable and this improbability becomes a certainty, when we find that he was neither in possession of the property nor of the sale-deed. The evidence on this point has been very carefully considered by the learned Subordinate Judge and I find no reason to differ from his conclusions. The sale-deed was filed by these defendants in a succession certificate case, and in connexion with this there is a very significant matter which leaves no doubt in my mind as to the benami nature of the purchase. The succession certificate case let to a suit by Mt. Lakhpati Kuer and Mt. Ganesh Kuer against Bishandayal Singh and others in respect of Jamalpore and to other Mouzahs. In this suit they stated that Jamalpore was purchased benami in the name of Nand Kishore. The suit was contested by defendant 1 but in the written statement the allegation of benami was not denied, and finally the suit was decreed on compromise. It is certain that if the purchase had not really been benami, the defendants would have denied the allegation and would have pleaded that the suit was not maintainable under S. 36 of the Sale Law.

The next point argued is with regard to legal necessity, and it is contended that the sale by Mt. Lakhpatti was good because it was to obtain funds for the construction of a temple and the installation of idols and for performing the Gaya Shradh for her husband. The temple has been constructed and the idols have been installed. It is conceded that ordinarily this would not constitute an item of legal necessity, as however there is a recital in the sale-deed that the temple was to be constructed in compliance with the wishes of her ancestor; it has been argued that this is sufficient, and reliance is placed on the ruling in *Nanda Lal* v. *Jagat Kishore Acharjya* (7). In that case their Lordships of the Privy Council held

"that under ordinary circumstances and apart from statute, recitals indeed can only be evidence as between the parties to the conveyance and those who claim under them."

But in that particular case they did not think these recitals could be disregarded, nor on the other hand did they consider that any fixed and inflexible rule could be laid down as to the proper weight which they are entitled to receive. The essential portion of this judgment for the purposes of this case is the following:

"It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper inquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed".

The question is whether the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed the truth of the recital. In that case the circumstances did, but in this case they certainly do not. The oral evidence as to the directions of Surjun

(7) A. I. R. 1916 P. C. 110=44 Cal. 186=36 I. C. 420=43 I. A. 249 (P. C.).

Singh is given by Paryag Singh; but this evidence has been rightly rejected by the Subordinate Judge. Surjun Singh had died about 25 or 30 years before the execution of the sale-deed. At the time he was only 15 or 16 years of age and had just married Mt. Lakhpatti Koer. It is unlikely that under the circumstances he would have given any direction to build a temple or to instal idols, and if he had, Mt. Lakhpatti Koer would certainly have carried out his wishes earlier. In addition to this we have it that the purchase was a benami one and the defendants certainly did not believe in the truth of the recital, because three years afterwards they fraudulently defaulted in payment of Government revenue and made a fraudulent purchase in order to try and perfect their title. I am satisfied therefore that this recital was merely inserted in order to try and give some validity to the purchase. The position with regard to the Gaya Shradh however is different. The performance of the Gaya Shradh is undoubtedly a legal necessity.

In order to make it binding however there should be no sufficient income from the estate to enable it to be performed. In this case Mt. Lakhpatti Koer had ample funds to perform the Gaya Shradh without selling any property, and in addition to this the learned Subordinate Judge does not believe that the Gaya Shradh was ever performed. In this view I agree. It is true that there is a certain amount of oral evidence, but this is of a very unreliable character and an attempt has been made to back it up by documentary evidence which is undoubtedly fabricated.

The last point which has been urged is that even if the sale was a benami one, the defendants' title was perfected by the revenue sale as the defendants had no intention of defrauding the reversioner. This contention has no force. The first purchase from Mt. Lakhpatti was a fraudulent one. The default in revenue and the subsequent purchase at the revenue sale were also fraudulent and the whole transaction is vitiated even if there was no express intention of defeating the plaintiff. I would therefore dismiss this appeal with costs, and in doing so I would note my appreciation of the extremely careful judgment of the learned Subordinate Judge.

Roe, J.—I entirely agree and have nothing to add.

V.S./R.K *Appeal dismissed.*

A. I. R. 1918 Patna 234

CHAPMAN AND ROE, JJ.

Nandakishore Jagati and *others*—Appellants.

v.

Nidhi Bihara and *others* — Respondents.

Appeal Nos. 65 and 66 of 1917, Decided on 17th April 1918, from appellate decrees of Dist. Judge, Cuttack, D/- 19th June 1917.

(a) Bengal Alluvion and Diluvion Regulation (11 of 1825)—Party showing char land as reformation in situ of land identifiable as his own is entitled to the land.

Primarily where a party can show that char land is in fact a re-formation in situ of land identifiable as his own, he is entitled to that land even though it may have been for a period submerged. [P 235 C 1]

(b) Bengal Alluvion and Diluvion Regulation (11 of 1825), Ss. 4 and 5—S. 4 and not S. 5 is applicable to lands which had been previously in existence and property of individuals.

Section 4 as a whole was not intended to apply to lands which had been previously in existence and the property of individuals. S. 5 of the Regulation was intended to apply to such lands. [P 235 C 2]

(c) Bengal Alluvion and Diluvion Regu[a]tion (11 of 1825), S. 4, Cls. (3) and (4)—"Small and Shallow River" is in contradistinction to "large and navigable."

The expression "small and shallow river" in Cl. (4), S. 4 is used in contradistinction to the expression "large and navigable" used in Cl. (3) of the same section. [P 236 C 1]

(d) Bengal Alluvion and Diluvion Regulation (11 of 1825). Ss. 4 and 5—Settlement of bed of large and navigable river.

The bed of a large and navigable river would not be settled with a private owner. [P 236 C 1]

S. C. Bose—for Appellants.

B. N. Sinha—for Respondents.

Roe, J.—The plaintiffs in this case, on the strength of a claim that they were proprietors of the bed of a river and one bank thereof, asked for a decree for possession of land which had accreted under the further bank to the occupancy holdings of the defendants. The learned Munsif after an enquiry through a commissioner was of opinion that the plaintiffs had proved their proprietary right in the lands in suit and accordingly gave them a decree for khas possession. The learned Judge was of opinion that, under Cl. (1), S. 4, Regn. 11 of 1825, the defendants had a better claim than the plaintiffs, on ground that the lands claimed were

gradual accretions to the holdings of the defendants. Had we been convinced from the pleadings and the evidence given that the parties thoroughly understood what was required to be proved to establish a claim to alluvial land by gradual accretions, we should have accepted this finding as a finding of fact. We are not so satisfied and are of opinion that the case must be re-tried. The defendants did not in their written statement allege a gradual accretion. They said only that the land had been " thrown up as char. " No issue was framed on the manner of re-formation, and the point was not touched in the judgment of the trial Court. The case law from the earliest days of the weekly reporter to the present day is that primarily, where a party can show that char land is in fact a re-formation in situ of land identifiable as his own, he is entitled to that land even though it may have been for a period submerged. In order that in this re-trial the true points for decision may be understood, we would refer in the first instance to the following passage in the case of *Lopez* v. *Muddun Mohun Thakoor* (1) :

" In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State ; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable. "

Their Lordships refer with approval in the course of their judgment, to the case of *Mt. Imam Bandi* v. *Hurgovind Ghose* (2). The following passages in the judgment in the latter case are most significant :

" The Judges mistook the nature of the question which they had to try. They conceived that the question was as to alluvial land, in the sense of land gradually gained from the river and which, having no other owner, would belong by way of accretion to the lands of the adjoining proprietor. Whereas the ownership of the adjoining lands, though essential in the consideration of a title founded on accretion, was of little or no value, in the issue actually joined between these parties. "

" The land in dispute was inundated. . . . . became partially dry . . . . and was again inundated and again re-appeared. The question then, is to whom did this land belong before the inundation : Whoever was the owner then remained the owner while it was covered with water and after it became dry. "

The doctrine in *Lopez's* case (1) is stated in the following terms in the case of *Radha Proshad Singh* v. *Ram Commar Singh* (3) ;

" The docrine in *Lopez's* case (1) was doubtless in favour of the defendants in both suits ; and if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the thakbust proceedings of 1864 as within the boundaries of their original mouzas, which would prima facie override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. "

The Judicial Committee again in *Ritraj Kanwar* v. *Sarfaraz Kunwar* (4) pointed out that the provisions of Cl. 2, S. 4 are in accordance with the English law, which may be stated to be as follows :

" All the authorities, ancient and modern, are uniform to the effect that if, by the irruption of the waters of a tidal river, a new channel is formed in the land of a subject, ... the right to the soil remains in the owner, so that if at any time thereafter the water shall recede, and the river again change its course leaving the new channel dry, the soil becomes again the exclusive property of the owner. "

If the whole Regulation be read in the light of these decisions, the scope of Ss. 4 and 5 becomes at once apparent. Cl. 1, S. 4 deals with lands gained by gradual accretion from the public domain of the river or the sea. Cl. 2 deals with changes made by sudden or violent action of a river. Cl. 3, deals with chars or islands formed in the public domain of the river or the sea. Cl. 4 deals with changes made by the action of a river of which both the bed and the water are private property. S. 5 deals with all other changes, and in particular cases of gain by alluvion and derelication as opposed to gain by gradual accretion. S. 4 as a whole was not intended to apply to lands which had been previously in existence and the property of individuals. S. 5 was intended to apply to such lands. Assuming that the land in suit falls within the plaintiffs' boundaries, the first issue for determaintion in a case such as this must be : Is the accretion a true accretion of land not previously in existence or a re-formation of

(1) [1869-70] 13 M I A 467=14 W R P C 11 (P C).
(2) [1846-50] 4 M I A 403=14 W R P C 67 (P C).
(3) [1877-78] 3 Cal 796=1 C L R 259=3 Sar 776 (P C).
(4) [1905] 27 All 655=32 I A 165=8 O C 293.

land which can be identified as the property of the plaintiffs? It is not sufficient that the plaintiff can show that the accretion is in situ of a river bed which has been settled with him It is necessary that he should show that the land had previous existence and was re-formed. The next issue will be: does property in the land still vest in the plaintiffs? [*Lopez* v. *Muddun Mohun Thakoor* (1):]

"It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State and so liable to the written law as to accretion and annexation."

It will be open to the defendants, the burden of proof being upon them if these issues are decided in the plaintiffs' favour to prove a right to the land under the English rules of equity in accordance with S. 5 of the Regulation as a slow gradual and imperceptible accretion [*Ritraj Kunwar* v. *Sarfaraz Kunwar* (4), *Attorney-General for Nigeria* v. *Holt* (5), *Baldeo Thakurai* v. *Ugra Nath Misra* (6) and *Bhagwan Rai* v. *Gopi Rai* (7). If either issue 1 or 2 is decided against the plaintiffs the Court will consider whether Cl. (4), S. 4, Regn. 11 is applicable, and I would remark here that the fact that this river is one of the biggest in Orissa is not conclusive that it would not have been regarded as a small and shallow river by the framers of the Regulation. The terms "small and shallow" are used in distinction to the term "large and navigable" used in Cl. 3. I should myself assume (as the framers of the Regulation seem to assume) that where a river is large and navigable, its bed would not be settled with a private owner.

These issues need not be regarded as exhaustive. The whole suit should, in my view, be re-tried in the Munsif's Court and it will be open to the parties to frame such issues as they please within the law as explained in this judgment and to adduce evidence afresh on the issues framed. And whereas the proprietary rights in the lands are to be determined on precisely the same considerations as the subordinate rights, it is expedient that the landlord of the defendants be impleaded and a fresh boundary commission, if he so desires, executed in his presence. I would therefore direct that the landlord of Amatpur be joined as a defendant and the whole suit re-tried, and would make no order as to the costs of this Court ort of the Courts below incurred up to date. The judgments and decrees of the Courts below are set aside in these terms.

Chapman, J.—I agree.

V.S./R.K. *Retrial ordered.*

(5) [1915] A C 599=84 L J P C 98.
(6) [1915] 29 I C 273.
(7) [1911] 10 I C 311.

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* A. I. R. 1918 Patna 236

SHARFUDDIN AND ROE, JJ.

Ganesh Lal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 93 of 1916, Decided on 5th June 1916.

(a) Press Act (1910), S. 3 (a)—Only Local Government can pass order under S. 3 (2).

An order under S. 3 (2), can be passed only by the Local Government. [P 237 C 1]

***(b) Press Act (1910), S. 3 (1), (2)—Keeper of old press making declaration but exempted from depositing security under S. 3 (1)—District Magistrate cannot direct him to deposit security—Proper course is to issue notice asking him to show cause why order of exemption should not be cancelled or varied.**

The keeper of an old press on the passing of the Press Act, made the necessary declaration but was exempted from depositing security under S. 3 (1) of the Act. Subsequently the District Magistrate directed him to deposit security within fifteen days.

Held: (1) that the District Magistrate had no power to issue such an order: (2) that the proper procedure for the District Magistrate was to issue a notice to the keeper of the press to show cause why the order exempting him from security made at the time of the filing of his declaration should not be cancelled or varied in such manner as may seem good to the District Magistrate. [P 237 C 1]

S. Sinha, Rajendra Prasad and *Dhirendra Nath Dutta*—for Petitioner.

Government Advocate—for the Crown.

Judgment.—In this case we are asked to interfere under S. 107, Government of India Act, 1915. The facts briefly are that a press is owned by the petitioner and alleged by the petitioner to have been working since 1889. From 1889 to 1914 it appears to have worked without any such declaration as was required by S. 4, Act 25 of 1867, but on a notice being issued under Act 1 of 1910, he filed the necessary declaration on 24th June 1914. At the time of filing that declaration no security was deposited. The proceedings in regard to this matter are not before us, and we are therefore not in a position to say whether or not

reasons were then recorded for exempting the petitioner from depositing the security. The present proceedings were taken on account of the publication of two pamphlets, which in the opinion of the district authorities contained objectionable phrases likely to excite disaffection. On 3rd April 1916 the petitioner appeared before the District Magistrate to show cause why he should not be called upon to give a security under S. 3, Act 1 of 1910. The terms of the notice served upon him are as follows:

"Issue notice to proprietor of the Behar Angel Press to deposit Rs. 2,000 as security under S. 3, Press Act, 1910, within 15 days as he allowed such objectionable pamphlets to be printed in his press as Jivan Jagya and Swavalamban. If he fails to comply with the order he will be prosecuted under S. 23 of the Act."

It is pointed out to us by the learned counsel for the petitioner that if this is meant to be an order passed under S. 3, Cl. 2, only the Local Government has power to make such an order. The matter is very much one of form. We have not before us, as I have said, the previous proceedings under S. 3, and it would undoubtedly have been better if the learned Magistrate had framed his notice so that it was clear that he was acting under S. 3, Cl. 1, and proposing to cancel or vary the order made under the first part of that clause, and in cancelling or varying that order was calling upon the petitioner to show cause why he should not be ordered to make a substantial deposit. Inasmuch as great subsequent difficulty may arise in the matter of prosecutions under S. 23 or proceedings in connection with the forfeiture of the deposit, we think it best to set aside the order made on 17th April 1916 and to direct that the Magistrate start afresh with a simple order upon the petitioner to show cause why the order exempting him from security, made at the time of the filing of his declaration in June 1914, should not be cancelled and that order varied in such manner as may seem good to the District Magistrate.

V.S/.R.K. *Rule made absolute.*

A. I. R. 1918 Patna 237 (1)

ROE AND JWALA PRASAD, JJ.

Jiblal Mahto—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 29 of 1918, Decided on 11th February 1918.

Criminal P. C (1898), S. 145—Right to tap tree may be subject of proceedings under S. 145.

The right to tap a tree is a question which may be the subject of proceedings under S. 145. Where on a police report that there was an apprehension of a breach of the peace regarding the right to tap a tree, the Magistrate initiated proceedings under S. 145 and directed that a passage may be left in a wall which was being built by the second party to enable the first party to tap the tree, the only way to cut the tree lying over the wall.

Held: that the order of the Magistrate was entirely without jurisdiction. [P 237 C 2]

Khurshed Hasnain—for Petitioner.

Indu Bhusan Biswas—for the Crown.

Judgment.—We have no doubt at all that the right to tap a tree is a question which may be the subject of proceedings under S. 145. That part of the Magistrate's order which directs that a passage should be left for the purpose of such tapping seems to us to be entirely without jurisdiction. There is no evidence on the record, so far as we can see, that the only way to cut this tree lies over the wall which is being built. But even if this were so, we should doubt whether the matter could be settled otherwise than by an injunction from the civil Court. We therefore set aside the latter portion of the order of the learned Magistrate. The order declaring the tree to be in the possession of the first party should not be disturbed.

V.S./R.K. *Order modified.*

A. I. R. 1918 Patna 237 (2)

ROE AND COUTTS, JJ.

Narsing Misser—Plaintiff—Appellant.

v.

Birju Misser and *others*—Defendants—Respondents.

First Appeal No. 193 of 1916, Decided on 10th December 1918, from decision of Sub-Judge, Bhagalpur.

Hindu Law—Partition—Burden of proof—Jointness is presumed—Defendant must prove separation.

In a suit for partition by a member of a joint Hindu family the initial onus is on the defendant to prove separation. [P 238 C 1]

Rajendra Prosad—for Appellant.

Gurusaran Prosad—for Respondents.

Coutts, J.—This was a suit by one Narsing Misser for partition of joint family property, details of which are set out in Sch. 1 of the plaint. The defendants are Birju Misser, brother of plaintiff's father Rajnath, the two sons of Birju Misser and the grandson of Birju

Misser. The plaintiff's case as made out in the plaint, is that his father Rajnath Misser died in 1310 F. S., while the family was joint and that after his death plaintiff and the defendants constituted a joint Hindu family of which Birju Misser, defendant 1, was the karta. The plaintiff became major some time ago; he separated in mess from the defendants four years ago and now being dissatisfied with the management of the joint property by Birju Misser, he brought this suit for partition. The defendants on the other hand contend that plaintiff's father Rajnath died in 1309, that he had separated from the other defendants some years before namely, in 1302, and that since then the defendants had been in separate possession of their respective shares, the share of Birju defendant 1 being larger on account of the custom of Jethangs which obtained in the family. The suit has been dismissed and the plaintiff has appealed. The question is whether there was a partition or not, and the first point which is urged before us is that the family being a joint Hindu family, the onus was on the defendants to prove separation. The learned Subordinate Judge, after discussion made the plaintiff produce his evidence first, and it is contended that he has been thereby seriously prejudiced and that the learned Subordinate Judge has, by putting the onus on the wrong side, been led to a wrong conclusion.

It is true that the family being a joint Hindu family, the onus was on the defendants to prove separation and it is also a fact that the learned Subordinate Judge made the plaintiff produce his evidence first. It is clear from his judgment however that he realised that the onus was on the defendants and although he did not in the first instance approach the case in the best way, it is clear from the evidence which is now all before us that the plaintiff has not in fact been in any way prejudiced. The defendants rely principally on the Record of Rights, which shows the majority of the plots in the name of the plaintiff or of the defendants and some plots shamilat. The explanation of some plots being recorded as shamilat is that this was done in cases where the land was in the occupation of the tenants. The record also shows two gihas more in the possession of the defendant Birju than in the possession of the plaintiffs, and from this it has been argued that there can have been no partition. It is clear from the evidence, however that the custom of Jethangs by which the elder brother got a larger share obtains in the family. The Record of Rights then is strong presumptive evidence of partition, particularly as it was prepared at a time when there was no enmity between the parties. Moreover the evidence of the record is corroborated by a large number of witnesses who have been examined on behalf of the defendants. The most important of these are the two punches who made the partition.

They state that the partition was made in 1302; their evidence was believed by the learned Subordinate Judge. The rest of the witnesses are all neighbours who certainly knew the state of the family. They depose that the plaintiff and defendants lived in separate houses and were separate both in mess and property. Several of the witnesses are tenants of the plaintiff and they depose that they pay rent to him separately. This evidence has all been carefully considered by the learned Subordinate Judge who has believed it, and no reason has been shown to us why it should not be accepted. The plaintiff on the other hand relies principally on oral evidence and on the fact that there has been no mutation of names in the landlord's sherista. With regard to the latter point, Birju himself says that mutation was not made after partition because it involved payment of salami and because the parties were not on bad terms. This is a reasonable and very common explanation of non mutation of names, and there is on the face of it no reason why it should not be accepted. The oral evidence adduced by the plaintiff not only does not rebut the defendants' evidence, but goes far to support the stay of partition. The witnesses all admit that the parties lived in separate houses and that they were separate in mess and that their moveables have been partitioned.

They also admit that there was disruption of the family in 1302 by which certain members became separate and that Birju actually has separate property. They say however that in spite of this the plaintiff and the defendants

still remained joint. Their evidence however on this point is of an exceedingly doubtful character. In several instances it has been elicited by means of leading questions put by the plaintiff's pleader, it has not been believed by the learned Subordinate Judge and it is in my opinion, totally unworthy of credit. In the result then I am satisfied that there was a partition in the time of Rajnath as alleged by the defendant and this being so, the plaintiff is not entitled to a partition. I would accordingly confirm the decision of the learned Subordinate Judge and would dismiss this appeal with costs.

Roe, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 239

MULLICK AND THORNHILL, JJ.

Bindeswari Prasad Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 123 of 1918, Decided on 13th May 1918, against order of Sess. Judge, Motihari, D/- 21st March 1918.

Penal Code (45 of 1860), Ss. 97 and 147—Rioting — Tenant's holding under water—Grant of lease of fishing rights by landlord to stranger—Tenant's opposition—Tenant is not guilty of rioting he having right of private defence of property—Dispossession and disturbance in possession distinguished.

A plot of land forming part of the accused's holding was under water, and the landlord leased the right of fishing therein to the complainant, who wanted to catch fish but was opposed by the accused:

Held: that the acoused being in possession, he had a right of private defence as against the complainant and he and his party could not therefore be convicted of rioting if that right had not been exceeded. The fact that on a previous day the complainant had succeeded in fishing without molestation on the part of the accused would amount only to a disturbance of possession as distinguished from dispossession.

[P 239 C 2]

G. C. Pal—for Petiticner.

Muhammad Fakhruddin — for the Crown.

Mullick, J.—The petitioners have been sentenced to three weeks' rigorous imprisonment each under S. 147, I. P. C., for committing a riot in respect of a piece of water known as Arganda Kund. It appears that the complainant Kauli Nunian has obtained a fishing lease of the water from the tenure-holder of the village, who are the Jalaha Factory. It is alleged that on the day of occurrence Kauli, together with four factory peons and eight fishermen from the village in which the Factory is situated came and began to fish in a ditch claimed by the petitioner Bindeswari, asserting that he was entitled to do so under the lease. The learned Sessions Judge finds that the ditch is on the site of the occupancy holding of the petitioner, that few years ago, at the time of the Record of Rights, the land was in a culturable condition and was recorded as the holding of the petitioner and that in the revisional settlement which has just been completed there is an entry in the column of remarks to the effect that the ditch is in possession of the petitioner, the land having been washed away and being now covered by water. The learned Sessions Judge also finds as a fact that the petitioner was in possession of the ditch and that he had a right of private defence as against the persons who came to fish forcibly in it, but the learned Judge has convicted the petitioner and his party because it is said that having come with 20 or 25 men armed with lathis they have exceeded the right of private defence and the common object found against them is an intention to assert a right or a supposed right to the ditch.

In my opinion upon the finding, the conviction cannot stand. The petitioner Bindeswari Prasad was in possession of the ditch and had a right to fish there. Kauli Nunian had no right to come there with a party of 12 or more men and to disturb the petitioner's possession. It is contended by the learned Government Pleader on behalf of the Crown that the petitioner was not in possession, because on the previous day he had been dispossessed by the lessee who had fished in it without molestation. If the lessee did fish in the ditch on the previous day that would not constitute dispossession in the eye of law. At the most his act would be a disturbance of possession and there is a distinction between dispossession and disturbance of possession. The petitioner Bindeswari being in possession on the day of the occurrence he had a right to oppose the complainant's party by reasonable force. Having regard to the injuries inflicted upon the complainant's party, which were slight that force was not unreasonable. On the other hand the evidence shows that the complainant's party inflicted injuries upon Bindeswari's party

which were far severer than the injuries inflicted by Bindeswari's party. In our opinion, the right of private defence was not exceeded and there was no unlawful assembly and the convictions and sentences are set aside.

Thornhill, J.—I agree.

V.S./R.K. *Conviction set aside.*

A. I. R. 1918 Patna 240 (1)

ROE AND ALI IMAM, JJ.

Garib Lall—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 223 of 1917, Decided on 13th December 1917, from order of Asst. Sess. Judge, Muzaffarpur, D/- 13th August 1917.

Criminal P. C. (1898), S. 408 — Appeal from sentence of less than four years, passed by Assistant Sessions Judge lies to Sessions Judge—Trial Judge promoted to officiate as Sessions Judge—High Court does not get jurisdiction to try appeal—Officiating Sessions Judge may send case to High Court or postpone it till return of Sessions Judge.

An appeal from a conviction and sentence by an Assistant Sessions Judge, where the sentence is less than four years' rigorous imprisonment, lies to the Sessions Court, and the fact that by the time the appeal is ready the Assistant Sessions Judge who tried the case has been promoted to officiate as Sessions Judge does not give the High Court any jurisdiction to try the appeal. In such a case it is open to the Officiating Sessions Judge, on receipt of the appeal, to either send the case to the High Court for disposal or to admit the appeal and postpone it till the return of the Sessions Judge. [P 240 C 1]

Lal Mohan Ganguly—for Appellant.

Mohammad Fakhruddin — for the Crown.

Judgment.—In this case the appeal is from a conviction and sentence by the Assistant Sessions Judge of Muzaffarpur, Mr. Raj Kishore. The sentonce is less than four years' rigorous imprisonment. The appeal therefore lay to the Sessions Court at Muzaffarpur. It is explained that the appellant felt that it was impossible to appeal to the Court at Muzaffarpur, for the reason that by the time his memorandum of appeal was ready Mr. Raj Kishore had been promoted to the position of Officiating Sessions Judge. We are of opinion that this fact does not give us any jurisdiction to try the appeal. It would have been open to Mr. Raj Kishore, on respect of the appeal, to either send the case to the High Court for disposal or to have admitted the appeal and postpone it till the return of Mr. Sheephanks for hearing. We certainly have no jurisdiction to hear the case and must therefore send it to the Sessions Judge for disposal. Let the record be sent down at once.

V.S./R.K. *Case sent back.*

A. I. R. 1918 Patna 240 (2)

ROE AND COUTTS, JJ.

Keshobati Kumari—Appellant.

v.

Satya Niranjan Chakraberty and *others*—Respondents.

Appeals Nos. 89 and 151 of 1915, Decided on 9th July 1918, from original decree of Sub-Judge, Bhagalpore.

(a) Santhal Pargannas Regulation (3 of 1872), S. 6—S. 6 contemplates mortgage decree setting forth amount due on latest date of payment.

Under O. 34, a mortgage decree must set forth the amount due on the latest date of payment. This is the decree which is contemplated by S. 6, Santhal Pargannas Regulation. [P 249 C 1]

(b) Santhal Pargannas Regulation (3 of 1872), S. 6—S. 6 is bar to a decree for interest upon interest.

Section 6 is a bar to a decree for interest upon interest. Interest subsequent to the decree must be limited to interest on the principal advanced and the costs of the suit. [P 249 C 1]

(c) Civil P. C. (1908), O. 34, R. 1—Paramount title cannot be inquired into.

In mortgage suits the paramount title of parties other than the mortgagor or his representative-in-interest cannot be gone into. [P 248 C 1]

Naresh Chandra Sinha, P. C. Manuk, S. P. Sen, Rajendra Porashad, Sarat Ch. Mukherji, Mohendra Nath Ray, Jagannath Prosad, Surendra Mohan Das, Hari Bh. Mukherji and *Lakshmi Kanta Jha*—for Appellant.

Hasan Imam, Sami, D. N. Sircar, Chandra S. Sircar, Ranjit Sinha, Lal Mohan Ganguli, Bipin Bihari Ghose, Harendra Nath Ganguli and *Surendra M. Dass*—for Respondents.

Roe, J.—These two appeals arise from a suit upon a mortgage-deed executed by the late Udit Narayan Singh securing an advance of four lacs of rupees upon the 16 annas of the Mukarrari Istamrari Estate Pergana Handwa. The defendants to the suit were Rani Keshobati Kumari and her adopted son Kumar Satya Narain Singh, and certain subsequent mortgagees. Separate defences were filed by the Rani and by the Kumar and on them the following issues were framed: 1. Is the mortgage-bond in suit genuine and was the consideration money recited therein advanced by the plaintiff to the late Rajah Udit Narain Singh? 2. Are fendants 1 and 2 or either of them

estopped from pleading that the mortgaged property in Pargannah Handwa is incapable of transfer by reason of its being a ghatwali tenure? 3. Is the finding of this Court in Suit No. 363 of 1905 res judicata in regard to the question whether the mortgaged property in Pargannah Handwa is a ghatwali tenure and therefore inalienable? 4. Was the late Udit Narayan Singh recorded as Mukarrari Istamrardar in respect of the mortgaged property in the Record of Rights framed and published under Regulation 3 of 1872? If so, is it open to the defendant to plead that the said Udit Narayan Singh's right in the said property was that of a ghatwal? 5. Was defendant 1 recorded as Istamrari Mukararidar of the mortgaged properties in the Record of Rights framed and published under Regulation 3 of 1872 in the year 1900? If so is it open to the defendants to claim that the property is a ghatwali tenure? 6. Is the mortgaged property in said Pergannah Handwa a ghatwali tenure subject to the performance of any public service duty and whether it is inalienable, and was the interest of the said Rajah Udit Narain Singh in the said property terminable with his life? 7. Can defendants 1 and 2 or either of them set up any right or interest to or in the mortgaged premises in derogation of the disposition, if any, contained in the will of Rajah Udit Narayan Singh? If so, whether the Rajah had any rlght to make any such disposition? 8. Is the bond in suit binding as against both the defendants or any of them? Should the mortgage be binding on one of the defendants, but not the other defendant, what are the rights of plaintiff? 9. Is the plaintiff's right to recover compound interest or interest exceeding the principal amount secured by the said bond barred by S. 6, Regulation 3 of 1872? 10. Is any portion of the claim for interest barred by limitation? What amount, if any, is due to the plaintiff under the said mortgage-bond? 11. To what relief or reliefs, if any, is the plaintiff entitled?

The learned Subordinate Judge found upon the first nine issues in favour of the plaintiffs and on issue 11, applying S. 6, Regulation 3 of 1872, made a decree for eight lacs of rupees with interest from the date of the suit. At the hearing the suit was contested only by the Kumar, the Rani having filed a petition of compromise whereby she agreed to pay the sum of eight lacs by instalments of Rs. 50,000, the first instalment to be paid in Chaitra 1320. The learned Subordinate Judge's judgment is dated 14th September 1914. He has held that the compromise is not now binding upon the plaintiff, for the reason that Chet of the Bengal year 1320 had already passed and the promised instalment had not been paid. Against the decree made both the Rani and the Kumar appeal. I propose to deal first with the appeal of the Kumar. The finding of the lower Court upon issue 1 is now accepted. It is also admitted that no amount of the claim is barred by limitation, the date of payment being 15th July 1910. For a consideration of the remaining issues it is necessary to give a history of Pergannah Handwa. This Pergannah is situated between Pergannah Pachite and Pergannah Lachmipur. The question whether prior to the permanent settlement it formed part of the Kharagpur Estate will be the main question for consideration. The Kharagpur Estate was held at the time of the assumption of the Dewani by the East India Company by Rajah Muzafar Ali under the Moghul Empire. The whole country was in a state of insurrection in 1774, and an armed force was sent by Warren Hastings under the command of Captain Brooke to restore order.

Rajah Muzafar Ali was superseded and Captain Brooke was given the powers of a Military Zilladar acting under Martial law over a tract of country then known as the Jungle Terai Mahal. Captain Brooke was succeeded by Captain Brown and in 1776 Captain Brown gave a sanad to Raja Subhao Singh, the ancestor of Udit Narain Singh. It is the defendant's case that this sanad created a ghatwali analogous to the Birbhum ghatwalis and that therefore the Raja had no alienable interest in it and the mortgage made by him was invalid as against his successor to the ghatwali. It is the plaintiff's case that in the first place the sanad does not create a ghatwali at all, and in the second place that if it did create a ghatwali, the ghatwali created was one of the Kharagpur ghatwalis, and that the great-grandfather of Udit Narain, Jagan Singh, having secured by litigation of the years 1809 to 1819 exemption from liability to miitary service under the Kharagpur Raj, there was now no bar to the

alienation of the lands attaching to the tenure. It is further the plaintiff's case that in the event of our finding that the tenure is a ghatwali tenure analogous to the Birbhum tenures, the conditions of military service have either been waived by Government or have so fallen into disuse as to be no longer enforcible. The first question for consideration therefore is whether the tenure is a Ghatwali tenure at all and the second whether the appellants have succeeded in proving that the tenure is analogous to the Birbhum tenures. It is admitted on behalf of the appellants that if indeed the tenure is a Kharagpur tenure the litigation which ended in 1819 destroyed the service character of he tenure.

Wherever it has been necessary for the proprietors of Pergannah Handwa to state the origin of their rights, that origin has always been asserted to be the grant made by Captain Brown. It is admitted that revenue is now paid through Kharagpur with the reservation that this is an arrangement made only for convenience of payment and that the tenure was in reality held directly under the Government. There is in Ex. (H), the judgment of the District Judge of Bhagalpur in suit No. 728 of 1910, a full statement of the claims of Jhabban Singh, the then proprietor of the Pergannah. The history of this litigation is important. The plaintiff's claim was that Parandar Singh had been under a sanad bearing the seal of the plaintiff, appointed to the post of Ghatwal of Pergannah Handwa situated within the Mahal of Kharagpur which was the zamindari of the plaintiff: that Parandar Singh had died in Chet 1215 and that on his death the plaintiff was entitled to appoint a Ghatwal in his place ; that Kallan Singh had refused to admit the plaintiff's right to appoint a Ghatwal and the matter had been taken up before the Acting Judge who had issued a Parwana to the plaintiff intimating that it was improper for the plaintiff to appoint a Ghatwal other than Jhabban Singh without instituting proceedings under the provisions of Regn. 4 of 1793, the first Code of Civil Procedure. Accordingly a suit was brought as provided by the said regulation for a declaration that the plaintiff was entitled to appoint as Ghatwal any person he might select. Jhabban Singh stated in reply that his Somi Zamindari Milkiat of Perganna Handwa had been held from the time of Raja Bijoy Singh and that Subhao Singh was the sixth holder of the office, and for several hundred years the defendant and his predecessors had been in possession of the said zamindari; that in 1184 F. S. Captain ,Brown Zilladar who was appointed for the purpose of making settlement of the Jungle Terai Perganna by the Hon'ble Members of the Council came to this place; that the said Subhao Singh under perpetual mukarrari pattah paid the rent to Captain Brown and subsequently to Mr. Norman and to Mr. Cleaveland up to 1187, and that when in 1188 the settlement of Mahal Kharagpur with the plaintiff was taken up the plaintiff put in an assessment dowl, that is to say an application for Goshwara Settlement with him; that the settlement of Pergannah Handwa, the Milkiat Zamindari of the defendant and that of Pergannah Chandan Passye, the Milkiat Zamindari of Rup Narayan Deo, were under the patta bearing the signature of the said Captain allowed to stand good , but subsequently the said (Saheb), in view of the fact that the country was jungli and there was danger in carrying the revenue directed the Amla of the said Raja Subhao Singh to deposit with Raja Kadar Ali (who was the son of Muzafar Ali) the land revenue due from his lands under the istamrari mukarrari patta and from there (that is from Kharagpur) the revenue becoming one item should be paid into the treasury of the East India Company and that consequently from that time Raja Subhao Singh and Raja Parandar Singh have been depositing down to 1215 F. S. the rent of their zamindari property, according to the perpetual mukarrari patta and the sanad bearing the seal of the August Khalsa and granted by Mr. Dickson, the Collector.

The plaintiff produced various sanads and the Parwana of Captain Brown dated 5th November 1775, and the defendant Jhabban Singh filed the following documents : (1) A taslimnama date uncertain. (2) A parwana from Mr. Tawney dated 17 Moharram 14th year. (3) A parwana of Captain Burkit, dated 16 Safir of the 8th year. (4) Another parwana by Captain Burkit date uncertain. (5) Perpetual mukarrari pattah granted

by Captain Brown dated 11th September 1776. (6) Receipts for payment of revenue direct to Captain Brown, dated 29th February 1777, 16th June 1777, and 13th September 1779, and 13th September 1780. (7) Parwana bearing English signatures, dated 1791 to 1793. (8) A sanad bearing signature in English, dated 20th January 1794, and many other papers.

The finding of the Court on these papers was that in fact the predecessors of the defendant and the defendant have been from time immemorial zamindars and istamrari mukarraridars with the title of Raja of Pergannah Handwa and that up to this time they have been paying the rent of the said pergannah in accordance with the perpetual mukararri pattah, bearing the signature and the seal of Captain Brown, to the plaintiff in his capacity as the mufassal talukdar, and in his own time the defendant has been paying the rent to the authorities for the time being: that his istamrari mukarrari was never cancelled and that he has during the times of all the present and past Hakims received zamindari documents in the form of istamrari mukarrari, and finally that it does not appear that the predecessors of the aforesaid defendant have been appointed to the post of Ghatwal of the said place at the instance of the plaintiff. This decision was taken in appeal to the Provincial Court at Murshidabad. Jhabban Singh's plea is, by the Court of appeal, stated to be that in 1184 F. S. Captain James Brown Zilladar who was appointed for the purpose of making settlement of pergannah Jungle Terai, had granted the istamarari mukararri patta in respect of pergannah Handwa to Raja Subhao Singh, uncle of the defendant, together with other Ghatwals who were in his ilaka and that while Hardat Singh and four of the defendants relied upon the defence set up by Jhabban Singh, the remaining defendants described themselves as the servants of Jhabban Singh's predecessors. The appellate Court called for a report from the Collector of the district of Bhagalpur with regard to the change of ghatwals and the settlement of the mahals, and on receipt of that report the Judge was directed to make an inquiry as to whether the aforesaid mahals had been the ghatwali appertaining to the zamindars of Raja Qadir Ali and of the fact that the practice was that on the death of the Ghatwal, if any person is appointed in his place, information of the same is given to the Collector and whether on the death of Raja Subhao Singh Parandar Singh was appointed as ghatwal on behalf of Raja Qadir Ali Khan, Zamindar, and whether information of the same was given to the Collector.

The report of the District Judge was forwarded in due course. It was then declared by the Provincial Court that Raja Qadir Ali himself admitted the fact of the disputed property being the perpetual mukarrari right of Raja Jhabban Singh and that the documents filed by the plaintiff purporting to be pattas and kabuliyats and security bonds given by Parandar Singh to Raja Mazafar Ali were not worthy of reliance, and that the report sent by the Collector upon the facts of the case was incorrect. For these reasons the judgment of the District Court was affirmed. Among the documents filed by the plaintiff was the rubkari of the Court of the Collector, dated 29th January 1810. In the plaintiff's pleadings it was stated that a rubkari was sent to the Court of the Collector of Bhagalpur for inquiry as to the title of the zamindari of Pergannah Handwa, that the reply of the Collector to the District Judge had been that the Mahal Kharagpur together with Pergannah Handwa constituted the zemindari of the plaintiff and that the said Raja is competent to appoint ghatwals in his own zamindari. We may presume that it was this reply that was declared to be incorrect. This finding is not res judicata as between the plaintiff and the defendant now before us, but it is of interest as showing the opinion of the Courts of that date based upon a mass of documents which are not now available. The opinion however does not go so far as to say that Raja Subhao Singh was not a ghatwal at all. It says only as I understand it that he ,was not a ghatwal serving under Kharagpur, but held a Milkiat Zamindari independent of the Kharagpur Estate. The Judges of those days were fully aware of the distinction between a Milkiat and a subordinate "mukararri tenure," and it is impossible to believe that they would have decided that the tenure was a milkiat tenure unless upon the documents before them they were satisfied that the estate was held directly under the ruling power. Mr. Hasan Imam contends that the real position was that the Rajas

of Handwa, if indeed they were independent of Karagpur, were not Ghatwals at all, and that the Ghatwals mentioned in the sanad did not include the Handwa Raja, but were Ghatwals holding Sikmi Ghatwalis under the Raja of Handwa. For an elucidation of this point it is necessary to examine carefully the sanad granted by Captain Brown which is Ex. (K) and the schedule attached to that sanad which is Ex. 105. In Sutherland's report, Ex. 126, is an extract from a report made by Captain Brown himself. This report is interesting as showing that Captain Brown recognised three classes of holders of land. (1) The Zamindars of the low country, (2) Chief Manjhis bound by a muchalka and holding jagir lands in the plains; and (3) Subordinate Manjhis holding Chaukis in the hills. His proposals were that the Sardars or Chiefs of Divisions should be restored to their authority and receive sanads from Government specifying the duties they were to perform and that similar engagements should be taken from the Manjhis binding them to their Sardars.

Police establishments should be set up in each tappa of the zamindars and the thanadars put under the control of Sazawals. His suggestions were approved by Government and a line of police posts established in Bhagalpur, Colgong, Raj Mahal, etc., to the north and east of the Jungle Terai Mahal. The jagirs given by him were approved by Mr. Cleaveland. Many of them are still in existence and have been the subject of consideration by the Judicial Committee. It is necessary in considering the real meaning of Brown's Parwana to bear carefully in mind his views of the policing of these tracts. The Parwana Ex. K is headed as follows: patta in terms of kabuliyat granted to Raja Subhao Singh, Babu Udit Singh, Gopal Singh, Babu Lal Singh and other Ghatwals of perganna Handwa appertaining to Kharagpur Jungle Terai Mahals, Sirkar Monhyr, in the Province of Bihar. The terms of the grant are that these people should pay their revenue direct to the treasury and by means of the Barkandazes, who hold jagir grants, should patrol the villages, and when called upon by Government should produce an army of seven Sardars and 300 archers and Barkandazes. Then follows the schedule Ex. 105, in which the details of the grant are set forth. Raja Subhao Singh takes five taluks with a total rent of Rs. 2,075. Udit Singh takes three talukas with a rent of Rs. 549, Gopal Singh takes two taluks with a rental of Rs. 270. Udit and Gopal are in subsequent documents specifically described as Ghatwals. The duties of Subhao Singh were precisely similar to those of Gopal and Udit and we find from Ex. (L) that Udit and Gopal were closely related to Subhao. It is clear, I think that Udit and Gopal held these lands as did Raja Subhao Singh by virtue of their descent from Bijoy Singh.

It is also clear from the terms of the parwana in which allusion is made to Jagirs held by Barkandazes already in existence and from the fact that all the grantees except Subhao are srecifically described as Ghatwals, that Captain Brown was not conferring a new grant, but confirming an old one, and that he was not imposing new duties, but merely stating the existing conditions upon which the tenure was already held. The Sardars mentioned as having jagirs may be taken to be the Sardars mentioned in his report. The Barkandazes to be employed were the Barkandazes mentioned in Regn. 20 of 1817. It is to be noted that in his report to Government the word "Ghatwal" is not used. Nor in Grant's report of 1786 see *Raja Lelanund Singh Bahadoor* v. *Government fo Bengal* (1) was the word Ghatwal used, but "there is no doubt", their Lordships say,

> "that the tenures here spoken of are Ghatwali tenures though they are not mentioned by that name."

There is nothing in the use of the word zamindar to support Mr. Hasan Imam's contention. At the time of granting this parwana to Subhao Singh and the other Ghatwals, Brown's intention was to hold them responsible, as they had hitherto been responsible, for the perfomance by the Sardars and Barkandazes of their duties as head Manjhis and hill policemen. There were no police posts then in existence in the Zamindari Tappas. Subsequently when he submitted his whole scheme to Government he left out of account the Zamindars in whose Tappas the outpost were to be set up, and when they were set up those zamindars were exempted by Regula-

(1) [1854-57] 6 M. I. A. 101=4 W. R. P. C. 77 (P. C.)

tion 22 of 1793 from police duties. But it is most significant that to this day no outpost has been set up in Pergannah Handwa, which is still a non-police tract.

The parwana granted by Captain Brown received no confirmation from Mr. Cleaveland. It did receive confirmation from Mr. Cleaveland's successor. In Ex. (L) Mr. Dickson or Dickenson on the application of Parandar Singh stating that Raja Subhao Singh and other Ghatwals holding under Brown's Sanad of 1184 are dead, declares Raja Parandar Singh to be in possession of the share of his uncle Subhao Singh and of his grand-uncles Udit Narain Singh deceased and Gopal Singh (who is still living but unable to pay the rent of his taluk), and the terms of the patta are reiterated, requiring Subhao Singh and the other Ghatwals to go round each village with the Barkandaz of the village and when required by the Sirkar to appear before the Hazur with 7 Sardars and three hundred Barkandazes and pay the fixed jama of Rs. 2,701 less Saraf Rs. 59-2-0 directly into the treasury. This Parwana is inconsistent in the last two respects with that granted by Cleaveland to Raja Kader Ali, Ex. 58 (1), dated 1st May and 13th May 1781, for in the latter parwanas it is ordered that the revenue of Handwa Rs. 2,818 (not Rs. 2,641-14-0) shall be paid not directly into the treasury, but through the Raja of Kharagpur. And this parwana is signed by Warren Hastings himself. Dickson's directions in this respect were again negatived by the Permanent Settlement, Ex. (60), dated 5th January 1796, in which Pargannah Handwa is mentioned as one of the 21 Mahals upon which revenue is assessed as appertaining to Pargannah Kharagpur. In Ex. G, the general register of estates paying revenue to Government prepared under S. 2, Regn. 48 of 1793, we find Pargannah Handwa shown as paying revenue jointly with 14 other pargannahs and the name of Raja Lilanand Singh Bahadur entered as the malik. On the other hand in Ex. F, memorandum of jama of the permanent mukarrari right to the mahals in district Bhagalpur dated 1209, we find it stated that the mukarrari patta was granted after the Dewani subject to Ghatwali and reference made to Mr. Dickson's orders granting a new Sanad to Raja Parandar Singh for the taluks granted by Brown to Subhao Singh, Udit Singh and Gopal Singh.

It is urged by Mr. Hasan Imam that the Permanent Settlement changed—if not the character—at least the incidents of the tenure. We have, therefore, to consider firstly what were the incidents and character of the tenure before the Permanent Settlement and next whether by the Permanent Settlement its incidents and character were changed. An istamrari mukarrari tenure was regarded as a grant made for life to an individual and on the death of the lifeholder the sanction of Government was necessary to validate the succession. The tenure was held at a fixed rate instead of an annual agreement. This is clear from the fact that by Regulation 1 of 1815, the Istamrari Mukarrari tenures outside the permanently settled districts were declared to be resumable on the death of the life-tenant. Captain Brown's intention was to create Subhao Singh a principal land-holder (a position which he no doubt already held) for the political purpose of guarding the frontiers on the west against the incursions of the barbarous Paharias by means of a war-like peasantry entertained as a standing militia with suitable territorial allotments under him [see *Raja Lelanund Singh Bahadur* v. *Government of Bengal* (1)]. The office was granted to Subhao Singh personally and was resumable on his death. It was therefore necessary for Parandar Singh to report the death of Subhao Singh to Mr. Dickson and to obtain a renewal. This renewal was obtained in 1794. The position in 1794, therefore was that the Handwa Ghatwali was a Zamindari Ghatwali held directly under Government resumable at the death of the life tenant.

It has been the contention of the appellant's family for generations, and strongly pressed by Mr. Manuk, that the payment of revenue through Kharagpur was an arrangement made for the sake of convenience only, but on reference to the map it will be observed that Kharagpur is no nearer to Handwa than was Bhagalpur and it cannot be possible that for the sake of convenience only the revenue of Handwa should have been sent first to Kharagpur and then on to Bhagalpur. The Collector of Bhagalpur in 1813 [*Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1)] reported to the Magistrate

of Birbhum that at the time of the Decennial Settlement the Ghatwals were not treated as independent talukdars, no settlement was made with them and they were included in the settlement of the zamindar of whom their lands were held. The appellant's ancestors have however also frequently said their tenure is in all respects similar to that of Chandan Passye or Lachmipore. This also was Word's view (Ex. 63), dated 1833. The Sadar Diwani Adalat in the case of *Rup Narayan Deo* v. *Raja Qadir Alee*, decided in 1809, pointed out that the revenue of Chandwa Passye had been included in the revenue of Kharagpur by mistake, and suggested (a suggestion that was not adopted) that the Board of Revenue should exclude Chandwa Passye from the Revenue Roll of Kharagpur. At p. 123, Vol. 6, Moore's Indian Appeals [*Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1)], a report of 1813 is quoted in which it is stated that the Ghatwals attached to the Kharagpur estate held their lands by virtue of sanads granted by the zamindars of Kharagpur, except some who have received theirs from the former authorities.

The inference is justified upon all the evidence available that, Chandwa Passye and Handwa were like Kharagpur, Birbhum and Pachit Crown Ghatwalis. They were not analogous to the Kharagpur Ghatwalis nor to the Birbhum Ghatwalis. They were Moghul Ghatwalis. The effect of the Permanent Settlement upon military tenures was discussed in *Raja Venkata Rao* v. *Court of Wards* (2): "The provisions of the Sanad," their Lordships say :

"differed in no respect from those which are contained in every ordinary deed of Permanent Settlement. The feudal or military tenure was at an end. The six Pergannas to which the sanad related became new zamindaris subject to the payment of fixed land revenue and subject to the ordinary stipulation and the performance of the duties ordinarily imposed upon zamindars."

And their Lordships go on to quote as a correct statement Para. 11 of the written statement of that case :

"That under the Empire of the Mahomedans the ancient zamindari of Nuzvid was extensive and was governed by its Chiefs with absolute power and independence; but under the policy of the British Government the same has become divested of its military character and dwindled into a large peshkash-paying zamindari."

Their Lordships therefore advise :

"Her Majesty that the lands in suit be declared to be a part of the zamindari above mentioned."

And in the case of *Muttu Vadugaanadha Tevar* v. *Dora Singha Tevar* (3), their Lordships say :

"In this case the Istamrar zamidar was put in his place by the Proclamation of 1801, it is to the terms of that document that we must look in order to find the quality of his estate. The Madras Government were no doubt in a position to grant out the estate on other than the old terms. The question is whether they did so."

I have no hesitation in saying that in the Permanent Settlement of 1796 the Governor General did not grant all the estate created by Captain Brown's Sanad on other than the old terms. He was not dealing with Parandar Singh at all. In the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (4) (at pp 204 and 205) the following statement of the law is made :

"The Permanent Settlement of the lands did not alter the nature of the Jagir or of the tenure upon which the lands were held, nor could it convert the services which were public into private services under the zamindar. The zamindar became entitled only to the rent or revenue which was previously payable to the Government and in respect of which he was assessed, and not to the services in respect of which the 1/3rd of the rent or revenue was allowed to the tenant as compensation for the services. Those services continued to be due to the Government."

This is conclusive. The Permanent Settlement might destroy a military tenure by a new contract with the holder of the tenure. It could not affect the position of a tenure-holder with whom the new settlement was not made. The caae of *Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1) is no authority for the contrary proposition. It decided only that land once assessed with revenue as a part of Kharagpur could not be resumed or re-assessed. The Handwa tenure was prior to the Dewanee a Moghul Ghatwali. The effect of assumption of jurisdiction over the Jungle Terai Mahals by the East India Company was at most to convert the allegiance of the ghatwal from an allegiance to the Moghul Empire to an allegiance to the East India Company. The Permanent Settlement did not destroy the Company's right to enforce, nor relieve Parandar Singh from liability to render, that allegiance. Nothing that has since been done has altered the position. The decision of Mr. Travers (Ex. C) that the tenure could not be

(2) [1884] 7 Mad. 128=7 I. A. 38 (P. C.).
(3) [1881] 3 Mad. 290=8 I. A. 99 (P. C.).
(4) [1883] 9 Cal. 187=9 I. A. 104 (P. C.).

resumed had no higher effect than the decision of Mr. Alexander which gave rise to the suits of *Raja Lelanund Sing Bahadoor* v. *Government of Bengal* (1). The descendants of Parandar Singh have never specifically refused to render services as ghatwals. Ex. E, dated the 24th December 1816, was not such a specific refusal. It was merely a protest by Jhabban Singh against the omission of his title of Raja in Parwanas addressed to him. The entry of the ghatwali service attached to the mahal in Ex. F still stands. So late as 1880, the Duputy Commissioner of the Santhal Pergannas (Ex. AAI) was trying with the idea of enforcing the services, as ghatwal, of the proprietor of the Handwa estate. It may be that the power to enforce these services has lapsed by limitation. That question was not argued at the Bar and could not be raised in this suit. I am satisfied that the right has not been destroyed by any definite act. Buchanan (Mc Pherson's Settlement Report. Appendix, page 41) may have been historically correct, but he erred on the point of law.

This by no means ends the matter. The tenure may be a ghatwali tenure. A person holding it as a ghatwali tenure might have no power to alienate it. The real question is, whether the mortgagor Udit Narayan Singh held it as a ghatwali tenure. Mr. Manuk asserts that this case is in no respect different from that of the Dhimsain Jagir in the Zemindari of Pachit dealt with in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (4). His revenue is payable to Government; his services are to be rendered to Government and the penalty for failure to render service is enforcible by Government. The revenue is clearly not payable to Government. It is payable to the Raja of Kharagpur. No services have been rendered to Government since 1796. There is no penalty in Captain Brown's Sanad attached to the failure to perform police duties. The only penalty suggested is that if any body lodges any complaint, then on proof of the matter after inquiry punishment will be inflicted on you. That was a condition imposed upon every zemindar prior to Regulation 22 of 1793. It is further said that he who will give bad advice to others and will interfere with the affairs of Government will be held guilty and will be turned out of his ilaqa and will not be allowed to come back. This was a penalty to be imposed not upon the grantees under the sanad, but upon any body residing within the taluk who might misbehave himself.

The penalty to be incurred by the Dhumsain Jagirdar was not attributable to his original sanad, but to the muchalka or security bond executed at the time of the appointment. The question decided in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (4) was whether the mauzas in question, which had been held by the plaintiff's father during his lifetime and which at his death had descended to the plaintiff as his heir and to which the plaintiff was appointed by Government, were liable to be attached in execution of a decree against the father as assets by descent in the hands of the plaintiff, his son. In the case before us the appellant has not been appointed by Government. Mr. Imam asks us to attach importance to this and to the fact that he has given no muchalka nor kabuliyat. I would attach even greater importance to the fact that his father was not appointed by Government. His grandfather, Madho Singh was not appointed by Government. His great-grandfather, Jhabban Singh, was not appointed by Government. The last appointment made by Government was that of Parandar Singh and when an attempt was made to assert the right of appointment on the decease of Parandar Singh, the Collector declined to make the appointment and the Zamindar of Kharagpur was held by the Courts not competent to do so.

Never since the death of Raja Parandar Singh has any proprietor of Handwa applied for a renewal of the Istamrari Mukarrari Ghatwali grant. For a hundred years no muchalka or kabuliyat undertaking military service has been given. No suggestion that the tenure was liable to military service was made until after the death of Udit Narayan Singh it became desirable to avoid paying Udit Narayan Singh's debts. On only one occasion has mutation of names even been applied for, and on that occasion mutation of names was refused (Ex. B). All that was done was that a note was made in the Register of Raja Udit Singh's application and the report made thereon. Whenever it has been necessary to prepare a list of the Ghatwali tenures of the Santhal Pergannas, Parganna Handwa

has been omitted. In successive settlement reports no mention is made of any Ghatwali duties to be performed. On what basis can the appellant claim that he or his father were Ghatwals?

At the outset of the argument we suggested to Mr. Manuk that the real issue involved was: Did the appellant succeed to his father's estate by inheritance or by appointment. If he succeeded by inheritance as his father's representative-in-interest he was estopped from denying his father's right to alienate the estates. If he succeeded to the estate by appointment his father's interest in the estate was dead and could no longer be pursued. For this view I find support in the obiter dictum of Mookerjee, J., in *Bhagwat Buksh Roy* v. *Sheo Pershad Sahu* (5), and in the judgments of Mullick, J., and Jwala Prasad, J. (equally obiter), in the case of *Jadab Lal* v. *Debi Lal Singh* (6). I place the case before us on a different, and, as I think, a higher plane than these two cases. Udit Narayan Singh was not appointed to the post of Ghatwal. He was merely de facto holder without license from the ruling power of the lands attached to the post of Ghatwal, and as such mortgaged his right, title and interest. His son (or his wife) has succeeded by inheritance or under his will to such rights as he had. They cannot successfully impugn his title, or even ask that the question of his title be investigated. The ruling power is not a party to the suit, nor is any Ghatwal appointed by the ruling power. It is well settled that in mortgage suits the paramount title of parties other than the mortgagor or his representative-in-interest cannot be gone into.

The right, title and interest of Udit Narayan Singh was mortgaged, and must be sold in execution of the decree to be made on the mortgage. It is only to be regretted that the time of the lower Court and this has been so long occupied in an inquiry of merely historic interest. In view of the value of the subject-matter of the suit I deem it expedient to record briefly my findings on the several issues framed. Issue 1 was not contested in this Court. It is admitted that the mortgage bond is genuine and the consideration money advanced. On issues 2 and 6 I find that the property mortgaged by the late Udit Narain Singh was a Ghatwali tenure, not held by him as a Ghatwal. Such right, title and interest as he had therein were alienable, and did not terminate with his life. Defendants 1 and 2 would either of them be estopped as his representative-in-interest from pleading that such right, title and interest as he held were inalienable.

On issue 3 I find that the decision in Suit No. 363 of 1909 is not res judicata. The suit in question was one to enforce a puisne mortgage upon the same property. The present plaintiffs were defendants to the suit as prior mortgagees. The present defendants pleaded successfully that the property mortgaged was inalienable; but on the case coming to the High Court in appeal the Court of Wards, who were then in charge of the estate, obtained a withdrawal of the appeal by promising to pay the mortgage money. There was no issue contested as between the present plaintiff and the present defendants with regard to the alienability of the property. The case was not one in which the decision would be res judicata as between co-defendants. In the finally published Record of Rights the late Raja Udit Narayan Singh was recorded as Mukarrari Istamrardar in respect of the mortgaged property in such documents as are before us. These documents relate only to the liability of the tenants to pay rent to him. The khewats have not been filed and even if they had been filed, I should hold on issue 4 that they would be evidence only of his title as proprietor and would not be conclusive with regard to a question of military duty attached to the proprietary rights. On issue 5 my finding would be the same as on issue 4. On issue 7 the question whether the Raja had any right to make dispositions of his property is covered by my discussion of the facts of the case. The right, title and interest of the late Udit Narayan Singh not being derived from the ruling power by appointment, he was at liberty to dispose of such right, title and interest as he possessed.

The learned Subordinate Judge has not discussed issue 8 and it was not touched in the arguments. I confess that I can see no meaning in it at all. The bond in suit is binding against whichever of the defendants is the representative-in-interest of the late Raja. That question is

(5) A. I. R. 1914 Cal. 4=21 I. C. 481.
(6) [1917] 2 P. L. J. 725=42 I. C. 399.

still sub judice in another appeal now before us. It is conceded by the appellants that issue 9 does not really arise. The sole question is, whether under S. 6, Regn. 3 of 1872, the respondent is entitled to a decree for more than half the mortgage-debt. The learned Subordinate Judge, while recognizing the force of S. 6, has made a decree for eight lakhs of rupees with interest from the date of the filing of the suit. This is in clear contravention of S. 6. Under O. 34, Civil P. C. the decree of the Court must set forth the amount due on the latest date of payment. I hold that this is the decree which is contemplated by S. 6, Regn, 3 of 1872, and that it should be decreed that the amount due on the day of payment be eight lakhs of rupees.

Section 6 is a bar to a decree for interest upon interest. Interest subsequent to the decree must be limited to interest on the principal advanced and the costs of the suit. Therefore on four lakhs of rupees and costs, interest will run at 6 per cent. per annum. Costs both in the lower Court and in this Court will be calculated on the total amount decreed. The appellants having failed on all the important issues involved will bear their own costs in both Courts. This decision covers both issue 10 and issue 11. This decision disposes of Appeal No. 89. Mr. Naresh Chandra Sinha argued that the decree could not bear interest at all, but in course of the arguments conceded that that part of the decree relating to interest on the original principal could not be assailed. His position with regard to the compromise filed was that his inability to pay the instalments promised was due to the fact that the estate was in the hands of the receiver, and that in view of the dispute regarding title to the estate he was unable to obtain from the receiver the sums necessary to pay the first instalment. It is immaterial by what causes the compromise became infructuous. The learned Subordinate Judge was correct in saying that it has become infructuous and cannot be acted upon. The parties will therefore be relegated to their former positions and the considerations which cover tbe decision of the appeal ol the Kumar cover also the position of the Rani, The decree which I propose will be of effect as against the representative-in-interest of the late Raja Udit Narayan Singh, whether that representative-in-interest be the Kumar or the Rani.

V.S./R.K. *Appeals dismissed.*

A. I. R. 1918 Patna 249

MULLICK AND THORNHILL, JJ.

Satish Chandra Ghosh—Petitioner.

v.

Kashi Sahu—Opposite Party.

Civil Revn. No. 147 of 1917, Decided on 18th April 1918, against an order of Small Cause Court Judge, Bhagalpur, D/- 29th January 1917.

(a) Contract Act (1872), S. 23— Slavery bond wholly void.

A contract under which a labourer engages to work without any payment whatsoever under conditions that make it practically impossible for him to discharge the debt until some other capitalist redeems him is wholly void. Such a contract is indistinguishable from slavery and in practice compels the debtor and his descendants to a perpetual serfdom. [P 250 C 1]

(b) Contract Act (1872), Ss. 23 and 24— Debtors executing bond with interest at high rate --One of them to render service without pay till bond becoming payable—Consideration as to render service is unlawful—Contract being indivisible is void—Condition to serve broken on first day—Limitation commenced from date of bond under Limitation Act (1908), Art. 75.

Two brothers executed a bond in favour of the plaintiff for a principal sum of Rs. 10 with interest at a high rate. One of the executants at the same time promised to work for plaintiff without pay for a period of two years from the date of the bond, i. e., up to the date on which the bond was to become payable. In default of service the bond was to become payabls at once. No service was rendered to the plaintiff even for a single day.

Held: (1) that the part of the consideration as to one of the defendants working for the plaintiff was unlawful; (2) that the contract being indivisible, and it being impossible to separate the lawful part of the consideration from the unlawful part, the whole was void under S. 24; (3) that the condition of the bond as to work having been broken on the very first day, limitation began to run from that very day under Art. 75. [P 250 C 1]

Kulwant Sahay and *Guru Saran Prasad*—for Petitioner.

Kurshed Husnain—for Opposite Party.

Mullick, J.—The plaintiff appears to be a landlord and defendants 1 and 2 to be labourers who have executed in favour ef the plaintiff a bond with somewhat curious terms, while defendant 3 appears to have been impleaded as a member of the joint family to which defendants 1 and 2 belong. The bond is for a principal sum of Rs. 10 with interest at half an anna per rupee per mensem, i. e., at 37½ per cent. per annum. The second executant at the same time promised to

work for the plaintiff without pay for a period of two years from the date of the bond, that is to say, from 3rd September 1911 till 2nd September 1913, on which date the bond was to become payable. The words in which the promise is expressed are as follows:

"I, Chaudhry Sahu, will remain all along in attendance and do the agricultural and other works of the aforesaid Ghosh and will never remain absent from duty. If I be absent from the work the aforesaid Ghosh will be competent to recover the whole amount mentioned in the bond together with interest calculated at the rate of one anna per rupee per mensem without any consideration and without waiting for the expiry of the due date from the person and property of us (the executants).

It is admitted that the second executant has not worked for the plaintiff for a single day and the present suit was brought on 2nd September 1916 for the principal sum with interest at the enhanced rate. Now it is quite clear that the bond is what is locally known as a "slavery bond" and is very similar to that which was the subject of discussion in *Ram Sarup Bhagat* v. *Bansi Mandar* (1) In our opinion a contract is wholly void in which a labourer engages to work without any payment whatsoever under conditions that make it practically impossible for him to discharge the debt until some other capitalist redeems him. Such a contract is indistinguishable from slavery and in practice compels the debtor and his descendants to a perpetual serfdom.

But the learned vakil for the plaintiff urges that although the condition with regard to the labour may be illegal and void, that part of the contract which provides for the payment of interest on money lent is enforceable. In my opinion the contract is indivisible and it is impossible to separate the legal part of the consideration from ahe illegal part. Therefore under S. 24, Contract Act the whole contract is void. Next, there is the question of limitation. The condition of the bond being an agreement to labour, time began to run against the plaintiff on the first day of the default to labour, that is to say, on 3rd September 1911. The general principle that time begins to run from the earliest date applicable to cases of instalment bonds under Art. 75, Lim. Act, is also applicable to cases of contracts which are subject to a condition. Therefore as time began to run from 3rd September 1911, and as the suit was not brought till 2nd September 1916, it is clearly barred. On both grounds, therefore, the plaintiff's suit was rightly dismissed and this application for revision must be dismissed with costs.

Thornhill, J.—I agree.

V.S./R.K. *Application dismissed.*

(1) [1915] 42 Cal. 742=30 I. C. 955.

A. I. R. 1918 Patna 250

ROE AND ALI IMAM, JJ.

Bali Sahu—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 402 of 1917, Decided on 18th December 1917.

Criminal P. C. (1898), S. 235—Sentences passed under S. 47 (a), Bihar and Orissa Excise Act and Ss. 9 (c) and 9 (f), Opium Act, in same trial in respect of two sales of opium to same person and for possession of residue—Trial is not illegal—Separate sentences for possession and sale did not contravene S. 26 General Clauses Act—Bihar and Orissa Excise Act (1915), S. 47 (a)—Opium Act (1878), S. 9 (c) (f).

Separate sentences were passed on the accused under S. 47 (a), Bihar and Orissa Excise Act and Ss. 9 (c) and 9 (f), Opium Act, in the same trial in respect of two sales of opium to the same person and for possession of the residue of the opium left after the sales.

Held: (1) that the whole series of acts for which the accused was punished made one transaction within the meaning of S. 235, Criminal P. C., and the joint trial of the offences therefore was not illegal; (2) that the conviction for possession was not in respect of the same article as that sold, but for the residue, and that therefore separate sentences for the possession and the sale did not contravene the provisions of S. 26, General Clauses Act. [P 251 C 1]

G. C. Pal—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—In this case the applicant has been sentenced under S. 47 (a), Bihar and Orissa Act 2 of 1915 to pay a fine of Rs. 50, and under S. (9) (c), Act 1 of 1878 to undergo rigorous imprisonment for three months and to pay a fine of Rs. 50 and under S. 9 (b), Act 1 of 1878, to pay a fine of Rs. 50. The grounds on which we are asked to interfere are, firstly, that offences under the Bihar and Orissa Act of 1915 and the Opium Act should not have been tried together; secondly, that the possession and the sale constitute the same offence, and that therefore the separate sentences are against S. 26, General Clauses Act, and thirdly, that the applicant was prejudiced by the admission of documentary and oral inadmissible evidence in the Magistrate's Court.

Upon ground 1 taken, it seems that the circumstances of the case fall well within S. 235, Criminal P. C. The two sales for which the applicant has been punished were made to the same person and the possession for which he has been punished was the possession of the residue of the opium left after the sale. The whole series of acts clearly made one transaction. This consideration also deals with ground 2 taken on behalf of the applicant. The conviction for possession has not been in respect of the same article as that sold, but for the residue. With regard to ground 3 the learned Sessions Judge most carefully discarded all the irrelevant evidence before dealing with the facts of the case. One lot of irrelevant evidence discarded, he describes, as based upon a palpable fallacy and the other lot he describes as rubbish and valueless. Certainly the applicant was not prejudiced in the appellate Court by the irrelevant evidence adduced in the Court of first instance. We are dealing with the judgment of the Sessions Court and are unable to say that the judgment of the Sessions Court is in any way improper. The sentences are not excessive. The application is rejected. The applicant will surrender to his bail and serve out the remainder of his sentence.

V.S./R.K. *Application rejected.*

A. I. R. 1918 Patna 251

MULLICK AND THORNHILL, JJ.

Abdul Sattar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 10 of 1918, Decided on 27th June 1918, against order of Munsif, Purneah, D/- 27th April 1918.

(a) Criminal P. C. (5 of 1898), S. 476—Order of prosecution without evidence is illegal.

A Court while proceeding under S. 476,. Criminal P. C., is required to arrive at findings upon some evidence before it. If there is no evidence on the record and the Court proceeds to order the prosecution of a person for forgery in relation to a proceeding before it the discretion vested in the Court under the section is illegally exercised and the order is liable to be set aside.

[P 251 C 2; P 252 C1]

(b) Criminal P. C. (1898), Ss. 195 and 476 — Conditions mentioned in S. 195 do not apply to S. 476.

Section 476, Criminal P. C., is a self-contained section and the reference to S. 195 in that section is only made for the sake of brevity and refers not to the conditions enumerated in S. 195 but merely to the offences enumerated in that section.

[P 252 C 1]

(c) Criminal P. C. (1898), S. 476 — Scope — It empowers executing Court to order prosecution.

Section 476, Criminal P. C., confers jurisdiction upon an executing Court to order the prosecution of a person for forgery even though not a party to the execution proceedings if the offence is brought to the notice of the Court in the course of the proceedings. [P 252 C 1]

R. L. Dutt—for Petitioner.

Manohar Lal—for the Crown.

Mullick, J.—This application arises out of an order made by the Munsif of Purneah directing the prosecution of the petitioner for the offence of forgery. The facts appear to be these: A decree was obtained by Mt. Bachah Mayi against Adalat Hossain for a sum of money and an execution petition was filed on 30th July 1917, purporting to have been signed by the pen of Abdul Sattar. When notice was issued upon the judgment-debtor he appeared and said that Bachah Mayi had died before 30th July 1917 and that before her death he had paid off the judgment-debt to her. The Munsif thereupon dismissed the execution case holding that it had been satisfied. Whether that dismissal was correct or not upon the evidence before him is a matter with which weare not concerned at the present moment but the judgment-debtor thereupon filed a petition before the Munsif stating that Abdul Sattar the petitioner now before us was the person who had forged the name of Bachah Mayi on the execution petition and praying that proceedings might be taken against Abdul Sattar under the criminal law. Notice was issued upon the petitioner and he appeared and contended that he had had nothing whatsoever to do with the execution petition.

The Munsif thereupon without making any investigation directed the prosecution of the petitioner under S. 476, Criminal P. C. Now it is clear that the Munsif had no materials before him. There is nothing whatever on the record to show that this petitioner had any connexion with the execution petition or that he ever took any part in the execution of the decree. The learned Munsif states in his explanation that it is sufficient that he should be satisfied that there is a case against the petitioner and so long as he is satisfied he is competent to make an order under S. 476, Criminal P. C. That is doubtless true but the law requires that the findings of the Court

should be arrived at upon some evidence and if in this case there was no evidence then the discretion vested in the Munsif has been illegally exercised. The learned Munsif is of opinion that the pleader who filed the execution petition if examined is sure to prove the case against the petitioner. On what ground the Munsif has come to this conclusion is not disclosed and we cannot on mere surmise take for granted that the pleader if examined will support the Munsif.

The proper order therefore for us to make is that the order directing the prosecution of the petitioner be set aside and the case be remanded to the learned Munsif for further inquiry. A point has been raised by the learned vakil for the petitioner that inasmuch as the alleged forgery in this case was committed by a person who was not a party to the execution proceedings no prosecution can be directed under S. 476, Criminal P. C., and that the person aggrieved should be left to take his remedy by ordinary complaint in the criminal Court. Reliance is placed on *In re Kallaru Ramalingam* (1), but the ruling of this Court in *Rajkumar Singh* v. *Emperor* (2) settles this point so far as this Court is concerned. It was decided in that case that S. 476, Criminal P. C., is a self-contained section and that the reference to S. 195, Criminal P. C., in this section is only made for the sake of brevity and refers not to the conditions enumerated in S. 195, Criminal P. C., but merely to offences enumerated in that section. In my opinion S. 476, Criminal P. C., confers jurisdiction upon the Munsif to order the prosecution of the petitioner even though not a party to the execution proceedings if the offence of forgery is brought to the notice of the Munsif in the course of a judicial proceeding.

Thornhill, J.—I ageee.

V.S./R.K. *Case remanded.*

(1) [1915] 40 Mad. 100=31 I. C. 653.
(2) [1917] 1 P. L. J. 298=37 I. C. 487.

A. I. R 1918 Patna 252

ROE AND JWALA PRASAD, JJ.

Mousi Lal and *another*— Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 464 and 483 of 1917, Decided on 5th February 1918, against order of Sess. Judge, Muzaffarpur, D/- 12th November 1917.

Penal Code (1860), Ss. 224, 323 and 353— Arrest by constable under warrant not signed by Magistrate nor directed by Superintendant of police under his signature —Rescue in such case is no offence — If unnecessary hurt is caused in rescue accused can be punished under S. 323.

One *L* was arrested by a constable under a warrant, which was not signed by the Magistrate issuing it and which was made over to the Thana Officer on an order purporting to have been made by the District Superintendent of Police but not signed by anybody. *L* was rescued by the other accused who caused unnecessary hurt to the constable in effecting the rescue:

Held: (1) that the warrant was defective and that the constable having purported throughout to act under the warrant the arrest of *L* was illegal and that the latter was not therefore guilty of any offence in effecting his escape ;

(2) that the persons who effected *L's* rescue were guilty of an offence under S. 323. [P 253 C 1]

Hasan Imam and *G. C. Pal*—for Petitioners.

Asst. Government Advocate — for the Crown.

Judgment.—The accused in Criminal Revision No. 483, Lal Bahadur, has been convicted of an escape from lawful custody and sentenced to six months' rigorous imprisonment. The lawful custody is alleged to have been effected by one Mathura Lal, constable, on a warrant which, it is admitted, was not signed by the Magistrate issuing it and made over to the Thana Officer on an order purporting to be made by the District Superintendent of Police, but not signed by anybody. It was admitted for the purpose of the argument in the Courts below that this warrant is defective. We need not go into this question. It is alleged however that the warrant itself was sufficient authority for the arrest, inasmuch as by it the constable had reason to believe that the person to be arrested had committed a cognizable offence. Had the constable said so himself we might conceivably have accepted this view, but nowhere in his evidence does he suggest that he had reason for such belief. He purports to have acted under cover of the warrant and we must

take the case as stated by the complainant in it. Lal Bahadur must be acquitted and discharged from his bail if he is not required for any other offence.

In Criminal Revision No. 464 the same remarks apply. It is clear on the evidence that the three men convicted of effecting the accused's rescue caused unnecessary hurt to the constable. One of the injuries inflicted was a blow over the eye with "dhanta." We are not able to hold that this assault was justified even if the arrest of Mathura Lal was technically wrong. It was Basdeo Singh who is responsible for the principal injury; Mauji Lal was responsible really for the whole occurrence by giving the orders to beat the constable in order to rescue the accused. The three accused were sentenced to nine months' rigorous imprisonment each under S. 353. In the exercise of our powers in revision we alter these convictions to convictions under S. 323 and direct that Basdeo Singh be sentenced to six months' rigorous imprisonment, Mauji Lal to three months' imprisonment and Kari Singh to three months' rigorous imprisonment. We see no reason to continue the bonds into which the accused have been directed to enter for the keeping of the peace. Clearly this was an offence committed on a sudden impulse. Lal Bahadur has now been convicted on the principal charge. There is no cause for anticipating a further breach of the peace by the accused.

V.S./R.K. *Convictions altered.*

A. I. R. 1918 Patna 253

ROE AND JWALA PRASAD, JJ.

Kalika Dutt Mandar—Appellant.

v.

Tulsi Mandar—Respondent.

Second Appeal No. 2055 of 1915, Decided on 11th July 1917, from decision of Dist. Judge, Bhagalpur, D/- 25th June 1915.

Civil P. C. (1908), S. 41, R. 27—Plaintiff failing to discharge onus which lay on him owing to non production of document—He cannot be allowed to produce it in appeal.

Order 41, R. 27 (b), does not mean that in order to enable the appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document. [P 253 C 2]

Where the plaintiff on whom the onus lay failed to discharge it owing to the non-production of a document which it was in his power to produce, but for the production of which he took no steps:

Held: that the provisions of O. 41, R 27 (b), could not be used in his favour and that he could not be allowed to produce the document in appeal. [P 254 C 1]

Rajendra Prasad—for Appellant.

Krishna Sahay—for Respondent.

Judgment.—The plaintiff in this suit sued upon a bond, in which it was set forth that the consideration upon which this bond was given was an existing consideration under a previous bond and account. The Court of first instance refused to accept the oral evidence given in support of this consideration and pointed out that it was impossible to give the plaintiff a decree without reliable accounts, the previcus bond itself and a close inspection of these papers. Upon appeal from the deeree of the first Court dismissing the plaintiff's suit, the appellant offered to place before the District Judge the original bond whereby the original consideration might have been proved. The learned District Judge refused to accept the bond and dismissed the plaintiff's appeal. Against that decision an appeal is made to this Court. The short point therefore is what document should an appellate Court accept under O. 41, R. 27. R. 27 (a) has nothing to do with the case before us, and the case comes under R. 27 (b):

"If the appellate Court requires any document to be produced . . . . . to enable it to pronounce judgment, or for any other substantial cause, the appellate Court may allow such evidence to be produced."

This does not mean that in order to enable the appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document. In this case the burden of proof was upon the plaintiff and in the absence of proof of the consideration the Court was in a position to pronounce judgment in favour of the defendant. The document was not required to enable the Court to pronounce judgment. The highest at which this can be put is that it might have been required in order to enable the Court to pronounce judgment in favour of the plaintiff, which is an entirely different thing. The question remains whether sufficient cause was shown for admitting the document in the

lower appellate Court. From the record of the case as tried before the learned Munsif it is clear that the plaintiff was fully aware of the precise place, namely, the record room at Bhagalpur, in which this document might have been found. He took no steps to search for it and produce it in time for use during the adjudication of his claim, and the learned District Judge exercised, in our view, a very sound discretion in refusing to regard the pure laziness of the plaintiff in the lower Court as sufficient cause for giving him a peculiar license in the appellate Court. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 254

DAWSON-MILLER, C. J. AND MULLICK, J.

Brij Nath Sahai Singh and *others*—Appellants.

v.

Hari Charan Ray and *others*—Respondents.

Misc. Civil Appeal No. 296 of 1917, Decided on 23rd October 1918, from a decision of Dist. Judge, Shahabad.

Limitation Act (9 of 1908), Art. 182—Defending appeal by judgment-debtor is not step-in-aid.

Defending an appeal preferred by the judgment-debtor in an execution proceeding is not a step-in-aid of execution within the meaning of Art. 182. [P 254 C 2]

Sunder Lal—for Appellants.

L. N. Singh—for Respondents.

Dawson-Miller, C. J.—In,my opinion this appeal should be dismissed. This is a secondappela from a judgment of the District Judge of Shahabad refusing to re ersea judgment of the Court below, which dismissed a petition for execution on the ground that it was time barred. Another objection was taken, but with that we are not now concerned. The question is a very short one. It appears that in the year 1906 the appellant obtained a decree. Between that time and 1912 he appears to have made three separate attempts to execute his decree. Each of these attempts proved infructuous. Then on 12th April 1912 a fresh petition for execution was filed. That, for reasons which do not concern us, was dismissed. On appeal to the District Judge on 5th July 1913 the appeal was allowed and the petition for execution granted. From that time until 20th July 1916, which was more than three years, the appellant took no steps to try and obtain execution. From the order of the District Judge, dated 5th July 1913, the judgment-debtor appaled to the High Court at Calcutta and on 20th April 1915 the High Court at Calcutta dismissed the appeal. Then on 20th July in the following year an application was made by the present appellant, which has been called an application to continue the previous petition for execution, that is to say, the petition which was filed on 12th April 1912. No doubt the reason why the petition has been so described and why probably it was set out in that form was because it was more then three years since the appellant had obtained his decree before the District Judge in July 1913 and he had taken no steps-in-aid of his execution since then, except that he had defended an appeal to the High Court at Calcutta.

That obviously was not a step-in-aid of execution, because the appeal by the judgment debtor to the High Court at Calcutta was no bar to the execution or to the carrying out of the decree which the appellant already had from the District Judge. That application, whether it is called an application to continue the previous petition or whether it is called a petition for the execution of the decree, was dismissed for default. Then the present petition was brought for execution on 1st February 1917, and both the lower appellate Court and the Court of first instance who tried these proceedings have come to the conclusion that the petition is time-barred. It seems to me that that decision is one which cannot be impeached. The Article in the Limitation Act which in my opinion clearly relates to a petition of this sort is Art. 182, and the period of limitation prescribed by that article is three years from the date of applying in accordance with law to the proper Court for execution or of taking some step-in aid of execution of the decree or order. It is quite clear to my mind that the last step which was taken in execution in accordance with law was not later then 5th July 1913 and as the present petition was not filed until 1st February 1917, it seems to me that it is quite clear that that petition is out of time and ought to be dismissed. It was contended in the first place that the petition of February 1917 was within three years of that filed on 20th July

1916 and was therefore in time. But the earlier petition which was dismissed for default was itself time-barred and being out of time, cannot constitute a fresh starting point within three years of which another petition can be lodged. To hold otherwise would be to defeat the whole object of the Limitation Act.

It was also contended on behalf of the appellant that Art. 182 does not apply to the case at all, although it cannot be denied that this is a petition for execution, but it is contended nevertheless that Art. 181 applies, which provides for applications for which no period of limitation is provided elsewhere in this schedule or by S. 48 Civil P. C. I cannot accept this view. It is quite clear to my mind that Art. 182 is the proper article to apply to a petition of this sort. But even if Art. 181 applies, it is very difficult to see how it can assist the appellant in any way, because there the time begins to run when the right to apply accrues. That part of the article the learned vakil for the appellant has not dealt with, but it seems to me that the right to apply is existing all along and that only shows that Art. 181 was clearly not meant to cover the case of a petition for execution such as that provided for in Art. 182. It has not been suggested when the right to apply accrued or before what time it was impossible to make this application. It is not necessary for me to say more then this that the article which is clearly applicable to the present case is Art. 182. That being so and it being quite clear that three years had elapsed since the last step taken by the appellant in aid of the execution, it follows that this application is time-barred and that this appeal ought to be dismissed with costs.

Mullick, J—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 255

MULLICK AND ATKINSON, JJ.

Mritunjoy Praharaj— Plaintiff— Appellant.

v.

Jagannath Jeu—Defendant— Respondent.

Appeal No. 11 of 1917, Decided on 7th December 1917, from a remand order of Dist. Judge, Cuttack, D/- 15th June 1917.

(a) Bihar and Orissa Tenancy Act (1913), S. 31—"Registration" only means that landlord should signify consent to transfer — Consent may be verbal, written.

The word "registration" in S. 31 means nothing more than that the landlord should signify his consent to the transfer; and his consent may be either verbal, written or in any way that he thinks proper. [P 256 C 1]

(b) Bihar and Orissa Tenancy Act (1913), S. 31—Transferee of occupancy has to apply for consent of landlord—Transferee is liable to pay fee, after consent — Suit lies to recover it and also second appeal from it.

Under S. 31 it is the duty of the transferee of an occupancy holding to apply to the landlord for his consent; and once the landlord gives his consent, the transferee becomes liable to pay the fee prescribed by the Act. If the transferee refuses to pay the fee a suit would lie to recover it, and in that suit a second appeal to the High Court would be competent. [P 255 C 2; P 256 C 1]

Baikuntha Nath Dutta — for Appellant.

Bichitrananda Das—for Respondent.

Judgment.— The plaintiff sues the defendant, who is his tenant, as transferee of an occupancy holding, for recovery of the registration fee which the plaintiff alleges is payable to him under S. 31, Orissa Tenancy Act. The defence put forward by the defendant is that there is no obligation upon a tenant as transferee to register his transfer or to pay the fee prescribed by S. 31, Orissa Tenancy Act.

The learned Deputy Collector yielded to the argument put forward by the defendant and held that there was no obligation upon the defendant to pay any registration fee to the plaintiff; and consequently that the plaintiff's suit was not maintainable. The learned Judge on appeal took a different view and held that S. 31, Orissa Tenancy Act, created a mandatory duty upon the tenant by way of transfer to apply to the landlord for registration of his transfer within one year from the date of the transfer; and that thereupon the tenant was liable to pay to the landlord a fee equivalent to 25 per cent. of the consideration money or six times the annual rent of the holding. Accordingly the learned Judge reversed the order of the Deputy Collector and remanded the case for hearing on the merits. The case now comes before us in second appeal, and we have satisfied ourselves that a second appeal lies under this particular statute. We have listened to a lengthy argument on the construction of S. 31. The fee sued for is recoverable under the provisions of S. 250, Orissa Tenancy Act, in the same way as if it were arrears of rent. Cl. (e), S. 250

enacts that the provisions of the Act applicable to arrears of rent and suits and proceedings in respect thereof shall apply to anything payable or deliverable in respect of any registration fees prescribed under Ss. 14, 15, 16 and 31. S. 31 runs as follows:

"When any occupancy holding or portion of a holding is transferred, . . the transferee or his successor-in-interest shall within two years from the date of the commencement of this Act or within one year from the date of the transfer, whichever is later, apply to the landlord to whom the rent of the holding or portion is payable for registration. . . The maximum fee payable on such registration shall be a sum equal to 25 per cent. of the consideration money or to six times the annual rent of the holding or portion thereof, whichever is greater."

The section clearly creates a duty upon the tenant to apply for registration. Now "registration" would seem to be an inappropriate term unless some form or procedure is prescribed as the method by which registration is to be effected. However this difficulty is got over, inasmuch as it is admitted by the learned vakil appearing for the appellants before us that registration means in this section nothing more than that the landlord should signify his consent to the transfer; and that his consent may be either verbal, written, or in any way that the landlord thinks proper. It is the duty of the tenant to apply to the landlord for his consent; and once the landlord gives his consent the tenant is clearly liable to pay the fee prescribed by the Act. In this case the landlord has voluntarily consented to a transfer of the tenancy to the defendant and once he has done this, his right to sue arises even though the tenant may not have expressly applied for registration. If the tenant fails to apply for registration with in the time prescribed, and the landlord does not consent to the transfer, the tenant loses the protection afforded to a transferee of an occupancy holding by the provisions of the Orissa Tenancy Act.

This construction of sub-S. (1), S. 34, is fortified by sub-Ss. (2) and (3) of the same section. Sub S. (2) says that

"if in any case, the landlord accepts the fee authorized by sub-S. (1), his consent to the transfer and to any distribution of the rent thereby rendered necessary shall be deemed to have been given."

Sub-S. (3) provides that if the landlord refuses to accept the requisite fee the transferee or his successor may deposit such fee with the Collector, whereupon the landlord shall be deemed to have consented and the transfer to have been registered.

We have no doubt whatsoever that this action is maintainable and that the learned Judge was right in setting aside the order of the learned Deputy Collector and ordering a remand. This appeal accordingly fails and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 256

ROE AND COUTTS, JJ.

Ramkishun Lal —Applicant—Appellant.

v.

Jatadhari Lal and *others*—Opposite Party—Respondents.

Appeal No. 157 of 1917, Decided on 27th May 1918.

(a) Civil P. C. (1908), O. 9, R. 8—Appearance of pleader without instructions to conduct case is not appearance.

Where the pleader of a party has no instructions but to ask for time, his sitting in the Court room is not an appearance. [P 257 C 1]

(b) Civil P. C. (1908), O. 9, R. 13, and O. 17, Rr. 2 and 3—Defendant's pleader declining to conduct case for want of instructions—Decree is ex parte—Court's recording decree on contest does not make it decree on contest—Agreement in good faith between parties to apply for adjourment—Time should be granted.

In a partition suit steps were being taken to arrange a compromise between the parties and a joint application for time was put in by the plaintiff and the defendant. The application was rejected and the Court proceeded to record the evidence of the plaintiff. The defendant's pleader declined to cross-examine the plaintiff's witnesses, saying that he had no instructions save to ask for time. The Court then passed a preliminary decree "on contest." The defendant then applied for a re-hearing but his application was rejected on the ground that the preliminary decree having been passed on contest, O. 9, R. 13, did not apply.

Held: (1) that the mere fact that the Court recorded that the decree was made on contest did not make it a decree on contest.

(2) that the procedure adopted by the lower Court was that provided by O. 17, R. 2, and that therefore O. 9, R. 13, of the Code was applicable.

Where there is an agreement in good faith between the plaintiff and the defendant to apply for adjournment for the purposes of a compromise, that in itself is a sufficient excuse for the defendant for not anticipating an attack by the plaintiff, and therefore not being prepared to meet it. [P 257 C 1, 2]

Chandra Sekhar Banerjee—for Appellant.

Shoroshi Charan Mitter, *Sudhangan Kumar Mitter*, *Sant Prasad* and *Tribhuban Nath Sahay*—for Respondents.

Judgment.—In this case the appellant is aggrieved by an order of the Subordinate Judge of Muzaffarpur, refusing an application to re-hear a suit decided in the following circumstances:—This was a partition suit. Defendant 10 had put in a plea that there had been a previous partition. Steps were being taken for a compromise between the plaintiff and the defendant, the defendant admitting that partition should proceed but limiting the plaintiff's rights in that partition to less than the whole of the lands claimed in the plaint. Accordingly on 13th February 1917 plaintiff and defendant 10 put in an application for time jointly. This application for time was rejected. The Subordinate Judge then put the plaintiff into the witness box. The defendant's pleader declined to cross-examine, saying that he had no instructions save to ask for time. The Subordinate Judge then recorded on 13th February 1917:—"Case opened. Plaintiff examined witness Jatadhari Lal. Arguments heard. Preliminary decree passed on contest." (N. B. The word uncontested in the paper book is a misprint). "Suit adjourned to 1st March 1917 for further orders."

Defendant 10 then applied for a rehearing. His application was rejected, on the ground that:

"the preliminary decree was passed on contest as against the petitioner, as appears from the judgment and record. Therefore R. 13, O. 9, does not apply and the applicant has failed on this ground."

Defendant 10 is now appellant before us. It is clear that the order of the learned Subordinate Judge cannot be supported on the ground given. The mere fact that he said that the decree was made on contest would not make it a decree on contest; we have to look into the circumstances and decide for ourselves whether it was on contest or not, and the decision in *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (1) is clear authority for the proposition that where a pleader has no instructions but to ask for time, his sitting in the Court room is not an appearance. It is obvious that the decree against the appellant was made ex parte. It is argued further on behalf of the respondent that O. 9, R. 13, does not apply to cases decided under O. 17, R. 3. With that proposition we have no reason to dissent. But the question again is one of fact, whether the case was decided under O. 17, R. 3, or not, and again it does not make a decision under O. 17, R. 3, that the Court should have erroneously imagined that it was acting under that section. The decision of the suit forthwith in spite of the default contemplated in O. 17, R. 3 is limited to cases in which there is already prior to the default sufficient material for a decision. If there is no material on the record at all, the case would be obviously dismissed against the plaintiff. If it is necessary to bring on to the record evidence sufficient to give the plaintiff a decree it could not be said that the decision was made forthwith. In the case before us what happened was not a decision made forthwith but a hearing of the plaintiff's witness and a decision in the absence of the defendant. This was a proceeding under O. 17, R. 2, not under O. 17, R. 3, and O. 9, R. 13, applies to it.

On the merits we are of opinion that the application should succeed. Where there is an agreement in good faith between the plaintiff and the defendant to apply for adjournment for the purposes of a compromise, that in itself is a sufficient excuse for the defendant for not anticipating an attack by the plaintiff and therefore not being prepared to meet it. As far as we can ascertain from the circumstances of the present case the joint application was made in good faith and should have been granted. The appeal is therefore decreed with costs. Hearing fee in accordance with the scale laid down. The decree of 13th February 1917 is set aside. The suit will be reheard on its merits.

V.S./R.K. *Decree set aside.*

(1) [1907] 34 Cal. 403. (F. B.).

A. I. R. 1918 Patna 257

ROE AND ALI IMAM, JJ.

Mahangu Singh and *others*—Accused —Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 424 of 1917, Decided on 19th December 1917, from order of Sess. Judge, Monghyr, D/- 7th Septem. 1917.

(a) Criminal P. C. (1898), S. 423—Appellate Court has power to alter finding of trying Magistrate—Finding is not limited to finding of law.

Section 423, Criminal P C., empowers an appellate Court to alter the finding of the trying

Magistrate, maintaining the sentence, and the word 'finding' is not limited to a finding upon a point of law as distinct from a finding upon a point of fact. [P 258 C 2]

(b) Criminal P. C. (1898), S. 423—Charges under Penal Code, Ss. 147 and 353—Conviction under S. 323—Appellate Court altering finding and convicting under S. 147 but maintaining sentence — Procedure is not illegal.

Accused were charged by the trying Magistrate under Ss. 147 and 353, but were ultimately convicted under S. 323 of the Code. On appeal the Sessions Judge pointed out that the conviction under S. 323 could not be maintained, but holding that the accused had been guilty of rioting he altered the conviction to one under S. 147, maintaining the sentences imposed under S. 323:

Held: that the procedure adopted by the Sessions Judge was not illegal. [P 258 C 2]

Naresh Chandra Sinha — for Petitioners.

Assistant Government Advocate — for the Crown

Judgment.—In this case the applicants before us were placed upon their trial on charges under Ss. 147 and 353, I. P. C., the general charge against them being that it being known to them that the Sub-Inspector of Excise was making preparations to search their houses and have them arrested by the regular police, they gathered in a body with the intention of preventing by force the fulfilment of his duty by the Sub-Inspector of Excise. The charge actually framed against the applicants was that they were members of an unlawful assembly with the common object of resisting the arrest and rescuing the persons arrested by the Excise Sub Inspector Zainul Abdin Kuli. After going into the evidence the Deputy Magistrate who tried the case was of opinion that the common object of the assembly was not to resist the arrest but to resist the search. He therefore acquitted the applicants of the offence charged under S. 147 but convicted them under S. 323, with which offence they had not been charged. On appeal to the Sessions Court the learned Judge pointed out that the conviction on the charge under S. 323 could not be maintained; but on going into the facts of the case he found that the intention of the unlawful assembly was to snatch away the cocaine phials and avoid arrest. He therefore found that the common object stated in the charge was at least one of the commom objects of the assembly, and that therefore the assembly was unlawful and that the applicants should have been convicted of rioting. Therefore under the provisions of S. 423 he altered the conviction under S. 323 to a conviction under S. 147, maintaining the sentences imposed under S. 323.

In this Court we are asked to revise this decision on two grounds: Firstly, that the learned Judge had no power to convict of an offence on which there had already been an acquittal, and secondly, that the charge as framed was so vague, containing as it did only a part at least of the common object of the assembly, that the accused have been prejudiced in their trial with regard to it. On the first part of this argument the case of *Queen-Empress* v. *Jabanulla* (1) is indistinguishable. This case has been followed, as Mr. Desai's notes in the Index of Cases shows, in all the Courts in India. It is true that in *Dhanpat Singh* v. *Emperor* (2) Chapman, J., apparently was not required to go further than to say that where the law had been improperly applied to the facts found, an appellate Court had power to alter a finding of acquittal to a finding of conviction. This too is the limit to which Beachcroft, J., felt it ncessary to go in the case of *Romesh Chandra Banerjee* v. *Emperor* (3). We see no reason to limit the section in the way suggested upon the basis of these two cases. The learned Judges in these two cases were not required to go further than they did, and there is nothing in their judgments to suggest that they would not have been prepared to go further if necessary. The section as it stands empowers the Court to alter the finding, maintaining the sentences, and if it be conceded that a finding of acquittal may be altered to a conviction on a point of law, we can conceive no valid reason for limiting the word 'finding' to a finding upon a point of law as distinct from a finding upon a point of fact.

Upon the second point urged, it is found by both the Courts in effect that the common object of the assembly was to thwart the Excise Officers in the execution of their duty; and it cannot be suggested that the particular wording of the common object as contained in the charge was a wording which could in any sense have misled the applicants in their defence. We must therefore decline to in-

(1) [1896] 23 Cal. 975.
(2) [1917] 42 I. C. 598.
(3) A. I. R. 1914 Cal. 456=41 Cal. 350=23 I. C. 935.

terfere in this case. The applicants will surrender to their bail and serve out the remainder of their sentences.

V.S./R.K. *Rule discharged.*

A. I. R. 1918 Patna 259

MULLICK AND THORNHILL, JJ.

Mowar Raghubar Singh and *others*—Appellants.

v.

Gouri Charan Singh and *others*—Respondents.

Misc. Civil Appeal No. 139 of 1917. and Civil Revn. No. 173 of 1917, Decided on 6th June 1918, from a decision of Sub-Judge, Daltonganj.

Civil P. C. (1908), O. 3, R. 1 and O. 9, R. 9—Appearance by pleader—Dismissal in pleader's presence is not dismissal for default—R. 9 does not apply.

The personal appearance of a plaintiff who has instructed a pleader to appear in his behalf for the purpose of conducting the suit is not necessary and if the suit is dismissed in the presence of the pleader the decree of dismissal would not be subject to review in accordance with the procedure laid down in O. 9, R. 9. [P 259 C 2]

Panchanan Banerjee—for Appellants.

R. L. Dutt and *Rai Tribhuban Nath Sahaiy*—for Respondent.

Mullick, J.—The plaintiffs, who are 26 in number, brought a suit for declaration of title and recovery of possession against the defendants. On 6th March 1917, the case on the application of the plaintiffs was adjourned till 10th March 1917. On that day a compromise petition was filed bearing the signature of the vakil employed by the plaintiffs. In this compromise petition the thumb-marks of four of the plaintiffs, namely, Nos. 1, 13, 16 and 19, were affixed. It is alleged that plaintiffs 3, 11, 14, 15 and 21 were not parties to the compromise petition and that the compromise was so far as they were concerned fraudulent and that the decree of 14th March 1917 made by the Subordinate Judge dismissing the entire suit should be re-opened on the ground that the Court was misled.

Now an application to this effect was filed before the Subordinate Judge on 4th April 1917. He after considering the matter rejected it on the ground that it was frivolous and not supported by an affidavit. Against that order of 4th April 1917 the plaintiffs have filed Appeal No. 139 of 1917 and by way of precaution they have also filed an application for Revision No. 173 of 1917. The only way in which an appeal can be said to lie is by treating the decree as one for default in reference to which an application has been made by the absentee plaintiffs under O. 9, R. 9 and dismissed. It is clear that the personal attendance of these plaintiffs was not necessary inasmuch as they had instructed a vakil to appear in their behalf for the purpose of conducting the suit and as the learned vakil was present on the day that the decree of dismissal was made it would not be subject to review in accordance with the procedure laid down in O. 9, Civil P. C. Therefore upon the face of it the Subordinate Judge's order declining to restore the case cannot be treated as an order under O. 9, R. 9, Civil P. C., and therefore no appeal lies.

Next as to the application for revision the learned Subordinate Judge upon the facts before him was apparently satisfied that the compromise was a proper one and that the parties were properly represented before him. For all we know the vakil who represented the absent plaintiffs was authorized to consent to the compromise and it was not upon the facts before the Subordinate Judge necessary to inquire any further into his authority in the matter. In any event the Subordinate Judge was satisfied as to a certain state of facts and if under that view of the facts he has passed an order dismissing the suit, it cannot be said that he has acted without jurisdiction or that he has declined to exercise a jurisdiction which was vested in him. Therefore the matter cannot he re-opened under S. 115, Civil P. C. Hence revision does not lie. Then the learned vakil for the petitioners falls back upon the inherent powers of the Court and he relies upon the case of *Basangouda Hanmantgouda* v. *Churchigirigouda Yegangouda* (1), but in that case defendant 2 had not engaged any pleader at all and the compromise having been made upon instruction given by defendant 1 it was held that it was open to defendant 2 to re-open the decree on the ground that the Court was misled. There are certain observations in the concluding portion of the judgment of their Lordships of the Bombay High Court in that case with regard to the position when counsel in the case agrees to a compromise in excess of his authority but those observations were in my opinion in the nature of obiter dicta and

(1) [1910] 34 Bom. 408=5 I. C. 968.

were not necessary for the decision of the immediate matter before their Lordships.

The learned vakil also relies upon the case of *Peary Choudhury* v. *Sanoory Dass* (2), but in that case there was not only a total suppression of service, but also the filing of a false and fraudulent vakalatnama upon the strength of which the Court was led to grant a compromise decree. That case does not apply here. In the present case upon the facts as stated above by me the Court was satisfied that the vakil had authority to agree to the compromise and the only ground that the learned vakil before us to-day can urge for our interference is that the vakil acted in excess of his powers and that if he has so acted it is open to the Court in exercise of its inherent powers to re-open the matter. I on my part do not consider that equity, justice and good conscience require that I should exercise my inherent powers for the purpose of investigating the authority that was reposed by the plaintiffs in this case in their vakil. The plaintiffs will have ample opportunity by means of a separate suit to litigate that matter and if there was fraud on the part of the vakil or on the part of any other person, they will be entitled to bring a suit for the purpose of setting aside the decree on that ground. It is not necessary that the inherent powers of the Court should be invoked for the purposes of this case.

The result is that the appeal and the application are dismissed with costs. Hearing fee one gold mohur for the latter.

Thornhill, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(2) [1915] 27 I. C. 628.

A. I. R. 1918 Patna 260

CHAPMAN AND JWALA PRASAD, JJ.

Nand Kumar Singh and *others*—Decree-holders—Appellants.

v.

Bilas Ram Marwari and *others*—Judgment-debtors—Respondents.

Appeal No. 163 of 1916, Decided on 8th August 1917, from original order of Sub-Judge, Monghyr.

(a) Civil P. C. (1908), O. 20, R. 12—Appeal to Privy Council—Decree to be executed is decree of Privy Council.

Where there is an appeal to the Privy Council, the decree which is to be executed is the decree of the Privy Council, and the word 'decree' in O. 20, R. 12, in such a case must be taken to mean the Privy Council decree. [P 260 C 2]

Plaintiffs obtained a decree on 28th November 1905 for possession and for mesne profits from the date of the decree to the date of recovery of possession. There was an appeal to the High Court which was dismissed, and a further appeal to the Privy Council which was also dismissed on 7th March 1913. Plaintiffs obtained delivery of possession on 29th May 1914 :

Held : that the defendants were liable for mesne profits from 28th November 1905 the date of the decree up to 29th May 1914 the date of delivery of possession. [P 261 C 1]

(b) Court-fees Act (1870), S. 13 — S. 13 does not apply to appeal against preliminary decree.

Section 13 does not apply to the case of an appeal against a preliminary decree. [P 261 C 2]

Pugh, Krishna Sahai and *Abani Bhusan Mukerjee*—for Appellants.

Hasan Imam, S. N. Dutt, Purnendu Narain Singh and *Naresh Chandra Sinha*—for Respondents.

Judgment.—(20*th July* 1917.) The plaintiffs in this case obtained a decree by a Subordinate Judge for delivery of possession of certain property and for mesne profits from the date of the decree to the date of recovery of possession. This decree is dated 28th November 1905. There was an appeal to the Calcutta High Court which was dismissed on 14th May 1907, and an appeal therefrom to the Privy Council which was dismissed on 7th March 1913. The plaintiffs obtained delivery of possession, some on 29th May 1914 and others on 14th January 1916. They applied to the Subordinate Judge for the assessment of mesne profits from 28th November 1905 till possession was delivered. On the objection of the judgment-debtors the Subordinate Judge has awarded mesne profits merely for the period of about 14 months from 7th March 1913 to 29th May 1914. The decree-holders now appeal to this Court. Now it is well settled that the decree which is executed in such a case is the decree of the Privy Council in final appeal. We have therefore to ascertain what that decree was. It was a decree dismissing an appeal from a decree of the High Court of Calcutta, which was itself a decree dismissing an appeal from a decree passed by the Subordinate Judge. The Privy Council decree was therefore a decree affirming the decree of the Subordinate Judge. In order to ascertain what the Privy Council decree was we have to inquire what the decree of the Subordinate Judge was. That decree is quite clear

and it is to the effect that from the date of the decree, namely, 28th November 1905, up to the date of delivery of possession the plaintiffs are to get mesne profits. The Privy Council decree therefore is a decree, dated 7th March 1913, directing that the plaintiffs are to get mesne profits from 28th November 1905 up to the date of delivery of possession. We have been referred to O. 20, R. 12, Sch. 1, Civil P. C., and to the authorities under which we are compelled to inquire whether that rule has been complied with, whatever the decree may purport to say. What does the rule say? It says that

"mesne profits may be awarded from the institution of the suit up to the expiration of three years from the date of the decree."

Now the Privy Council have decided in case of *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1) that for the purpose of interpreting O. 20, R. 12, the word "decree" for the purposes of a case such as the present must be taken to mean the Privy Council decree. We have therefore to inquire whether an order directing mesne profits from 28th November 1905 up to the date of delivery of possession is in contravention of the rule under which mesne profits could only be awarded in this case from the date of the institution of the suit till three years after the date of the Privy Council decree. The 28th November was after the institution of the suit and three years had not expired from the date of the Privy Council decree when possession was delivered. The result is that this appeal is allowed and the order of the Subordinate Judge is set aside. We direct therefore that the mesne profits be calculated from 28th November 1905 up to the date when possession was delivered. This will not only be just, it will also be in accordance with O. 20, R. 12.

We are informed that certain of the appellants have not yet paid the deficit court-fee which was required for the purposes of this appeal, namely, the petitioners Raghuraj Singh, Jaduraj Singh and Sukhraj Singh. These petitioners are given time to file the deficit court-fee till Wednesday next, the 25th instant. On their failure to pay this court-fee the appeals so far as they are concerned, will be dismissed. In the event of their paying the court-fee their appeal will be decreed. The other appellants are entitled to their costs according to rule. There was an objection that no appeal lay. We held that an appeal did lie, having regard to the decision of their Lordships of the Privy Council in *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1). An application has been made for the refund of the court-fees paid. The refund is claimed under S. 13, Court-fees Act which requires an appellate Court to grant a refund certificate where a suit is remanded under O. 41, R. 23, Civil P. C. O. 41, R. 23 however applies only where the original Court has disposed of the suit on a preliminary point. In the present case the suit has not been disposed of by the first Court. It is a case of an appeal against a preliminary decree. A certificate for refund cannot be given by the Court under S. 13 in such a case.

Chapman, J.—Since the passing of the above order the three appellants who had not paid the deficit court-fees have applied for leave to amend the valuation in their plaints and to pay the court-fees assessable on the lower valuation. This may be done.

Jwala Prasad, J.—I entirely agree.

V.S./R.K. *Appeal allowed.*

(1) [1901] 23 All. 152=27 I. A. 209 (P. C.).

A. I R. 1918 Patna 261

ROE AND JWALA PRASAD, JJ.

Mahendra Ram and *another* — Petitioners.

v.

Singi Lal and *others* — Opposite Parties.

Civil Revn. No. 305 of 1917, •Decided on 23rd October 1918, from order of Munsiff, Siwan.

Civil P. C. (5 of 1908), O. 23, R. 1—Ground for withdrawal must be only some formal defect for which suit will fail — Other sufficient cause in Cl. 2 must be analogous to grounds in Cl. 1.

Under O. 23, R. 1 a suit can only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to bring a fresh suit. The sufficient grounds contemplated in Cl. 2 of the rule must be grounds closely analogous to the grounds given in Cl 1. The provisions of O. 23, R. 1 must be strictly applied. [P 262 C 1]

Rajendra Prasad—for Petitioners.

Chandra Sekhar Banerjee and *Sambusaran*—for Opposite Parties.

Judgment.—The order against which this application is made purports to have been made under O. 23, R. 1. The facts upon which it was passed do not appear in the petition asking to withdraw the suit, but are stated to have been ascertained orally from the pleader in charge of the plaintiff's case. They were firstly that the plaintiff's father had not been made a party to the suit; and secondly, that the defendant's brother had not been made a party to the suit. In the affidavit filed in support of the application it appears that the defendant denied that he has a brother at all and it is argued by the learned vakil for the applicant that the plaintiff's father had nothing to do with the contract upon which the suit was brought and was not a necessary party to the suit at all. We wish to draw particular attention to the imperative nature of the rule under which the Munsif purported to act. A suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The sufficient grounds contemplated in Cl. 2, should be grounds closely analogous to the grounds given in Cl. 1. We feel strongly that the Courts below are far too prone to allow suits to be withdrawn when they are more than a year old, so that the withdrawal of them from the file will improve the look of the file. The Munsif in the case before us does not appear to have been satisfied that the suit must fail. He was merely vaguely of opinion that the defect of parties might materially affect the decision. This was not a sufficient reason for giving the permission asked for. We are of opinion that in making the order against which this application has been made the learned Munsif failed to exercise the jurisdiction which was vested in him by law to make a serious inquiry as to whether the suit must fail for defect of parties or not.

We therefore remand the case to him and direct that he devote his attention strictly to the wording of the rule and that before granting permission to bring a fresh suit, he satisfy himself that the suit must fail by reason of a defect in it. We would draw the attention of other Courts to this decision for we are of opinion as we have already stated that a great deal of laxity prevails with regard to the manner in which these applications to withdraw with permission to bring fresh suits are granted. Costs will follow the result. The hearing fee of this Court is two gold mohurs.

V.S./R.K. *Case remanded.*

A. I. R. 1918 Patna 262

ROE AND JWALA PRASAD, JJ.

Karimulla Shah—Plaintiff—Appellant.

v.

Muhammad Raza—Defendant—Respondent.

Appeal No. 264 of 1917, Decided on 24th October 1918, from the original order of Sub-Judge, Gaya, D/- 11th November 1917.

Civil P. C. (1908), O. 34, R. 6—Compromise in mortgage suit giving right to mortgagee to proceed against other property if mortgaged property found insufficient—Formal order under R. 6 is necessary for proceeding against other property.

A compromise in a mortgage suit provided that if the amount due under the mortgage was not realised by sale of the mortgaged properties, the other properties of the judgment-debtor should be pursued in due course. A decree was passed in accordance with the compromise and the mortgaged properties having been sold, the decree-holders sought to proceed against the other properties of the judgment-debtor.

Held: that a formal order under O. 34, R. 6 was a necessary preliminary before proceeding against the properties not covered by the mortgage. [P 263 C 1]

Mohammad Fakhruddin and Panchanan Banerjee—for Appellant.

Kailas Pati and D. N. Sirkar—for Respondent.

Judgment.—These proceedings arose from a decree made upon a mortgage in accordance with a compromise. That compromise provided that if the amount due under the mortgage was not realised by sale of the mortgaged properties the other properties of the judgment-debtor should be pursued in due course. The properties covered by the mortgage were sold. It is not contested that there is a balance outstanding, but on the decree-holder's seeking to proceed against the other properties of the judgment-debtor two objections were made, firstly, that the judgment-debtors were minors and could not be pursued without guardians, and, secondly, that there had not been any order under R. 6, O. 34, and until that order was made no proceedings against

properties other than the mortgaged properties could be taken. In the first objection there appears, on the merits, to be no substance whatsoever, but there is substance in the contention that the making of a formal order under R. 6 is a necessary preliminary to pursue properties not covered by the mortgage. This has been the universal view taken, and the position is not altered by the fact that the original decree was a compromise decree. All that that compromise in effect does is to create an undertaking on the part of the judgment-debtor not to contest an order under R. 6. The benefit of an order under R. 6 is that a proper account is taken, the parties know exactly where they stand, and the proceedings are in order. As at present framed the proceedings are not in order. We, therefore, direct that a proper order be made under R. 6, stating the amount of the indebtedness of the judgment-debtor and formally authorizing the decree-holder to proceed against the properties not covered by the mortgage.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 263

MULLICK, J.

Sugrive Misser — Defendant—Appellant.

v.

Jogi Misser and *others*—Plaintiffs—Respondents.

Second Appeal No. 737 of 1917, Decided on 23rd March 1918, from decision of Sub-Judge, Shahabad, D/- 28th April 1917.

Civil P. C. (1908), S. 11—Decision does not operate as res judicata against pro-forma defendant against whom no relief is claimed.

The decision in a case does not operate as res judicata against a pro forma defendant who was not a necessary party to the suit and who was impleaded not because any relief was claimed against him, but because he might assist the Court in the adjudication of the claim against the real defendant. [P 264 C 1]

Nirsu Narain Singh—for Appellant.

G. C. Pal—for Respondents.

Judgment.—This appeal arises out of a suit for redemption in respect of 4·76 acres of land alleged to constitute a raiyati holding, which was mortgaged by Ramgolam Misser, and Ramdevi Misser, the predecessors of the plaintiffs, to one Rameshwar who is alleged to be the predecessor of the defendants. The suit was contested by defendant 1, who denied that Rameshwar was joint with him and asserted that the holding had always beloged to him and that Rameshwar never had any interest therein.

The Munsif found that the defendants had entered into possession through Rameshwar on the strength of the zurpeshgi mortgage and that the allegation that the defendant had title to the holding was false. At the same time the learned Munsif found that in or about 1901 the Maharani of Dumraon, the admitted landlord, attempted to attach and sell certain lands, which included a part of the present holding, in execution of a decree for arrears of rent obtained by her against the present plaintiffs. The defendant 1 thereupon brought a title suit against the Maharani joining the present plaintiffs as pro forma defendants and obtained a declaration in 1902 that a part of the land, which was about to be attached and which corresponds to plots 74, 76, 77, 148, 154, 162, 164, 168, 149 and 175 in the present suit, was not liable to be attached on the ground that he had raiyati interest therein. The learned Munsif was of opinion that this decree was res judicata between the defendant 1 and the plaintiffs, and therefore, the plaintiffs were not entitled to recover these plots in the present suit. The learned Munsif also found that since 1901 the defendant 1 had been asserting a right as occupancy raiyat in respect of these plots adversely to the plaintiffs' title as mortgagors and that therefore the suit in respect of these plots was also barred by limitation.

The learned Subordinate Judge in appeal agreed with the Munsif that the defendands got possession as mortgagees and that they had failed to prove that any part of the lands in suit was the first defendant's ancient occupancy holding. He also held that the Munsif's decisions with regard to res judicata and limitation was incorrect and he gave the plaintiffs a decree entitling them to redeem the whole of the lands in suit on payment of a sum of Rs. 160. The first point urged by the learned vakil for the defendant-appellant before me is that the learned Subordinate Judge was wrong on the point of res judicata.

Now I have to observe at the outset that the learned vakil has not supplied me, as required by the rules of this Court, with any copies of the translations of the

plaint, written statement, decree and judgment upon which he relies for this part of his argument. It is almost impossible to decide whether a former judgment is res judicata unless we have all the pleadings before us. I have, however, with the learned vakil's assistance examined the vernacular plaint and the judgment in the suit of 1901, upon which the learned vakil relies and which are on the record of the case before me. It appears from these documents that defendant 1 claimed no relief against the present plaintiffs, who were impleaded as pro forma defendants. It was not alleged in the plaint that he had any cause of action against them. His suit was directed against the Maharani of Dumraon who was defendant 1, and he desired to establish that he and not the plaintiffs was the tenant under the Maharani. He had a cause of action against the Maharani, namely, that the Maharani had obtained a decree for arrears of certain lands alleging them to be the holding of the present plaintiffs. There is a faint allegation in the plaint that that decree was collusive, but there is no allegation that there was any collusion between the Maharani and the present plaintiffs. The suit was aimed at the Maharani for the purpose of setting aside the deree on the ground of fraud, but in the absence of any specific allegation against the pro forma defendants in that suit that they were parties to the fraud and in the absence of any claim for relief as against them, it cannot be said that there was any question directly and substantially in issue between them and the plaintiff in that suit. The present plaintiffs were really not necessary parties at all and were impleaded not because any relief was claimed against, them, but because they might assist the Court in the adjudication of the claim against the real defendant, the Maharani of Dumraon. It would seem that the position was so regarded by the present plaintiffs, for they took no trouble to appear in the suit. The Maharani of Dumraon did appear, but finally allowed the suit to be decreed without any substantial contest.

In my opinion the case of *Malhi Kunwar* v. *Imam-ud-Din* (1) is somewhat similar to the case now before me. In that case the plaintiff in the first instance brought a suit for redemption of a mortgage against two sets of defendants, alleging that he had paid half the mortgage money to the second set and the remaining half only was due to the first set. The Court held that the second set of defendants had no concern with the land and that the whole amount of the mortgage money was due to the first set and he ordered redemption on that footing. The plaintiff thereupon brought a second suit to recover from the second set of defendants what he had paid to them on account of the mortgage, but it was held that the decision in the first suit did not operate as res judicata upon the point whether or not the second set of defendants were interested in the mortgaged property, and that it was open to these defendants to re-agitate this matter as between themselves and the plaintiff in the second suit. I think therefore the decision of the learned Subordinate Judge on the point of res judicata is correct and that it is not necessary for the present plaintiffs to set aside the decree of 1902 before proceeding to redeem.

The second point urged by the learned vakil is that there is no clear finding by the learned Subordinate Judge that the lands in suit were not the ancestral occupancy holding of defendant 1. It appears that the case made by defendant 1 before us is that he has succeeded to Rameshwar's property as a distant agnate upon the death of Rameshwar's son and that Rameshwar took a mortgage of the lands now in suit from persons who had no title to the same. The learned Munsif however claarly found that Rameshwar got into possession upon the strength of the zurpeshgi mortgage which was executed so far back as 1883. He also found that the defendants got into possession through Rameshwar and that they were not in possession before the mortgage upon the strength of a title independent of that of Rameshwar. The learned Subordinate Judge, although he has not examined the evidence upon the point in any details, has come to the same conclusion.

I am asked by the learned vakil to remand the case for a fuller consideration of the evidence, but I think it is unnecessary to do so having regard to the form that the litigation took in the Courts below. It would seem from

(1) [1905] 27 All. 59.

judgment of the learned Subordinate Judge that the defendants' main attack was directed to the points of limitation and res judicata. The finding of fact therefore being conclusive in second appeal, what is the position as regards limitation? Defendant 1 is found to have no independent title and to have been always in occupation as a mortgagee. He was therefore in the position of a trustee in regard to the mortgagors and it was not open to him to set up any claim of title adverse to their title. He could not therefore by adverse possession have acquired a prescriptive title to plots 74, 76, 77, 148, 154, 162, 164, 168, 149 and 175. The point of limitation therefore must fail. This disposes of all the points argued before me and the appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 265

MULLICK, ALI IMAM AND THORNHILL, JJ.

Special Bench

Emperor.

v.

Bir Kishore Rai—Accused.

Civil Reference No. 2 of 1918, Decided on 12th April 1918, from order of Dist. Judge, Cuttack.

Legal Practitioners Act (1879), S. 13 (b)—Pleader acting for both parties in one suit is guilty of gross carelessness—Action amounts to gross misconduct.

A pleader, who acts for one party at one stage of a suit or proceeding and then, without the leave of the Court, acts for the opposite party in the same suit or proceeding, although he may not act out of any improper motive, is guilty of gross carelessness and disregard of the rules of the profession, amounting to gross misconduct in the discharge of professional duties within the meaning of S. 13 (b).

[P 266 C 1]

Government Advocate—for the Crown.

Pugh, G. C. Pal, Lalmohan Ganguli and *Gajendra Prasad Das*—for Accused.

Mullick, J.—This matter arises out of a reference under the Legal Practitioners Act 18 of 1879, from the District Judge of Cuttack regarding a pleader named Bir Kishore Rai. The learned Judge has found the pleader guilty of three charges under S. 13, Cl. (b), of the Act, and has referred the case under S. 14 of the Act, for our orders. Pending the investigation the learned Judge has suspended the pleader from practice with effect from 7th February 1918. The charges are three: the first relates to a mortgage suit of 1914 in which the pleader signed a plaint on behalf of the plaintiff and subsequently, it does not appear how long afterwards, accepted a vakalatnama on behalf of one of the defendants, the mortgagor and filed a written statement in which he admitted the claim of the mortgagee, although a number of the other defendants who were transferees from the mortgagor contested it. When the case went up on appeal from the decree of the Munsif, it was discovered that the pleader had acted for both sides and upon that being brought to the notice of the Court, the pleader for the mortgagee, who happened to be the pleader's father-in-law, on behalf of his client compromised with the transferee and the case was finally disposed of on that footing. The next charge relates to Execution Case No. 219 of 1915 of the Court of the Subordinate Judge. In that case the pleader on 15th March 1915 filed an execution petition on behalf of the judgment-creditor; on 10th November 1915 he filed an application on behalf of the judgment-debtor praying for an order to set aside the sale.

The third charge relates to Execution Case No. 347 of 1914 of the Court of the Subordinate Judge of Cuttack. In that case the pleader filed an execution petition on behalf of the decree-holder on 2nd April 1914; on 9th March 1915 he appeared on behalf of a claimant under O. 21, R. 58, Civil P. C., whose claim was dismissed on 10th March 1915. The sale was held on 16th March 1915, and on 13th April 1915 the same pleader filed a petition on behalf of the judgment-debtors to set aside the execution sale. In the mortgage suit as well as in the two execution cases the pleader's father-in-law was engaged on the opposite side. It is urged that the conduct of the pleader in signing the vakalatnamas and acting for both sides in the same case was grossly improper conduct within the meaning of Cl. (b), S. 13, Legal Practitioners Act. The pleader's explanation is that he acted carelessly, but not with any improper motive and that in the two execution cases, as soon as the matter was brought to his notice by the Court, he immediately expressed his regret and declined to take any further part in the case on behalf of the judgment-debtors. Mr. Pugh on behalf

of the pleader urges that grossly improper conduct within the meaning of S. 13 means conduct involving moral turpitude and that it does not extend to cases of negligence of the rules of the profession such as that with which the pleader has now been charged. Now whatever the rule may be with regard to the other branches of the legal profession, so far as pleaders are concerned, the matter seems to have been settled in this Court by the decision of the Special Bench in *In the matter of two Pleaders* (1). In that case the matter turned upon O. 3, R. 4, sub-Cl. (2), which enacts that

"every appointment of a pleader when accepted shall be filed in Court and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client."

It was held by the Special Bench in the case above referred to that although the pleader may not have acted out of any improper motive, gross carelessness and disregard of the rules of the profession cannot be overlooked and constitute gross misconduct in the discharge of professional duties within the meaning of S. 13 (b), Legal Practitioners Act. The pleader urges in his explanation that he had no intention to defraud any person and that in fact neither the plaintiff in the mortgage suit nor the judgment-debtors in the execution cases have so far raised any objection in regard to his conduct. He further brings it to our notice that this proceeding has been initiated upon information supplied by a discharged clerk of his. We are willing to accept the assurance of the pleader that he had no fraudulent motive, but we cannot accept the explanation that his disregard of the rules was not intentional. In our opinion his disregard of the rules was gross and intentional, and we do not think that a mere warning will have the effect of impressing upon members of the Bar in the mufassil the necessity of strict observance of the provisions of the law. We are unable to accept Mr. Pugh's contention that in order to make the pleader liable to punishment under S. 13, it is not sufficient to prove that he has intentionally disobeyed the rules, but that there must be some act involving a moral stigma or proof of actual injury to a litigant. That in our view is not the law as interpreted in this Court. That being so, the only question we have to consider is the punishment which should be inflicted in this particular case. We have taken into consideration the fact that the pleader is a young man who at the time that he committed the offences had only been four years in practice, that he was working under the guidance perhaps of his father-in-law and that he did not realize the gravity of his offence. We think however that we must impose some period of suspension and that a mere warning will not be sufficient in this case. We direct that the pleader, Babu Bir Kishore Rai be suspended for a period of six months commencing from 7th February 1918.

Imam, J —I agree.

Thornhill, J.—I agree.

V.S./R.K. *Pleader suspended.*

(1) [1917] 41 I. C. 328=2 P. L. J. 259.

A. I. R. 1918 Patna 266

CHAPMAN AND JWALA PRASAD, JJ.

Chattarpatt Singh—Judgment-debtor —Appellant.

v.

Surendra Nath Singh—Decree-holder —Respondent.

Appeal No. 289 of 1916, Decided on 16th July 1917, from original order of Sub-Judge, Purneah, D/- 30th June 1916.

(a) Civil P. C. (1908), O. 21, R. 90—Under-valuation made in sale-proclamation being gross misrepresentation sale will be set aside.

Where an under-valuation of the property to be sold made in the sale-proclamation is obviously a gross misrepresentation, the sale will be set aside. Where a right of fishing which extended over 138 villages and the annual income realized from which was over Rs. 1,000 was described in the sale proclamation merely by a tauzi number and a name the value of the estate being given at Rs. 2,500, and it was sold for that sum:

Held: that the sale proclamation was materially irregular both in the description of the property and in the valuation put upon it and that for that reason alone the sale should be set aside. [P 267 C 2]

(b) Civil P. C. (1908), O. 21, R. 54—Property to be sold consisting of right of fishing over length of stream—It is not possible to say that any particular spot is conspicuous part.

Where the property to be sold consists of a right of fishing over a length of stream extending over several miles, it is not possible to say that any particular spot on the stream is a conspicuous part of the property within the meaning of R. 54, O. 21. In such circumstances the principle of the rule must be applied and a copy of the order must be conspicuously displayed at various por-

tions of the estate. In addition the sale should be advertised either in the local newspapers or in the Gazette. [P 268 C 1]

Mritunjoy Lal and *Krishna Sahay*—for Appellant.

Baikuntha Nath Mitra and *Naresh Chandra Sinha*—for Respondent.

Chapman, J.—This is an appeal by the judgment-debtor. He applied to have an execution sale set aside upon the ground of material irregularity in publishing and conducting the sale. His application was refused by the Subordinate Judge and hence his appeal to this Court. The property which has been sold is a right of fishing in a river which is partly silted up. This river flows through the thanas of Auraria and Kasba Amore in the District of Purnea. The evidence is that in Auraria thana the river is for the most part silted up, but there still remains in thana Kasba Amore a sufficient length of the river to cover a distance approximately of 20 miles as the crow flies and considerably more than that following the line of the river, which is a very winding one. The actual collections received from this large estate amounted to Rs. 900 out of a rental of Rs. 1,200 odd. In addition to that there was a rental received from certain se-patnidars of Rs. 739. The rental payable for the estate which was a patni estate was Rs. 601. The actual realised income annually therefore from the property was over Rs. 1,000. It was sold for Rs. 2,500 a price which was obviously grossly inadequate, both having regard to the vast extent and promise of the property and having regard to the actual realisations from it. In the sale proclamation there is no indication that the estate is of this magnitude. The estate is described merely by a tauzi number and a name, in fact the estate ran through as many as 138 villages. There is nothing to indicate this in the notification and the valuation stated in the sale proclamation is Rupees 2,500. It is inconceivable that the decree-holder could have thought such a valuation reasonable in the case of an estate of such magnitude, even though he may not have been aware what the actual income realized from the estate was. The Privy Council have held in the case of *Saadatmand Khan* v. *Phul Kuar* (1), that where an under-valuation of the property made in the sale proclamation is obviously a gross misrepresentation the sale will be set aside.

The learned Subordinate Judge in dismissing the application does not appear to have applied his mind to this question. It appeared to him to be necessary only to consider whether the property had been actually proclaimed for sale or not. To so decide the matter was to act in contravention of the principle laid down by the Privy Council in the case to which I have above referred. I am of opinion that the sale proclamation was materially irregular, both in the description of the property and in the valuation put on it, and for that reason alone we should be justified in setting the sale aside. I am confirmed in this view when I come to consider the manner in which the sale was proclaimed. In this long stretch of country 20 miles or more in length, there is one village containing some 30 or 40 houses called Basbeli in which there is a pool of 100 yards long and 150 yards broad. The evidence is that either upon the edge of the water here or upon the land by the side of the pool a notification proclaiming the sale was posted. I am not prepared to differ from the learned Subordinate Judge as to the question of fact whether this notification was actually posted there or not: but it is certainly on the evidence quite impossible to say whether the notification was actually posted on the estate that is to say, in the water or not. It also seems impossible to say upon the evidence that there was any beating of drum in any village other than the village of Basbeli. It would be difficult to hold that this was a proper compliance with the law in an estate of this magnitude. The rule which is applied is that laid down upon the subject of attachment in R. 54, O, 21, Sch. 1, Civil P. C., which requires:

"that the order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode and a copy of the order shall be affixed at some conspicuous part of the property."

When the property consists of a right of fishing over a length of stream which may quite reasonably extend to some 30 or 40 miles it is not of course possible to say that any particular spot on that stream is a conspicuous part of the property. In such circumstances the principle of the rule must be applied and a copy of the order must be conspicuously displayed at various portions of the

(1) [1898] 20 All. 412=25 I. A. 146 (P. C.).

estate. I am of opinion that the principle of this rule has not been applied in the present case when a copy of the order was affixed in only one out of 138 villages. In addition we think that it would have been certainly desirable in such a case to have adopted some other method of advertising the sale either in the local newspapers or in the Gazette. The result of the inadequate description of the property in the sale proclamation, the gross under-valuation and this perfunctory method of proclaiming the property was that nobody appeared at the sale to make any bid. The decree-holder was the sole bidder and purchased the property himself at Rs. 100 over the valuation which he had stated in the sale-proclamation. All that is required of us to find in justifying the setting aside of the sale, is that on the facts we are of opinion that substantial injury has resulted, and on the facts even in this case I am entirely satisfied that there has been substantial injury. I am not deterred in setting aside the sale by the fact that on the day of sale the judgment-debtor tried to stay the sale by raising certain objections of want of jurisdiction, that the decree had been otherwise satisfied without expressly raising any objection to the valuation of the property. I am also not deterred from decreeing this appeal by the fact that the other decree-holders were at the time applying for a rateable distribution and that they might have joined in the bidding. Finding as I do that the property was not sufficiently described, that it was grossly undervalued and that it was not properly proclaimed, I would allow the appeal and set aside the sale. The judgment-debtor is entitled to his costs.

Jwala Prasad, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 268

ALI IMAM, J.

Durga Prasad — Defendant — Appellant.

v.

Harihar Prasad and *others*—Plaintiffs —Respondents.

First Appeal No. 766 of 1917, Decided on 15th April 1918, from a decision of Dist. Judge, Patna, D/- 23rd March 1917.

Record of Rights—Entry in, merely raises presumption as to its correctness—Presumption sought to be rebutted—Duty of Court enunciated.

An entry in the Record-of-Rights merely raises a presumption as to its correctness and where this presumption is sought to be rebutted the Court must show by its judgment that it has considered the evidence on the record and then come to a distinct finding whether the evidence has or has not rebutted that presumption.

[P 269 C 1]

Kulwant Sahay, Purnendu Narain Singh, Siveswardyal and *Jagannath Prasad*—for Appellant.

Ganesh Dutt Singh and *Gangadhar Das*—for Respondents.

Judgment.—The plaintiffs instituted this suit for recovery of rent in respect of 60 bighas of land situated in mauza Singthu. The defendant resisted the claim on the ground that the land in question was "aima lakhraj" and that he had never paid any rent to the maliks and that no such rent was payable for this land. The learned Munsif of Bihar who tried the suit decided it in favour of the plaintiffs and gave them a decree at the rate of the jama claimed in the plaint. The defendant appealed to the learned District Judge of Patna who dismissed it with costs. The present appeal is from the decision of the learned District Judge. It is contended on behalf of the defendant -appellant that the learned Judge did not apply his mind judicially to the evidence adduced on his behalf in rebuttal of the presumption arising from the Record-of Rights.

It appears that the land in question was recorded in the Record-of-Rights in the column which runs thus: "*darmiani haqdar ke taraf seadai haneke laek lagan.*" The lower appellate Court has correctly come to the conclusion that the amount mentioned under this heading, namely, Rs. 37-8-0, is the amount which is the actual rental of the land in question. The learned Judge has also correctly construed Ex. 3, which is a mokurrari deed executed by defendant 1 in favour of defendant 2. An examination of this deed clearly points out that there was some Government revenue payable on account of the 60 bighas of land. I am therefore of opinion that on the construction of Ex. 3 and on the construction of the Record-of-Rights the lower appellate Court has come to correct findings. The difficulty in this appeal however is that there is nothing in the judgment of the lower appellate Court to show that the presumption that arises from the Record

of-Rights has been considered in the light of the evidence adduced by the defendants. The learned vakil, Mr. Kulwant Sahay, appearing on behalf of the defendant-appellant urges that it was necessary for the lower appellate Court to have considered that evidence and then come to a distinct finding as to whether or not that evidence had or had not rebutted the presumption that arises from the Record-of-Rights. The contention of the learned vakil is supported by the decision given in *Laloo Singh* v. *Tahbal Gope* (1) and *Dilan Singh* v. *Choa Singh* (2).

I accept the contention of the learned vakil. The result is that the judgment and the decree of the lower appellate Court are set aside and the case is remanded to the learned Judge for re-hearing and disposing of the appeal on arriving at a distinct finding on the question as to whether the presumption arising from the Record-of-Rights has or has not been rebutted in the light of the evidence produced by the defendants. Costs will follow the result.

V.S./R.K. *Case remanded.*

(1) [1917] 38 I. C. 814.
(2) [1917] 42 I. C. 397.

A. I. R. 1918 Patna 269

THORNHILL, J.

Ramadhin Chaudhury—Defendant—Appellant.

v.

Kumodini Dassi and *another*—Plaintiffs—Respondents.

Appeal No. 729 of 1917, Decided on 30th April 1918, from appellate decree of Dist. Judge, Monghyr.

Contract Act (1872), S. 74—Agreement to pay enhanced rate of rent after expiry of term of tenancy is valid — Landlord and Tenant.

An agreement by a tenant that if he holds over upon the expiry of the term he would pay rent at a higher rate than that which he paid during the term, is valid and enforceable.

[P 269 C 1]

Jager Nath Prasad—for Appellant.

Atul Krishna Ray—for Respondents.

Judgment.—This is an appeal from the judgment of the District Judge of Monghyr dismissing the appeal from the decree of the lower Court. The plaintiffs-respondents' case is that the defendant took a settlement of 2 bighas 17 cottahs of land at an annual jama of Rs. 8-8-0 under a registered kabuliyat, dated 28th April 1908. In the kabuliyat it was stated that after the expiration of the term of five years he won't retain possession without taking fresh settlement and if he does retain possession, he shall go on paying rent to the maliks at the rate of Rs. 5 per bigha so long as he shall so continue in possession, and to this payment neither he nor his heirs shall have any objection. The term mentioned in the kabuliat expired in 1320 and the plaintiffs brought a suit to recover two years' rent, that is, for 1321 and 1322, at the rate of Rs. 5 per bigha. The chief point for decision is whether the plaintiffs are entitled to recover rent at this rate. For the defence it is stated that the enhanced rate is in the nature of penalty. The plaintiffs rely on the case of *Gunput Singh* v. *Josodhur Singh* (1). In that case it was stipulated in the kabuliats:

"that after the expiration of the term of five years I shall cease to have any right to retain possession: that in case I fail to execute fresh kabuliats the malik zemindars shall have the power to realize rent at Rs. 5 per bigha on the strength of the kabuliyat and I shall have no objection to this."

It appears to me that the present case and the case referred to above are almost identical so far as the terms of the kabuliats are concerned. It remains only to consider whether this decision has been overruled or encroached upon. In *Gobind Mandar* v. *Banarsi Prosad* (2), Mookerjee, J., followed the decision of *Gunput Singh* v. *Josodhur Singh* (1) referred to above, holding an agreement by the tenant that if he held over upon the expiry of the term, he would pay rent at a higher rate than he did during the term, was valid and enforceable. That case was decided on 26th February 1913 by Mookerjee, J., and Beachcroft, J. The same Hon'ble Judges a few weeks later formed the Court which heard the case reported as *Abdul Aziz* v. *Karu* (3) which is relied on by defendant. In his judgment Mookerjee, J., refers to the two former cases and points out that they are clearly distinguishable from the case before them, inasmuch as the lease had been granted for a term at a rent specified and the tenant had agreed that if he continued in occupation after the expiry of the term, he would pay rent thereafter at a rate which was not deemed as the proper consideration for occupation of the

(1) [1913] 20 I. C. 516.
(2) [1913] 21 I. C. 35.
(3) [1913] 21 I. C. 443.

land. Such enhancement of rent depended upon,

"if the tenant claimed an occupancy right in the land or caused a claim to be put up by any other person."

The learned Judges held that the enhancement amounted to a penalty and was consequently not enforceable in law. I think the decision in *Gunput Singh* v. *Josodhur Singh* (1) above mentioned must govern this case. With reference to the question of cesses referred to in the lower appellate Court's judgment, the defendant's vakil has been unable to find any notification to exempt the holding from the operation of the Bengal Tenancy Act, and consequently abandons the point. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 270

MULLICK AND ATKINSON, J.J.

Sadhu Charan Ray—Petitioner.

v.

Balei Swain—Opposite Party.

Criminal Revn. No. 30 of 1917, Decided on 5th December 1917, against order of Dist. Magistrate, Puri, D/- 17th October 1917.

Criminal P. C. (5 of 1898), Ss. 4 (h), 200, 203 and 437—*B* charged by *A* for house-breaking—*B* lodged information of theft of gun against *A*—Police reported it as false—*B* preferred objection to report—*B* acquitted of house-breaking—Magistrate in order of acquittal remarked that story of theft of gun was false—Application against this was treated as revision under S. 437—Petition of objection to police report is complaint—Order that theft case was false was one under S. 203—Interference in revision can be made in order under S. 203 apart from any illegality—Magistrate cannot revise complaint legally dismissed but can do so when dismissal is illegal.

A charged *B* with house-breaking and *B* lodged an information against *A* for theft of his gun. The Police reported *B*'s case to be false and *B* filed a petition of objection asking the Magistrate to make an investigation and to summon the accused. *B* in the meantime was tried on the charge of house-breaking and acquitted and the Magistrate passed the following order on his petition of objection: "Judgment of counter-case, record and Police report gone through. Enter false." Against this order *B* made an application to the District Magistrate who acting under S. 437, Criminal P. C. held that it was premature to call the theft case false and sent the case back to the Magistrate:

Held: (1) that the petition of objection filed by *B* was a complaint within the meaning of S. 4, (h), Criminal P. C (2) that the order of the Magistrate entering the theft case as false was in substance an order under S. 203, dismissing the complaint: (3) that where the final order is in fact one under S, 203, the revisional jurisdiction of the District Magistrate can be exercised even though there may have been some irregularity on the part of the officer taking cognizance of the complaint lodged under S. 200. [P 271 C 1]

Section 437 contemplates that where a complaint has in fact been dismissed under S 203, the revisional jurisdiction of the District Magistrate can be invoked irrespective of the consideration whether the dismissal is legal or illegal. [P 271 C 2]

It is absurd to hold that a Magistrate is competent to revise the dismissal of a complaint legally dismissed but that he is not so competent to revise in the case of a complaint illegally dismissed. [P 271 C 2]

Biswa Nath Sinha and *S. N. Gupta*—for Petitioner.

Brajraj Choudhury — for Opposite Party.

Mullick, J.—One Amareswar Biswal laid an information before the Police charging one Balei with house-breaking. He alleged that Balei had been caught on the premises with a gun. Balei was put upon his trial upon that charge and was acquitted. His defence in that trial was that he did not go to the katcheri in which Amareswar was living on the night of the occurrence, but that the gun had been forcibly snatched from him by Amareswar as he was passing the katcheri on his way to shoot a crocodile. After the acquittal of Balei the Sadr Sub-Divisional Magistrate of Puri, who had taken cognisance of the information lodged by Balei before the Police passed the following order:

"Judgment of counter-case record and Police report gone through. Enter false under S. 379 I. P. C. No prosecution."

Against that order Balei made an application for revision on the same day, namely 17th of October 1917, to the District Magistrate who acting under S. 437, Criminal P. C , passed the following judgment.

"I have heard the judgment in the counter-case. This makes it clearly premature to describe as false the present case. Let a charge sheet be called. To Sub-Divisional Officer for orders."

Amareswar now comes before us in revision and prays that the order of the District Magistrate may be set aside. The first contention urged by the learned vakil for the petitioner is that the District Magistrate had no jurisdiction to set aside the order of the Deputy Magistrate of 17th October 1917. It is urged that the only way in which the District Magistrate could have interfered was to transfer the case to his own file under S. 528, Criminal P. C. Now it appears

that after the Police reported Balei's case to be false Balei filed a petition of objection before the Sub-Divisional Magistrate asking that an investigation might be made and that the offenders might be summoned.

It is clear upon the authorities that this petition was a complaint within the meaning of the Criminal Procedure Code, and it is also clear upon the authorities that the order of the Sub-Divisional Magistrate declining to put the accused upon their trial and directing that the case might be entered false under S. 379, I. P. C. was in substance an order under S. 203, Criminal P. C., dismissing the complaint. The learned vakil, however contends that the Sub-Divisional Magistrate not having examined Balei when he made his petition of objection on oath in accordance with the terms of S. 200, Criminal P. C., the order was not an order of dismisssl under S. 203, Criminal P. C. He contends that if it had been a legal dismissal in accordance with the terms of the Criminal Procedure Code, then the District Magistrate would have been competent to interfere under Ss. 435 and 437, Criminal P. C. but in the case of an illegal dismissal or a dismissal without conforming to the provisions of the Code, the Magistrate has no power to exercise his revisional jurisdiction. Reliance is placed upon the case of *Lokenath Patra* v. *Sanyasi Charan Manna* (1). That case however is not exactly in point. There the Magistrate ordered the prosecution of a complainant under S. 211, I. P. C. without dismissing his complaint under S. 203, Criminal P. C.

The Court held that in order to justify a prosecution under S. 211, I. P. C., it was necessary that the dismissal under S. 203, Criminal P. C. should be a legal dismissal. That however is not the case before us. Here we have to consider whether the revisional jurisdiction of the District Magistrate could have been exercised in a case where in respect of a complaint lodged under S. 200, Criminal P. C. there had been some irregularity on the part of the officer taking cognisance, but where the final order was in fact one under S. 203, Criminal P. C. As I read S. 437, it contemplates that where a complaint has in fact been dismissed under S. 203, Criminal P. C. irrespective of the consideration whether the dismissal was legal or illegal, the revisional jurisdiction of the Magistrate can be invoked. To hold otherwise would lead to the absurdity that whereas the Magistrate is competent to revise the dismissal of a complaint legally dismissed he is not so competent to revise in the case of a complaint illegally dismissed. The learned vakil has also relied upon *Moul Singh* v. *Mahabir Singh* (2). In that case after a number of accused persons had been convicted, an application was made by the prosecutor to summon the remaining accused, including three against whom warrants had already been issued by the Sub-Divisional Magistrate. The High Court of Calcutta in revision held that the District Magistrate in exercise of his revisional jurisdiction was competent to revise the order of the Sub-Divisional Magistrate refusing to summon those accused in respect of whom warrants had been issued, but that he was not so competent in respect of those against whom no warrants had been issued. It appears from the judgments of their Lordships that there were facts in that case leading to the inference that the Sub-Divisional Magistrate in refusing to summon the accused against whom no warrants had been issued had not passed any final order of dismissal or discharge.

In the present case upon the facts before us it is quite clear that a final order of dismissal had been passed and therefore in our opinion the learned District Magistrate had full jurisdiction to revise that order in exercise of his powers under S. 437. On the merits too we think it is desirable that the charge made by Balei should be investigated now that he has succeeded in defeating the charge made by Amareswar against him in the counter case. It is true the learned District Magistrate has not given any detailed reasons but from the fact that the judgment in the counter-case was in favour of Balei it is desirable that Balei's complaint should now be investigated. The application is rejected.

Atkinson, J.—I agree.

V S./R.K. *Application rejected.*

(1) [1903] 30 Cal. 923.

(2) [1900] 4 C. W. N. 242.

A. I. R. 1918 Patna 272

MULLICK AND THORNHILL, JJ.

Mahomed Zamiruddin and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 255 to 258 of 1918, Decided on 18th July 1918, from decision of Sessions Judge, Patna.

(a) Criminal P. C. (1898), S. 439—High Court can direct Sessions Judge to rehear appeal after obtaining additional evidence—Government of India Act (1915), S. 107.

Both under the Criminal Procedure Code and under S. 107, Government of Act, the High Court has power to direct a Sessions Judge to re-hear an appeal after obtaining additional evidence. [P 273 C 1, 2]

(b) Criminal Trial—Procedure — Court should not merely direct petitions to be filed with record.

When petitions are made to the Court, it is improper merely to direct them to be filed with the record. [P 272 C 2]

Yunus Muhammed Rai and *Tribhuban Nath Sahay*—for Petitioner.

Mullick, J.—The petitioner Zamiruddin has been sentenced under S. 498, Penal Code, to rigorous imprisonment for one year and the petitioner Nurul Wahab to rigorous imprisonment for nine months and a fine of Rs. 200. Nourangi and Thakur Singh have been sentenced to rigorous imprisonment for six months each under Ss. 498 and 114, Penal Code. The woman in regard to whom these offences are alleged to have been committed is Saleha, the wife of Saiyid Hassan. It appears that the petitioners were defended by counsel before the Deputy Magistrate who took cognizance of the case and that in spite of a full and protracted trial, numerous petitions were made to the Court by the accused protesting inter alia on the ground that evidence likely to assist the defence had been improperly excluded. These complaints were repeated before the Sessions Judge in appeal but were found to have no substance. Dissatisfied with the learned Judge's order the petitioners have come to this Court in revision. We have heard the parties at great length and have come to the conclusion that the learned Sessions Judge should have followed the procedure prescribed by S. 428, Criminal P. C., and have directed the trial Court to allow the accused to adduce the additional evidence which they desired him to take. The two witnesses from Mirzapore were clearly necessary for the defence of the accused Nurul Wahab and we are not satisfied that there was any such negligence on the part of the accused in the matter of taking out process as would have warranted a refusal to procure the attendance of the witnesses. It is said that the accused made no clear and definite prayer on 11th May for issue of fresh processes. It is diffieult to understand this explanasion in the face of the accused's counsel's repeated protests on 11th May that he was not prepared to argue the case till his defence was completed.

The learned Deputy Magistrate also states in his explanation that it was the accused's duty to supply the certified copy of a document the original of which he had summoned one of the Mirzapore witnesses to produce, and likewise to deposit the diet and .travelling expenses of the witnessess. The answer to these objections is that the Court never asked the accused to take these steps. On the contrary the Court issued processes twice for the attendance of these witnessess without making any such demands. In our opinion the Court having once issued process was bound to exhaust all the processes allowed by law, unless it was clearly shown that the accused was guilty of wilful obstruction and delay. We are also of opinion that the learned Sessions Judge should have directed the trial Court to recall Abdul Karim for further cross-examination in regard to the validity of the marriage. We are not satisfied that the questions which the accused's counsel desired to put were irrelevant. We also think that the request to recall Mt. Sabuzni should have been granted. The learned Magistrate has unfortunately kept no record of the questions which he disallowed on the ground of irrelevance. In this connection we have to observe that it is to be regretted that the learned Deputy Magistrate, who appears to have otherwise tried the case with great care and patience, should have omitted to record order on the numerous petitions filed by the accused, and that he should have allowed the impression to be created that the imputations as to his conduct of the trial remained unchallenged. It has been repeatedly held that when petitions are made to the Court, it is improper merely to direct them to be filed with the record. The result is that the order of the learned Sessions Judge dismissing the appeal is

set aside and the appeal restored. We direct, that the appeal be re-heard after due attention to the observations herein made.

Upon receiving the additional evidence certified by the trial Court the learned Judge will dispose of the appeal according to law. The learned counsel for the petitioners contends that this Court, in exercise of its revisional jurisdiction, has no authority to make this order and he relies upon the case of *Gajanand Thakur* v. *Emperor* (1). That case does not deal with the powers of this Court as a Court of revision and is certainly no authority for the contention that in the present case we cannot interfere except to direct a re trial. In our opinion both under the Criminal Procedure Code and under S. 107, Government of Act of 1915, this Court has full jurisdiction and power to direct the learned Sessions Judge to rehear the appeal after obtaining the additional evidence. It would be utterly unreasonable to accede to the demand that because two defence witnesses have not been examined and because the cross examination of two prosecution witnesses was not sufficiently full, the whole case should be re-tried de novo. As the Sessions Judge of Patna has already formed an opinion on the evidence we transfer the appeal to the file of the Sessions Judge of Shahabad and direct that the petitioners be released on bail to the satisfaction of the District Magistrate of Patna to appear before the Sessions Judge of Shahabad when called upon to do so. Let the record be sent through the Sessions Judge of Patna to the District Magistrate of Patna and then by the last named officer to the Sessions Judge of Shahabad, who will pass the necessary orders under S. 428, Criminal P. C.

Thornhill, J.—I agree.

V.S./R K. *Order set aside.*

(1) [1916] 1 P. L. J. 99=35 I. C. 508.

A. I. R. 1918 Patna 273

ROE AND COUTTS, JJ.

Mukhram Singh—Appellant.

v.

Sadasi Koer—Respondent.

Appeal No 451 of 1917, Decided on 17th July 1918, from appellate decree of Sub-Judge, Chapra.

1918 P/35 & 36

Landlord and Tenant—Re-entry—Non-transferable holding sold to recognized zarpeshgidar—Landlord has right of re-entry.

Where a non-transferable holding is sold to a zarpeshgidar of the holding the landlord has a right of re-entry even where the zarpeshgi right of the purchaser had been recognized by the landlord prior to the sale. [P 273 C 2]

Nirsu Narain Sinha, *Harnarain Pershad*, *Rajendra Prasad* and *Tribhuban Nath Sahay*—for Appellant.

Fakhruddin and *Sambhu Saran*—for Respondent.

Coutts, J.—This was a suit for ejectment by the landlords in respect of a certain holding consisting of two plots measuring one bigha and seven kathas respectively. The original holder mortgaged the one bigha plot to the defendants who have since been in possession. In 1911 the plaintiff brought a suit for possession of this one bigha plot on the allegation that the original holder had left no heir and that consequently the holding had reverted to him as landlord. It was found in that case however that the plaintiff had no right of re-entry in that he had recognized the zarpeshgi right of the defendants by accepting rent from them and from the zarpeshgidars. The suit was therefore dismissed. Subsequently the defendants purchased the entire holding from the original holder and the plaintiff brought this suit for possession of the holding on the allegation that the original holder had abandoned it and that the plaintiff was entitled to possession. It is not now denied that there is no custom of transferability. Prima facie therefore the plaintiff has a right of re-entry.

It is contended however that the defendants can rely on their original zarpeshgi as preventing the plaintiff getting possession of the one bigha plot. This contention however has no force. What was originally mortgaged was the tenants' interest. It has now been found however that the tenant's interest is gone, consequently the mortgage of that interest is also gone. This is the view which appears to have been taken by the learned Subordinate Judge and agreeing with that view I would dismiss this appeal with costs.

Roe, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 274

ROE AND ALI IMAM, JJ.

Idu Jolaha—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 241 of 1917, Decided on 14th December 1917, against order of Sess. Judge, Saran, D/- 3rd September 1917.

(a) Penal Code (45 of 1860), S. 471 — Forged document — Filing document with plaint amounts to "User."

Where a document is filed with the plaint in a suit but is not used in the course of the case there is "user" of the document within the meaning of S. 471. [P-275 C 1]

(b) Penal Code (45 of 1860), S. 30— Account paper acknowledging liability is valuable security.

An account paper which purports to be a document whereby a person acknowledges that he lies under a legal liability is a valuable security within the definition given in S. 30. [P 275 C 1]

Muhammad Yunus and *Narendra Nath Sen*—for Appellant.

Muhammad Fakhruddin — for the Crown.

Judgment.—The facts of this case are that there lived in Nelphamari in the District of Rangpur two families of Bengali gentlemen one of which we may call Halakhdhar's family and the other Harender's family. These two families are on very bad terms. In Gopalgunj lives the family of Subdhan Haji and Idu Mia. Subdhan Haji has been for sometime living in Nelphamari in Harender's house. In 1914 Subdhan instituted a civil suit against Halakhdhar claiming some Rs. 200 on a bond. That suit was dismissed on 4th September 1914. In it Idu was a witness. The papers of this case were shown to a Bengali gentleman living in Gopalgunj, Mr. Raj Chandra Banerji now a Head Master of the Gopalgunj English High School, by Idu Mia. Idu when showing him the papers asked the Head Master's advice as to instituting a similar suit in Gopalgunj. The Head Master remembers distinctly that he said to him "it is against your religion to institute a false suit. Do not do so." No suit was instituted by Idu, but in April 1915 a suit was instituted by one Jodha, who as the evidence shows was under the influence of Idu against Halakhdhar of Nelphamari. In it with the plaint in the suit were filed three letters said to have been written by Halakhdhar to Jodha and signed by Halakhdhar. On the case coming to trial the Courts were agreed that the suit was a false suit and that the documents used in support of it were forgeries. Sanction was therefore given to prosecute Jodha for bringing the false case and Subdhan and Idu for abetting the the institution of the case and the use of these documents as genuine. Subdhan has been acquitted by the Sessions Judge, Jodha has been convicted and files no appeal. Idu has also been convicted and is the appellant before us.

Upon a narrative of the case there can be no doubt whatever that the case was in all probability not Jodha's case at all but Idu's case: and this probability is lifted to the level of certainty by the evidence of the pleader employed nominally by Jodha, Babu Chandra Gokhul Prasad. He tells us that the interest taken by Idu in the case was not that of a friend or a legal agent but that of a principal. This evidence coupled with the evidence of the Head Master as to Idu's desire to bring in Gopalgunj a case which would obliterate the pain of the defeat at Nelphamari, is to us conclusive evidence that this case was not Jodha's case but Idu's case and it being admitted by the appellant in this case that Jodha's case was a false case and the documents used in support of it forgeries, it follows that Idu must have known that they were forged when he brought about their use in the false case instituted by his tool Jodha.

Mr. Yunus asks us to rely on the case of *Ambika Prasad Singh* v. *Emperor* (1), in support of his proposition that inasmuch as all the three letters were not exhibited but only the account, the three letters being filed only with the plaint but not used in the course of the case there has not been user within the meaning of S. 471. The case of *Ambika Prasad Singh* v. *Emperor* (1) has been fully dealt with in *Mobarak Ali* v. *Emperor* (2), and indeed one of the learned Judges who decided the former case distinguished that case on the ground that the documents used in the former case were not documents upon which the decision of the case depends in the sense that the documents filed with the plaint are the basis of a civil suit. It cannot be denied that inasmuch as documents not filed with the plaint may be rejected and their

(1) [19] 3 Cal. 820.
(2) [1912] 15 I. C. 81.

use refused at a subsequent stage of a case and the first step towards the admission being the filing of them with the plaint the filing of documents with a plaint is user.

We are asked to say that the sentence which in this case is five years' rigorous imprisonment is excessive. Mr. Yunus in this connexion urges that the account paper is not a valuable security. It purports to be a document whereby a person acknowledges that he lies under a legal liability, and is a valuable security within the definition given in S. 30, I. P. C. The decision in *Queen-Empress* v. *Ramasami* (3) supports this view if support were necessary. The sentence cannot be said to be excessive. The appeal is dismissed.

V.S /R.K. *Appeal dismissed.*

(3) [1889] 12 Mad. 148.

A. I. R. 1918 Patna 275

MULLICK AND ALI IMAM, JJ.

Teju Bhagat and *another* —Defendants —Appellants.

v.

Deoki Nandan Prosad— Plaintiff— Respondent.

Appeal No. 56 of 1918, and Civil Revn. No. 46 of 1918, Decided on 12th July 1918, from appellate order of Dist. Judge, Patna.

(a) Civil P. C. (1908), S. 11—Suit on promissory note— Suit dismissed — Pro-note found not genuine—Plaintiff prosecuted for forgery but acquitted—Suit by plaintiff for damages for malicious prosecution—Finding as to genuineness of pro-note in previous suit is not res judicata.

Plaintiff brought a suit against defendent for recovery of money on the basis of a promissory note. The suit was dismissed and the pro-note was found to be not genuine. Defendant then prosecuted plaintiff for forgery but the plaintiff was acquitted. He thereupon brought a suit for damages for malicious prosecution:

Held: that the finding as to the genuineness of the pro-note in the previous suit was not res judicata in the suit for malicious prosecution, inasmuch as the plaintiff was not litigating under the same title in both the suits [P 276 C 2]

(b) Civil P. C. (1908), O 41, R. 27—Additional evidence—When can be taken—Power of appellate Court.

It is not open to a Court of appeal to order additional evidence to be taken except to cure an inherent defect in the evidence already recorded. [P 276 C 2]

D. N. Sarkar, *Asghar* and *Harihar Prashad Singa*—for Appellants.

P. C. Manuk and *Rajendra Prosad*—for Respondent.

Mullick, J.—On 8th August 1912, the plaintiff brought a suit upon a hand-note alleging that defendant 2 had executed that hand-note on behalf of himself and defendent 1. The suit was dismissed on 10th March 1913. There was then an appeal which met with a like fate on 11th July 1913. Defendant 2 thereupon applied for sanction to prosecute the plaintiff for bringing a false suit. Sanction was granted by the Subordinate Judge on 13th December 1913. There was an appeal against that order to the District Judge and a revision application to the High Court. The order however was affirmed, with the result that the plaintiff was committed for trial to the Court of Session on a charge of forgery in respect of the hand-note. The plaintiff, however was acquitted by the Sessions Court on 17th September 1914. He thereupon in 1915 instituted a suit against defendants 1 and 2, claiming damages for malicious prosecution. The Subordinate Judge dismissed the suit. There was then an appeal to the District Judge who has remanded it for further evidence.

It appears that in the Court of the Subordinate Judge the plaintiff applied for permission to call Mr. Hardless, the handwriting expert to prove that the hand-note was signed by defendant 2. The Subordinate Judge held that the question as to the genuineness of the hand-note was res judicata as between the parties and therefore could not be reopened in the suit for malicious prosecution. He accordingly disallowed the prayer for the examination of Mr. Hardless. There was another prayer before the District Judge in regard to an item of evidence which had come into existence since the dismissal of the suit by the Subordinate Judge. That item of evidence consists of an admission which is alleged to have been made by defendant 2 in another suit admitting that the hand-note was genuine. The District Judge held that in the interests of justice and equity the plaintiff should be allowed in the inquiry after remand to adduce evidence as to this alleged admission. The matter now comes before us in appeal against the order of the District Judge remanding the case. Now the objection as to the power of the District Judge to order a remand and to direct further evidence to be taken has not been pressed

before us by the learned vakil for the appellant. He has directed the weight of his attack against the learned District Judge's finding on the point of res judicata.

The learned vakil contends that the finding at the original trial regarding the genuineness of the hand-note was a finding upon a question substantially in issue between the parties litigating under the same title and therefore it is not competent to the plaintiff to go behind that finding in the suit for malicious prosecution. The whole point depends on the question whether or not the parties were litigating under the same title. Was the suit for money against defendants 1 and 2 a suit in which the title of the plaintiff was the same as it was in the suit for malicious prosecution? In my opinion it was not. In the former suit the plaintiff was claiming as a creditor for money lent and the question of the genuineness of the hand-note was incidental and even if the hand-note had been proved to be a forgery the plaintiff would have been successful if he could have proved the debt otherwise. In the suit for malicious prosecution the cause of action was the false charge brought by the defendants against the plaintiff and the circumstance that the defendants had put the criminal law into motion against the plaintiff so as to bring about his trial before the Sessions Judge. How can it be said that in the two cases the plaintiff was litigating under the same title? The case of *Fitzjohn* v. *Mackinder* (1) is authority for the proposition that the suit is maintainable even though the prosecution was brought about on sanction obtained from a Court but it is also authority for the further proposition that the cause of action is not the same in the two suits and that the suit for malicious prosecution is in no way based upon perjury committed in the original trial. The concluding portion of the judgment of Lord Cockburn makes this quite clear. His Lordship observes with regard to the argument that the action could not be maintained inasmuch as it was founded upon the perjury committed in the original trial as follows:

> "The short answer is that this is neither in form nor substance an action in respect of the prejury committed by the defendant to the plaintiff's damage. It is an action for preferring an indictment and carrying on a prosecution against the plaintiff on a charge which the defendant knew to be untrue, and which he knew could only be supported by perjured testimony. The prejudice only comes incidentally into question as shewing that the whole proceeding was malicious and destitute of any pretence of probable cause."

In my opinion the suit for malicious prosecution was not founded upon the hand-note and therefore the question of the genuineness of the hand-note is a matter only incidentally in issue in this case. The finding as to the genuineness of the hand-note in the previous suit is therefore not res judicata. Then as regards the question of the admissibility of the additional evidence in the shape of the admission, I think the learned vakil for the appellant must succeed. This admission was made after the original trial and upon the accepted principle that it is not open to a Court of appeal to order additional evidence to be taken except to cure an inherent defect or lacuna in the evidence already recorded; it seems to me that this additional evidence ought not to be allowed to go in. The learned vakil for the respondents urges that the powers of an appellate Court are very wide and in every case where it thinks additional evidence is necessary in the interests of justice it is open to it to order that additional evidence be received no matter at what stage that additional evidence came into existence. In my opinion this is too wide an interpretation of O. 41, Civil P. C., and I prefer to interpret the decision of their Lordships of the Privy Council in this matter more strictly than their Lordships of the Madras High Court. The learned District Judge's order therefore allowing this admission to go in will be set aside but his order of remand will be affirmed and it will be open to the plaintiff to prove that the hand-note was a genuine document. The appeal is decreed in this modified manner. As both the parties have succeeded to a certain extent there will be no costs. The application for revision in Civil Revision No. 46 of 1918, is also dismissed.

Imam, J.—I agree.

V.S./R.K. *Application dismissed.*

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(1) [1861] 9 O. B. (n. s.) 505=30 L. J. C. P. 257.

A. I. R. 1918 Patna 277

ROE, J.

Ernest Mylne—Appellant.

v.

Nathu Sundi and *others*—Respondents.

Second Appeals Nos. 486 to 501 of 1917, Decided on 20th February 1918, from the decisions of Sub-Judge, Shahabad.

(a) Jurisdiction — Court should decide nature of, from plaint and not from written statement.

A Court in order to satisfy itself as to its jurisdiction is required to examine the plaint and decide on the plaint and not on the written statement what is the nature of the claim. [P 277 C 2]

(b) Provincial Small Cause Courts Act (1887), Ss. 15 and 16—Suit to recover from tenant sum levied as mutharfa is cognisable by Court of Small Causes.

A suit to recover a sum from a tenant levied as mutharfa, irrespective of the area of the land upon which the tenant builds and of the dimensions of the house built by him, is cognisable by a Court of Small Causes whether the sum is regarded as rent or as a tax. [P 277 C 1,2]

(c) Lease—Rent—House rent and ground rent—Distinction between, lies in contract between parties.

The distinction between a house rent and a ground rent lies in the contract between the lessor and the lessee. If a lessee takes a parcel of land and then builds a house upon it, the rent that he pays to his lessor is a ground rent. If the lessor builds the house and then lets house and land together, the rent is a house rent. [P 277 C 2]

Kulwant Sahay and *Mritunjoy Lal*—for Appellant.

Atul Krishna Ray—for Respondents.

Judgment.—These appeals arise from decisions of the Court of the Subordinate Judge of Shahabad confirming a decree of the Munsif of Arrah, rejecting the plaintiff's claim for what he called in his plaint "mutharfa rents." The learned Munsif had held on issue 3 framed, that the suits were cognizable by a Small Cause Court, but instead of returning the plaints to be presented in the Small Cause Court he proceeded to dismiss them upon the merits. On appeal the issue was again raised, whether the lower Court had jurisdiction to try the suits. Upon this question the learned Subordinate Judge decided that mutharfa rents were ground rents and that suits for such rents were not cognizable by a Small Cause Court. The distinction between a house rent and a ground rent lies in the contract between the lessor and the lessee. If a lessee takes a parcel of land and then builds a house upon it, the rent that he pays to his lessor is a ground rent. If the lessor builds the house and then lets house and land together, the rent is a house rent. This I understand to have been the basis of the decision in the case decided as *Uma Churn Mandal* v. *Bijari Bewah* (1). In my view the learned Munsif should have gone into the issue whether he had jurisdiction to try the cases or not, before he proceeded to try them, and to satisfy himself as to his jurisdiction he was required to examine the plaint and decide on the plaint and not on the written statement what was the nature of the claim. The plaint has been read out to me. I do not find in it one word regarding land or any contract to pay rent for land. It is said that the defendants have houses, and that for the privilege of occupying those houses they are liable to pay yearly a certain sum. On the plaints as framed clearly the sums claimed were either house rents or as set out in the judgment of Chamier, C. J., in the case of *Mahboob Momin* v. *Bhagwati Prasad* (2), taxes and not rents at all. The evidence given in the case by the plaintiff's agent (which evidence may be now taken for the purposes of the argument as a statement explaining the nature of the claim) shows that the sum levied as mutharfa is levied irrespective of the area of the land upon which the tenant builds and irrespective of the dimensions of the house which the tenant has built upon the land. Whether we regard such a levy as a rent or a tax, a suit to recover it is cognizable by the Small Cause Court. The learned Munsif had therefore no jurisdiction to try it and the learned Subordinate Judge, had he decided this point in this way, would have set aside his order and directed him to return the plaint for presentation in the proper Court, as was done in the case of *Mt. Edoo* v. *Shaikh Hefazut Hossein* (3).

If I am wrong on this point and if the suits can be regarded as suits for ground rent, I may say that in my view the appeal is concluded by findings of fact. The expressions used by the learned Subordinate Judge are not peculiarly happy, but he does find as a fact that there has been no satisfactory evidence to show that these defendants voluntarily agreed to pay mutharfa rents after 1300 F. S.,

(1) [1888] 15 Cal. 174.
(2) [1917] 39 I. C. 949.
(3) [1870] 13 W. R. 358.

nor is their any satisfactory evidence to prove usage or custom. If the sums be regarded as ground rents it was necessary for the plaintiffs to show an attornment to them by the defendants as tenants. Both the Courts below are agreed that there was no such attornment and if indeed any rents were realized they were realized by force and not under any contract. They were in a sense bribes to the landlords to be left in peace and not acknowledgments of any liability to pay yearly rent. The payment of such bribes would not create the relationship of landlord and tenant and therefore the suits as suits for ground rent were not maintainable. The order of the Court is that the Munsif be directed to return the plaints to the plaintiffs in these sixteen cases. The costs of this appeal and of the appeal to the lower appellate Court will be paid by the appellants to the respondents. There will be no order as to the costs of the Munsif's Court.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 278

DAWSON-MILLER, C. J. AND MULLICK, J.

Mt. Sukhdei Kumri — Decree-holder —Appellant.

v.

Mahamaya Prasad Singh and *others*— Judgment-debtors—Respondents.

Appeal No. 255 of 1917, Decided on 3rd December 1918, from original order of Sub-Judge, Darbhanga.

Civil P. C. (5 of 1908), O. 21, R. 2, (3) — Uncertified payment out of Court—It does not help judgment-debtor in execution.

Where a judgment debtor makes a payment out of Court to the decree-holder towards the satisfaction of the decree, he is nevertheless not entitled in execution proceedings under the decree to claim the benefit of the payment unless he has complied with the provisions of O. 21, R 2, sub-R. (3). [P 278 C 2]

Parmeshwar Dayal, Jagannath Prasad and *L. K. Jha*—for Appellant.

Sudhansu Kumar Mitra and *Saroshi Charan Mitra* — for Respondents.

Dawson-Miller, C. J.—This is an application for execution of a decree. The appellant Mt. Sukhdei Kumri obtained a decree for a sum of Rs. 2,000 in respect of her maintenance and cost of certain ornaments against the respondents, who were members of the same family. On 24th February 1917 she took out execution proceeding under the decree. A question then arose between the parties as to whether any and if so, what part of the decree had already been satisfied. The appellant, plaintiff in the suit, admitted payment of the sum of Rs. 1,083-10-3, including two sums of Rs. 333-5-3 and Rs. 83-10-6 paid or deposited in Court pending the execution proceedings. The amount which the appellant now claims to be due is a sum of Rs. 916 and odd. The figures are set out in the judgment of the Subordinate Judge now appealed against, and a question arose before him on behalf of the respondents, whether certain sums which are there referred to had been paid out of Court by the respondents to the appellant in satisfaction of the decree, leaving a balance due of abont Rs. 100 only. Now the learned Subordinate Judge, after apparently hearing the evidence on this point of both the parties, came to the conclusion that the sums had, in fact been paid and deducted them from the amount claimed; but the learned Subordinate Judge has unfortunately omitted to take into consideration the effect of O. 21, R. 2, Civil P. C. which provides:

"Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly."

It is further provided if the decree-holder fails to do so:

"The judgment-debtor also may inform the Court of such payment or adjustment and apply to the Court to issue a notice to the decree-holder to show cause on a date to be fixed by the Court why such payment or adjustment should not be recorded as certified."

And then follows sub-Cl. (3), which says:

"A payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any Court executing the decree."

Now what happened in the present case was that the amount in dispute was according to the respondents paid to the appellant out of Court and the Subordinate Judge so found although the appellant denied it. If the sums were in fact paid by the respondents, judgment-debtors, as the Subordinate Judge finds they were, they nevertheless are not entitled in the execution proceedings under the decree to claim the benefit of the payment unless they have complied with the provisions of O. 21, R. 2, sub-R. (3). It may possibly be a hardship in such cases if in fact the money has been paid or the decree otherwise adjusted. We have no doubt,

however that the rule was introduced with the very object of avoiding in execution proceedings disputes between the parties and frequently long enquiries as to what sums had or had not been paid out of Court in satisfaction of the decree. Unfortunately the Subordinate Judge has not adopted the right procedure as laid down in O. 21, R. 2. We are therefore of opinion that this appeal ought to be allowed and the judgment of the Subordinate Judge set aside and judgment should be entered for the appellant for the principal sum of Rs. 916 5-9. The interest falling due in respect of that amunt, if any, should be calculated by the Subordinate Judge and added to the amount decreed. The appellant is entitled to costs of this appeal.

Mullick, J.—I agree.

V.S./R.K. *Appeal allowed.*

[A. I. R. 1918 Patna 279

ROE AND ALI IMAM, JJ.

Upendra Nath Das and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 247 of 1917, Decided on 18th December 1917, against judgment of Sess. Judge, Manbhum, D/- 1st October 1917.

Criminal Trial—Retracted confession—Without material corroboration reliance is unsafe.

In the absence of material corroboration, it is unsafe to rely upon the retracted confession of a co-accused which is not self-implicating in the same degree as it implicates the other accused.

[P 280 C 1,2]

Gour Chandra Pal—for Appellants.

Manohar Lal—for the Crown.

Ali Imam, J.—The three appellants, Upendra Nath Das, Bairagi Jina and Lakshmi Dhar Mahanti, have been convicted and sentenced by the Sessions Judge of Purulia under Ss. 466 and 193, I. P. C. The facts of this case are as follows: One Judhistir Padhan had borrowed some money from one Gangai Barik and had given him a blank stamp paper as security. When the loan was repaid Gangai returned to Judhistir a paper which was different from the one that had been given as security. On a complaint lodged by Judhistir against Gangai, a police investigation of the complaint was held with the result that Gangai, Bairagi and Nandai were put upon their trial at Balasore. It appears that all stamp papers sold by vendors in Balasore are required to bear the thumb impressions of the vendor and the vendee. In the trial of that case one of the points under enquiry was whether the two impressions on the stamp given by Gangai to Judhistir bore the thumb impressions of Bairagi and Nandai.

Some experts were examined and at one stage of the trial the defence suggested that there were more than one impression at each of the two places on the stamp instead of a single impression. This happened on the 18th August. On the 19th, when the charges were framed in that case, the Superintendent of Police was informed of a conspiracy to tamper with the impressions and that the accused in that case intended to call an expert to destroy the evidence offered by the prosecution. This apprehension was communicated to the trying Magistrate and the document (Ex. 1) was placed by him in a sealed cover. On the 14th November the accused in that case called an expert, the document was taken out of the cover and shown to him and he with reference to one of the impressions gave his evidence in direct conflict with the expert evidence already produced by the prosecution. This thumb impression (Ex. 1 a) was alleged to be of Bairagi's thumb. With reference to Ex. 1b alleged to be thumb impressions of Nandai, the defence expert deposed to its being too blurred to give any opinion without an enlargement. No enlargement was made and the Magistrate relying on the defence expert evidence acquitted Bairagi and Nandai and convicted Gangai. Matters seemed to have ended there, except in so far that an appeal preferred by Gangai was dismissed on the 21st December and that the High Court was moved against the acquittal of Bairagi and Nandai with no success.

On the dismissal of his appeal Gangai did not surrelern to his bail and was arrested sometime in January and was placed in jail. Not very long after, on some information received, a Deputy Magistrate visited Gangai in jail who made a confession. Early in May the accused Lakshmi Dhar was arrested and placed before a Magistrate, before whom he made a confession implicating the accused Bairagi as the man who had taken him to one Lal Mohan Sahu, where Bairagi and the accused Upendra Nath Das had asked him to put his thumb im-

pression on a paper. This thumb impression, the document shows, was a super-imposition and has been indentified as that of Lakshmi Dhar. The prosecution case is that this super-imposition (Ex. 1a) and the other super-imposition (Ex. 1b) were the result of a conspiracy to tamper with the evidence in the case in which Gangai, Bairagi and Nandai were on their trial and that the conspirators among others were the appellant Upendra Nath Das, the Peshkar of Mr. Godfrey who tried the case, Bairagi Jina and Lakshmi Dhar Mahanti. An examination of the documents leaves no doubt in our minds regarding the tampering. There is also little doubt that the document was tempered with to destroy the prosecution case before Mr. Godfrey and that it took place after the document was placed on the record of that case and was marked as an exhibit. The three appellants before us have been found guilty of having tampered with this document and the question before us for consideration is whether the evidence on the record is sufficient to sustain their conviction.

The evidence consists of the deposition of Gangai, the approver, and the retracted confession of Lakhshmi Dhar. We are in complete agreement with the Sessions Judge in that the approver's evidence is wholly unworthy of trust inasmuch as it is inconsistent and discrepant with the confession of Lakhshmi Dhar. The presence of Lakhshmi Dhar at the tampering is conclusively proved by the fact that the super-imposing impression (Ex. 1 a) is of his thumb. There can be no doubt therefore that he was not only present at the tampering but had taken a prominent part in the commission of this offence. The disagreement between his version of events and the version given by Gangai must necessarily result in discarding the evidence of the latter as absolutely valueless. The result is that there remains only the confession of the appellant Lakshmi Dhar to support the conviction of the appellants Upendra Nath Das and Bairagi Jina. This confession is a retracted one. It is also worthy of note that the confession is not self-implicating in the same degree as it implicates the prisoners. In his confession Lakshmi Dhar clearly wants to make out that he was almost an unconscious instrument in the hands of the other conspirators. His confession clearly does not make him out to be in pari delicto with the others. It is also a confession that has been retracted. In the circumstances it is unsafe to rely upon it without material corroboration. As to this, the Crown, represented by the learned Government Pleader, frankly admits there is no such corroboration affecting the appellant Upendra Nath Das. All that is urged against him is that the document under notice was in his custody and that he must have had access to it even when it was put in an envelope and sealed by Mr. Godfrey. We are not at all satisfied on the evidence that this contention is sound. The evidence is that the envelope was not properly gummed down nor was the seal put in the right place. There are also other circumstances in the case showing that the appellant Upendra Nath Das was not the only person who could have had access to it after it was brought on the record of the case tried by Mr. Godfrey. In the circumstances, the evidence against this accused is limited to the retracted confession of Lakshmi Dhar who clearly implicates himself in a lesser degree than this appellant.

We do not therefore consider this confession sufficient to sustain the conviction of Upendra Nath Das and we accordingly set aside the conviction and sentences passed upon him by the learned Judge. As regards Bairagi Jina it has been suggested that inasmuch as the original impression (Ex. 1a) on the document has been proved to be his, the super-imposition must have been done for his benefit, and therefore a legitimate inference may be drawn against him as having participated in the tampering and that thereby some corroboration is obtainable of Lakshmi Dhar's confession. We are not disposed to take this view of the case, as the thumb impression of Nandai also was on the document in question and it further appears that the tampering with this impression has been more successfully achieved, for it has been completely blurred by the super-imposition of somebody's thumb impression. It is evident that Bairagi Jina was not the only person interested in tampering with the document. Nandai's interest was no less than his and unless there is some independent and trustworthy evidence of the exclusion of Nandai from

the conspiracy, it is not open to us to hold that the interest of Bairagi is in itself sufficient to regard it as a material corroboration of the confession. The learned vakil on behalf of the appellants rightly contends that it might have been Nandai or persons interested in him who brought about the tampering, as in the case of this man the tampering was so complete that the original thumb impression became unrecognizable. The result is that in the case of Bairagi Jina, as it is in the case of Upendra Nath Das, we have nothing to go upon but the retracted confession of Lakshmi Dhar which we have already found to be insufficient. We accordingly set aside the conviction and sentences passed upon him.

The case of the appellant Lakshmi Dhar stands on a different footing. His confession, retracted as it is, is materially corroborated by the clear evidence furnished by the super-imposing impression on the document. It has been proved to be his and there can be no doubt that he is guilty of the tampering and that he has been rightly convicted and sentenced. We dismiss his appeal and confirm the sentences passed upon him.

Roe, J.—I concur. Seeing that Gangai's evidence was when examined found to be completely valueless, it is fair to surmise that under cross-examination Lakshmi Dhar might have proved equally untrustworthy. His first confession was made at a time when there was at least a probability that Gangai would be pardoned and called as an approver. It reads as if it was an attempt to obtain a pardon. Without this confession and the evidence of the approver there would be nothing but vague suspicion of the guilt of Upendra and Bairagi. I am not prepared to say that these lift that suspicion to the level of proof. Mr. Godfrey seems to have been so inexplicably careless with regard to the custody of these documents that it was open not only to Upendra Nath Das but also to any chaprasi or private servant of his to obtain possession of it. With regard to Bairagi I cannot see that the evidence against him is any more conclusive than against Nandai whom the learned Sessions Judge has found it impossible to convict.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 281

DAWSON-MILLER, C. J.
AND ALI IMAM. J.

Ramdayal Mahto and *others*—Defendants—Appellants.

v.

Uttim Mahto and *others*—Plaintiffs—Respondents.

Appeal No. 424 of 1915, Decided on 28th May 1918, from original decree of Addl. Sub-Judge, Hazaribagh.

(a) Hindu Law—Joint family—Presumption of jointness.

The presumption of the Hindu law is that a Hindu family is joint unless the contrary is proved. [P 282 C 2]

(b) Hindu Law—Partition—Suit for—Plea of separation—Burden of proof is on defendant.

In a partition suit the burden of proving separation lies heavily on the defendants and unless that burden is discharged, the issue as to jointness or otherwise of the family must de decided in favour of the plaintiff. [P 282 C 2]

(c) Hindn Law—Joint family—Purchase of property in name of one member—Separate acquisition is not to be presumed.

The acquisition of a property in the name of one member of a joint family raises no presumption that it was bought as his separate property. [P 285 C 2]

(d) Hindu Law—Partition—Properties held jointly with strangers need not be included.

In a suit for partition of joint family properties the plaintiff is not bound to include properties held jointly with stranger. [P 289 C 2]

Kulwant Sahay—for Appellants.

Sakti Kantha Bhattacharya, *Bankim Chandra Dey* and *Jamini Mohan Mukerji*—for Respondents.

Judgment.—This appeal is from the decision of the Additional Subordinate Judge of Hazaribagh decreeing the plaintiffs' suit. The plaintiffs as members of a joint Hindu family, claim partition of their 8-annas share in the properties mentioned in schedules ka and kha of the plaint and pray that a commissioner be appointed to divide the properties in suit into two equal moieties and to put the plaintiffs in separate possession of one of these. The defendants on the other hand resist the suit by alleging that a separation was effected in mess, worship and estate between the contending branches of the family so long ago as the year 1858 and that since then the two families have lived in a state of separation in every respect. They further allege that between 1858 and 1892, though separated, they continued to acquire properties jointly with the plaintiffs not as co-parceners but only as partners and that in

1892 they effected a division of the properties so acquired within this period and adjusted their rights in proportion to the extent of contribution made by each party separately for these acquisitions. It is also alleged by the defendants that since 1892 no more property was jontly acquired, but that it so happened that some deeds were jointly executed with the plaintiffs at the request and pressure of the creditors for the reason that some of the old title deeds stood in the names of both the parties. The defendants further allege that the plaintiffs among themselves are not joint and that the suit is only nominally a suit for partition but in substance a suit for declaration of title and delivery of possession.

The principal point for consideration in this appeal is whether there was a separation in 1858 or whether up to the institution of the present suit the plaintiffs and defendants have continued to be members of a joint Hindu family governed by the Mitakshara law. Before dealing with that issue it is desirable to deal with the contention that the suit is a suit for declaration of title and recovery of possession put forward in the guise of a partition suit. We cannot accept this contention. The frame of the suit is disclosed in the plaint and a perusal of paras. 13 and 14 clearly shows that the plaintiffs have never admitted to have lost their joint possession over the property sought to be partitioned. The terms in which reliefs Nos. 1 and 2 in the plaint have been framed are clear and unequivocal. We are unable to find from the plaint any indication whatsoever that the frame of the suit is such as is alleged by the defendants. The prayer is to partition the property in suit and effect separation of possession of one of the equal moieties. We are therefore of opinion that this is not a possessory but a partition suit and the view taken by the lower Court of Sch. 2, Art. 17, Cl. 6, Court-fees Act is correct. The learned vakil appearing for the appellants relies on some proceedings recorded before the settlement officer in connexion with the publication of Record of Rights with reference to some of the properties in suit. It has been suggested that the fact that in some instances the Record of Rights was made in favour of the defendants alone, raises the presumption that the two families were separate. In this connexion our attention has been drawn to Ex. P (1), which is a certified copy of the tanaza sheet of Mauza Mandai Khurd, one of the properties in suit. It contains an order dated 18th April 1912, passed by the settlement officer. The order is as follows:

"Uttam Matho (plaintiff) cousin of Ramdayal Matho (defendant) claims a share in the village but admits that he has never had any possession nor has ever been given any share of the rents. His claim if any, is purely a civil one and the name of Uttam Mahto should not therefore be recorded."

The Assistant Settlement Officer was in no way concerned with the question of title. His proceedings were limited to a decision on the factum of possession without any reference to the rights of a co-parcener in such possession. We are therefore unable to conclude from the order quoted above that the proceedings of the settlement officer, whether with reference to Mandai or any other properties in suit, can be construed in any way to affect the principal issue in the case before us, and we hold that the orders passed in the preparation of the Record of Rights do not raise any presumption that the plaintiffs were separate from the defendants in mess, worship and estate at the time when those orders were passed. The frame of the suit as disclosed in the plaint remains unaffected by the proceedings of the settlement officer. The real question at issue is whether the plaintiffs and the defendants were members of a joint Hindu family on the date of the institution of the suit or there had been a separation as is alleged by the defendants. The presumption of the Hindu law is that a Hindu family is joint, unless the contrary is proved. The burden of proving separation therefore lies heavily on the defendants and unless that burden is discharged this all important issue must be decided in favour of the plaintiffs. The question then is: Was there a separation in the year 1858? In order to understand how the parties are related it is necessary to refer to the genealogical table on the paper-book. It appears that Chamari Mahto, the grandfather of the plaintiffs Uttim and Chhatardhari and the defendants Ramdayal, Teka and Dayal, had two brothers named Gandouri and Jitan. These two predeceased Chamari who died in 1857. The defendants' case is that a year after Chamari's death a complete

disruption of the joint family took place. In para. 11 of the written statement they say that the eight sons of Gandouri Mahto got 2 annas of raiyati land in Mauza Mandai and 1 anna of raiyati land in Mauza Naudiha and began to live in separate houses in Mandai. Similarly Jitan's son got ½ anna of raiyati land in Mauza Mandai and ½ anna of raiyati land in Mauza Naudiha and removed to separate houses where they commenced to live. Among the sons of Chamari himself the paragraph in question shows the following groups:

Hulas and Harakh got 8 annas of raiyati land in Mauza Udaipur and began to live there separately. Dhani and Mohar got 1 anna of raiyati land in Mauza Mandai and 1 anna of raiyati land in Mauza Naudiha and began to live at Mandai. Hardayal got 4 annas of raiyati land in Mauza Adra and settled there. The above shows that at the alleged separation of 1858 seven different shares were made, one going to Gandouri's branch, one to Jitan's and the remaining 5 to the five sons of Chamari. It is not denied that a large amount of property was acquired between 1858 and 1892, but as has already been stated, the defendants' case is that though these properties were acquired jointly, these acquisitions took place after the joint family had separated and broken up into the 7 groups referred to above. In order to find out whether the separation alleged to have taken place in 1858 was a fact, it will be necessary to consider not only oral evidence produced to support this contention, but also the manner in which the properties in suit have been dealt with by the family.

The only witness to prove the separation in 1858 called by the defendants is Gopal. It is significant that two more witnesses of the alleged separation were present in Court but the defendants did not examine them. Gopal is a grandson of Gandouri and as a near relation is well qualified to speak of what is supposed to have happened in 1858. Were it not that there are some inherent improbabilities in the scheme of separation and partition of 1858 deposed to by him, we should have regarded the evidence of this witness as of considerable value. The witness says that the lands were not measured at the time they were divided. He also says that the division was by calculation on the basis of annas but the income in annas was not considered. According to him Hulas, Harakh and Hardayal did not get a share in the ancestral house nor were any grains divided. He is unable to say why Mohar and Dhani remained joint nor can he say why Hulas and Harakh did the same. The evidence of this man is unconvincing and it does not appear how if he is telling the truth, an equitable partition of the family property could have been made without regard being had to a proper and just apportionment of various shares and interests into seven divisions. He also says that the rent receipts of raiyati lands were not produced at the time of this partition. The allegation of a separation and partition having taken place in 1858 is further discredited by a reference to Ex. 16.

It appears that the defendant Dayal Mahto was examined as a witness in one of the proceedings before the Assistant Settlement Officer on 31st March 1913 and his evidence before that officer was that this separation had taken place 30 years before. This would go to shew that the idea of suggesting a partition in 1858, as stated in the written statement, had not taken root till then. There are other grounds also for discrediting the story. Gandouri's sons representing their father should have received a share in the family properties of the same value as received by Jitan's sons. But para. 11 of the written statement shows that they received twice as much as the latter. This is incredible. The separation of 1858 is largely discredited by the manner in which the family has been treating the property supposed to have been separated and given to Hardayal, one of the sons of Chamari, at this partition. Gopal Mahto says Hardayal received his share at Adra and commenced to live there. If the story of separation in 1858 is true, on Hardayal's death the property at Adra would descend to Latoo. Latoo died leaving a widow. His interest in Adra, therefore should have been inherited by his widow if he was separate from his uncle Dhani, the father of defendants 1, 2 and 3. But a registered kobala, Ex. 2 (a), shows that Dhani sold this property on 19th March 1903. Latoo's widow is living and has raised no objection to it. No satisfactory explanation is offered how Dhani could deal with this property if his separation had taken place in 1858.

Again with reference to the acquisitions between 1858 and 1892 no satisfactory evidence is forthcoming to prove what was the contribution of the alleged sharers. This is strongly indicative of the plaintiffs' allegation that these properties were bought by the joint family with joint family funds. The evidence of Dayal and Chhohan to the contrary does not seem to us to be satisfactory. Not only no accounts are produced to show the contributions, but it appears that even the income from these villages was not appropriated by the sharers in proportion to their alleged interests as deposed to by Dayal and Chhohan. We agree with the learned Additional Subordinate Judge in the view that if the family had separated in 1858 the profits from these properties could not have been enjoyed by these sharers in the manner deposed to by these two witnesses. In fact the whole scheme and arrangement of the manner of their enjoyment shows that they were being dealt with as properties belonging to a joint family rather than to sharers. The interests of the parties in these do not seem to have been in any way defined.

This has been fully discussed at p. 360 of the paper-book in the judgment of the lower Court and we accept the learned Subordinate Judge's conclusion that co-partners could not deal with properties in the manner they were dealt with by the descendants of Chamari between the years 1858 and 1892. All this strongly negatives the contention that there was a separation accompanied with partition of the family properties in 1858. The evidence of the alleged division of these properties in 1892 is no less unsatisfactory. No document is forthcoming to prove such an event. It is exceedingly improbable that properties of considerable value could have been divided among the co-sharers without a proper adjustment of profits and losses. We are invited to rely on the evidence of Dayal, Chhohan and Nado in proof of this partition. In the absence of documentary evidence, oral evidence of most unimpeachable character alone can be relied upon to prove a transaction like this. The two parties to the division of 1892 were represented, according to these witnesses, by Dhani and the plaintiff Uttim. Uttim was within his teens at the time and Chhatardhari almost an infant; but each party is alleged to have been in separate possession of various villages and the division of 1892 was supposed to be a step in terminating this arrangement by finally fixing the rights of each party in accordance with which possession was to be exercised. It is curious that no change in the possession of villages took place. In fact it would seem that the division of 1892 was neither a division of properties nor an adjustment of rights. They were to continue to hold possession without being answerable for the excess of profits. No mutual transfer of title was made. The evidence relating to this division of 1892 is discrepant. The defendant Dayal Mahto says that Uttim and Ramdhani called Panchaits from various villages and that it took the Panchaits two or three days to convene their meeting. This is contradicted by the evidence of Chhohan Lal, who says that no Panchait took place and that there was no dispute to settle. He also says that no khasra showing the property allotted to each party was prepared nor was any list of such property made. Chhohan also says that nobody suggested that the matter of the partition should be put down in writing. This again is contradicted by the evidence of defendant Teka, who claims to have suggested to his father Dhani at the time of this partition that it should be reduced to writing to serve as evidence of the incident. The witness Chhohan is an old servant of the family and as such qualified to speak; but we have no doubt that he has sided with the defendants and his evidence does not appeal to us as reliable. On a careful examination of all the oral evidence produced by the defendants relating to the alleged partition of 1892, we have no hesitation in holding that it is altogether unworthy of credence. This division of properties is also completely discredited by the manner in which the contending branches of the family have dealt with the properties in suit since 1892. But before discussing this part of the case attention may be called to the manner in which these properties were acquired between 1874 and 1892 and also how the two branches of the family stood in relation to each other.

It is admitted that the numerous title-deeds by which these properties were acquired contain the names of members of the family represented by Dhani and Hulas. As an instance reference may be

made to Ex. D (8). By this document four-annas mokarrari interest in village Hudwa was acquired on 17th July 1877 for Rs. 550. This is a document in which Hulas and Dhani were both mentioned as vendees, but Dhani's name was penned through and the document was registered with the name of Hulas alone standing therein. Witness Chhohan, who is the scribe of this document, says that Dhani's name was penned through because he could not advance his share of the consideration money. It is argued that the scoring through of the name of Dhani taken with the evidence of Chhohan Lal ought to be sufficient to show that the brothers were separate. For reasons already given reliance cannot be placed on the evidence of this witness, which is further discounted by his admission in cross-examination that the amount of the consideration money of four annas of Hudwa was not paid in his presence. It is contended for the defendants that the exclusion of Dhani's name from this deed should be regarded as in itself sufficient to prove separation. We are unable to accept this contention, as the theory of separation is completely negatived by Ex. 1 which is a mortgage deed executed by Dhani himself hypothecating eight-annas of Hudwa on 20th June 1893 to one Ram Prasad. It is to be borne in mind that this deed was executed nearly a year after the alleged division in 1892 by which, according to the defendants, Dhani had no right, title or interest left in this village. The recital in this deed shows that the property was purchased by Dhani and that until repayment of principal with interest he engaged not to transfer the mortgage property in any form to any other person. This document is of very great importance in the decision of this case and the defendants, knowing its damaging character, have essayed to explain it away by oral evidence given by defendants Teka Mahto and Dayal Mahto. The explanation is childish in the extreme.

It is suggested that when proposals for a loan were made to the mortgagee Ram Prasad, he was informed by Dhani that he had no right, title or interest in the property, but the mortgagee expressed his willingness to advance the money in spite of this communication and the deed was registered. The explanation is further sought to be supported by the story that immediately after its registration Ram Prasad changed his mind and the transaction fell through, on which Dhani destroyed the document. It was contended for the appellants that it was for the plaintiffs to prove that the loan covered by the mortgage deed was a fact and that the money had passed from Ram Prasad to Dhani. There is no substance in this contention. The plaintiffs rely on a registered document, the contents of which have been duly proved. It was not for them to send for the account books of Ram Prasad. Rather the onus was on the defendants to prove by reliable evidence and the production of Ram Prasad's account books that the deed was in fact infructuous. We reject the explanation as unworthy of credit and consider that the transaction indicates that Dhani was dealing with Hudwa as a property which he could mortgage as the karta of the family. In this connexion attention may be drawn to Ex. 2. This is a sale deed, conveying 8 annas mukarrari right in Hudwa by one Bishen Prasad on 16th January 1879 for Rs. 950.

The transferees mentioned therein are Ram Dayal, Anup, Uttim and Hulas. These men represent the contending branches of the family. The third document of importance with reference to Hudwa is Ex. 3 (d) dated 27th March 1905. By this document the family obtained 2 annas of mukarrari right in the village in the name of Kunj Behari, son of Uttim, for Rs. 564. It has been generally contended that if according to the plaintiffs' case Dhani was the karta of the family his name should not have been scored through in Ex. D (8), nor should his name have been absent from Ex. 3 (d). If these contentions were sound one should have expected Dhani's name in Ex. 2. It is not unusual in this country that properties are brought by a joint Hindu family in the name of a member or some members of the family and not necessarily in that of the karta. In fact, the acquisition of a property bought in the name of one member of a joint family raises no presumption that it was bought as his separate property. This proposition has been upheld in *Gajendar Singh* v. *Sardar Singh* (1). There are innumerable title deeds on the record of this case showing acquisition of properties men-

(1) [1896] 18 All. 176.

tioned in Schedule *ka* of the plaint as having been made in the name of various members of the descendants of Chamari. These documents are inconclusive on the point that the branches of the family represented by Dhani and Hulas were separate. On the contrary there is one feature in the majority of these documents that largely supports the plaintiffs' case. It will be remembered that the case of the defendants is that ever since 1858 when Hulas removed to Udaipur his connexion with Mandai Khurd ceased altogether and the cessation continued when he removed a few years after to Hudwa and lasted throughout till his death. The defendants claim the separation of 1858 to have been so effective that in mess, estate and worship no jointness of any kind was left and that Hulas ceased to have any connexion with Mandai Khurd whatsoever.

The case of the plaintiffs, on the other hand, is that the residence at Hudwa was only for the purposes of carrying on the business of the joint family and the home and residence of Hulas at Mandai Khurd remained unaffected. It is remarkable that in the majority of the title deeds between 1874 and 1890 when Hulas died his residence given is not Hudwa but Mandai Khurd, which is a strong piece of evidence supporting the case of the plaintiffs and negativing that of the defendants. We feel no doubt therefore that the acquisition of property by the descendants of Chamari between 1874 and 1892 was joint acquisition and not in partnership, as has been contended for the defendants. Attention has already been called to Dhani having mortgaged 8 annas of Hudwa only a year after the alleged division of 1892. It is unnecessary to give in detail the various deeds and documents in which between 1893 and 1909 the names of the contending branches of the family occur dealing with properties in various ways. These, as we have said before, are, however, inconclusive, but there are certain transactions which the defendants have attempted to explain away, but they do nonetheless point to the conclusion that the descendants of Chamari were joint. In this connexion Ex. 8 deserves consideration. It appears that a deposit of Rs. 200 was made in the Chota Nagpur Bank in the joint names of Teka and Uttim some time about 1895. In 1897 Uttim and Teka jointly drew a cheque in favour of the latter to the full amount of Rs. 200. This cheque is Ex. 8, and shows a joint account in the names of the plaintiff Uttim and the defendant Teka. The explanation offered is that the idea was to buy a house at Hazaribagh, the district headquarters, for the use of the two branches of the family of Chamari and that the deposit was made not as members of a joint family but as representatives of two families that had separated. It is curious that if this was the intention, the money should have been allowed to remain in the Bank for two years without any effort to buy a house; nor is there anything on the record to show that a house was in fact, bought at Hazaribagh at any time.

The explanation as to why Uttim should have drawn the Rs. 200 from the Bank on a joint cheque is scarcely credible. The story is that one Abilakh Singh executed a mortgage bond in favour of Dhani, Uttim and one Domar, but Uttim had not any money and therefore requested his uncle Dhani to pay the money (Rs. 100) for him and he would pay him off by a cheque on the Bank and hence the cheque to Teka. Like the other explanation of the defendants this also does not hold water. Evidently the share of Dhani in the mortgage was to the extent of Rs. 100 and so also of Uttim. Both uncle and nephew had Rs. 200 lying in the Bank. The simplest course in the circumstances would have been to pay the money out to Abilakh by a joint cheque drawn by Uttim and Teka. The parties were at Hazaribagh at the time and there is nothing on the record to show why this easy course could not be adopted. The next transaction proving the family to be joint is Ex. 1 (b) dated 4th May 1903. This is a mortgage bond in favour of the Chota Nagpur Bank hypothecating pucca five annas four pies out of the entire 16 annas of Mauza Mandai Khurd for the sum of Rs. 1,600 with interest at one and a half per mensem. The striking feature of this document is that the executants are Dhani, Ram Dayal, Teka, Uttim and Alak. The recital in the bond is that the property in question had been in the joint possession of each of the executants and that the same was purchased by themselves. This is a very damaging document to the defendants' case but here again an explanation is put forward.

It is suggested that Uttim had in fact, never exercised any act of possession over Mandai Khurd, nor had he in fact, any right, title or interest in the same, but that he was invited to assume the role of an executant in order to satisfy the Bank inasmuch as the title deed of the family, dated 15th May 1883, stood in the name of his father Hulas along with that of Dhani Mahto. An attempt to prove this story has been made by the evidence of defendant's witness Chandi Prasad. This man is a pleaders' clerk at Hazaribagh but claims to have been the law agent whatever that may mean, of the Chota Nagpur Bank and states in his evidence that on an examination of the title deeds he found that Hulas Mahto's name appeared in one of them which he reported to the Managing Director who thereupon insisted on Uttim, the son of Hulas, joining in the execution of the bond. The Managing Director of the Bank would have been a more convincing witness to prove all this but he has not been called. Moreover if Uttim was in fact, separate from his uncle Dhani and had ceased to have any right, title or interest in the mortgaged property, he would have refused to join in executing a document that would throw no small ultimate liability upon him personally. On the other hand as a member of the joint family it was perfectly natural for him to have taken part in the execution of this deed. Ex. 3 (b) is also a document of considerable relevancy in destroying the defendants' case of separation. A mokarrari of two annas of Hudwa was obtained in the name of Kunj Behari son of Uttim by this document on 27th March 1905, on a nazrana of Rs. 564 with an annual jama of Rs. 2 as rent reserved. It has been strongly contended that this was a separate acquisition by Kunj Behari. The document however proves the contrary. It shows that the whole of nazrana of Rs. 564 was not paid in cash but the major portion of it was set off against the money due to the family under several heads. They are as follows:

Rs. 67 due to Hulas on a bond, dated 23rd June 1888.

Rs. 120 due to Uttim, Mahto and Ram Dayal Mahto on a bond, dated 17th April 1888.

Rs. 116 due to Uttim, Chhatardhari and Dhani on a bond dated 16th December 1902.

Rs. 116 on account of rent of raiyati jote in Mauza Hudwa due to Uttim and Ram Dayal.

If Kunj Behari, a son of plaintiff Uttim was separate from Dhani and his descendants, it is incredible that moneys due to separated branches of the family of Chamari could have been allowed to be set off to make up the consideration for a mokarrari taken by Kunj Behari. No satisfactory explanation is forthcoming to reconcile this transaction with the theory of separation. Ex. A-(5) is also a document which is instructive. It purports to be a mortgage of 4-annas pucca share out of the entire 16 annas of Mauza Polandu by Chhatardhari on 24th April 1904. This was a village which according to defendants was in possession of Dhani's branch of the family and according to the alleged division of 1892, the plaintiffs' branch had ceased to have any kind of right in it. It is admitted by the plaintiffs that the consideration money relating to Ex. A (5) never passed. The executant Chhatardhari explains it by saying that he executed this deed to frighten the uncle, Dhani into a separation and division of the family property. Whether this transactiou was real or otherwise it is strongly corroborative of the plaintiffs' case of jointness. On no other hypothesis could a document like this have been executed. The cumulative effect of all these documents is clearly in favour of the view that the contending branches of the family of Chamari have been joint and the plea of separation effected in 1858 and the division or adjustment in 1892 is unacceptable. It is contended for the defendants however that there are other documents on the record which show that the two families could not have been joint. We will now proceed to the consideration of these documents :

Exhibit H (1), dated 24th February 1888, is a plaint in a rent suit instituted by Ram Dayal against Hulas in respect of land in Udaipur. Similarly Ex. H (2) is a plaint, dated 7th July 1890, in another rent suit by Ram Dayal against Uttim and Chhatardhari in respect of land in the same village. It is contended for the appellants that if the two families were joint, it is impossible that Ram Dayal could have sued his uncle Hulas and his

cousins Uttim and Chhatardhari for rent. The argument on the face of it is impressive, but an examination of the documents on the record shows that in each instance Ram Dayal was suing as thikadar of the village and the plaintiffs' contention is that these two cases were collusive and were instituted with the object of creating tenancy rights in lands that on the expiration of leases would otherwise revert to the proprietor, the lessor of Ram Dayal. This contention is completely borne out by an appreciation of what happened in these two cases. As regards the first the plaint was filed on 20th February 1882, but was ordered to be struck off on 17th April same year. As regards the second case the evidence of collusion is complete. Execution was taken out and some barai crops amounting in value to 8 annas were attached and held in deposit by the Nazir. There was a deficit of 12 annas in respect of the security of costs for execution. This was never paid and the case was struck off for want of prosecution (vide Ex. 1). It may also be mentioned that the suit was not contested but a petition of admission was filed. During the attachment however a petition of objection on behalf of one Bhatoo Mahto was filed.

This Bhatoo was successor of Ram Dayal in the lease of the village, and charged the parties with collusion alleging that the crops attached were on 4 bighas of land out of 5 bighas of malik's zerait lands (Manjihas). The objection filed by Bhatoo Mahto was decided and the Court held that the real question raised was not so much for the crops as for the establishment of title to the land. The outgoing lessee, it is common experience, is anxious by all devices to keep as much of the leased property in his hands as he can after the expiration of the lease. In the present case the whole attempt seems to have been to retain possession of the zamindar's land by creating title in Uttim and Chhatardhari as its tenants. We are not at all satisfied that these two suits were genuine and that any inference of separation can be drawn from them. On the contrary it seems that it was a clear attempt on the part of Ram Dayal in the latter of these two suits to keep the malik's zerait land in the possession of his own family through Uttim and Chhatardhari. The most important document relied upon by the defendants however is Ex. 10 (4), which is a plaint, dated 12th January 1900, of a suit instituted by Uttim and Chhatardhari against Horil Kumhar and others. Para. 2 of this plaint runs as follows :

"The father of the plaintiffs and the plaintiffs were joint and their father was managing member of the family. The money covered by the bond was appropriated by the joint family. After the death of their father the plaintiffs by right of survivorship held possession of all the properties left by their father."

It cannot be denied that this paragraph, rightly interpreted, is a clear statement pointing to Hula's separation from Dhani. The learned vakil for the appellants has offered several explanations of para. 2 of the plaint under notice. One is that as the bond on the basis of which this money suit was instituted stood in the name of Hulas only, and with a view to avoid any complicated issue of jointness or separation with Dhani para. 2 was inserted in the plaint. The explanation is not a very convincing one and were it not that there are registered documents of dates subsequent to this plaint showing jointness of the contending parties, we should have felt disposed to regard the admission in the paragraph as a much more serious defect in the plaintiffs' case. We cannot however regard this as in any way determining the matter, as the numerous documents which have been already discussed in this judgment conclusively point to the family having remained joint subsequent to 1892 and even after 1900 when the plaint Ex. H-(4) was filed. We therefore think that para. 2 of the plaint (Ex. 4) is not a true statement of fact and it may be that the explanation offered is somewhere near the truth.

In the course of the argument of both sides reference has been made to road-cess returns and some rent receipts. We do not regard them as conclusive to support the case of the plaintiffs or of the defendants. On a careful examination of all the facts and circumstances of this case we are satisfied that the learned Subordinate Judge was right in holding that the plaintiffs and defendants were members of a joint Hindu family at the time of the institution of this suit. We also agree with the lower Court that 12 annas of Hudwa, the mokarrari of Kanchanpur, one-third of Mandai Khurd 16 annas of Polandu and nine and half annas of Patra

are joint. This is amply proved by the title-deeds standing in the names of the various members of this family to which an exhaustive reference has been made in the judgment of the lower Court. In fact we have no doubt that the family having remained joint till the institution of this suit, the properties mentioned in Schs. ka and kha of the plaint and also Udaipur are joint. It was suggested in the course of the argument of the learned vakil for the appellants that with reference to such properties as were admittedly in the sole possession of the defendants, the principle of exclusion of the plaintiffs as contemplated in Art. 127, Lim. Act, ought to apply. We do not consider that the findings at which we have arrived permit the consideration of such exclusion. We have held the family to have been joint and the fact that Hudwa and Udaipur were in charge of the plaintiffs and the other properties in that of the defendants will not prevent the plaintiffs from getting the relief they seek. The authority of the case of *Bidhata Roy* v. *Ram Charitra Roy* (2) is conclusive on this point.

The question of the inclusion within this suit of the properties mentioned in para 5 of the written statement is easy to dispose of. Of these eight annas of the scattered raiyati land in Mauza Udaipur have been included by an amendment in the plaint. As regards the rest, one was a mortgage lien which has been redeemed, and the rest are held in share with strangers excepting some cattle in the possession of the plaintiffs the inclusion of which has not been pressed. As regards the properties held jointly with strangers the plaintiffs were not bound to include them in the present action. For this proposition reliance is rightly placed on *Kailash Chandra Das* v. *Nityananda Das* (3), *Jogendra Chandra* v. *Srish Chandra* (4) and *Purushottam* v. *Atmaram Janardan* (5). The result is that the appeal is dismissed with costs. As regards the loan of Rs. 3,995 covered by Ex. A-6, we direct that this be regarded as family debt and should be taken into account when the division of the family property is made. This is agreed to by the learned vakil appearing for the defendants.

(2) [1907] 6 C. L. J. 651.
(3) [1909] 3 I. C. 21.
(4) [1909] 1 I. C. 110.
(5) [1899] 23 Bom. 597.

We wish to add that everything that could be said on behalf of the appellants in a somewhat lengthy and complicated case has been very clearly and ably put before us by the learned vakil who appeared on their behalf.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 289

JWALA PRASAD AND COUTTS, JJ.

Rama Singh—Defendant—Appellant.

v.

Harakhdhari Singh and *others*—Plaintiffs and Defendants — Respondents.

Second Appeal No. 584 of 1917, Decided on 29th July 1918, from decision of Dist. Judge, Patna.

(a) Evidence Act (1872), S. 3 — Deputy Collector holding enquiry under Bengal Land Registration Act is Court—Enquiry is judicial enquiry.

A Deputy Collector holding an enquiry under the Bengal Land Registration Act for the purpose of registering the names of rival claimants, is a Court within the meaning of S 3 and the enquiry held by him is a judicial enquiry. [P 290 C 1]

(b) Deed — Construction — Compromise providing that transfer by widow would be null and void—Compromise conferred rights of Hindu widow.

Where a compromise deed entered into between a Hindu widow and her husband's reversioners provided that if the widow made any transfer or created any incumbrance it would be null and void and that there would be no injury to the title of the reversioners:

Held: that the compromise gave the widow the rights of a Hindu widow in her husband's estate. [P 291 C 1]

Sami and *Khurshed Husnain* —for Appellant.

Fakhuruddin, *Abani Bhusan Mukerji* and *Ram Gopal Choudhry*—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit brought by the plaintiff for a declaration that a sale-deed dated 8th January 1915 executed by Mt. Sakalbasi Kuer, defendant 1 in favour of the appellant is invalid and inoperative as against the plaintiffs, that the appellant did not derive any title thereunder and that it cannot in any way be binding upon them. The plaintiffs are agnatic relations or reversioners of Hiabal Singh who died in the month of Fagoon 1309 fasli without any issue. Defendant 1 is his widow. Defendant 2 the appellant purchased from defendant 1 the properties in question by a sale-deed dated 8th January 1915 which is the

subject-matter of the suit. Shortly after the death of Hiabal Singh, the plaintiffs and defendant 1 applied to the Collector for registration of their names in respect of the properties left by Hiabal Singh under Act 7 of 1876 (Land Registration Act). The plaintiffs who are the reversioners claimed to have succeeded to the properties by right of survivorship. Defendant 1, the widow, on the other hand said that her husband was separate from the plaintiffs and that she inherited the properties as an heir under the Hindu Law. The land registration dispute was settled between the parties and a compromise petition embodying the terms of the settlement was filed before the Land Registration Deputy Collector. On 1st December 1902 the Deputy Collector passed an order in the following words: "Petition of compromise filed. Draw up decree accordingly and put up on 3rd instant." On the latter date the order was "No objection filed; decree recorded, make entry in revised Register D, etc." By the terms of the compromise the widow defendant 1 was registered in the Collectorate Register D as a proprietor of the properties and accordingly she was in possession until 8th January 1915 when she executed the sale-deed in question in favour of the appellant.

The reversioners therefore brought the present suit for a declaration referred to above. There were other reliefs also sought in the plaint, namely, that the right of the widow to remain in possession was extinguished on account of the invalid transfer and for the immediate registration of the plaintiffs' names. We are not however concerned at all with those reliefs, nor are we concerned with the allegations of the plaintiffs in the case that the husband of defendant 1 was joint with them and that she had not inherited the property nor was she in possession thereof. The learned Subordinate Judge who tried the case, held that the husband of defendant 1 was separate from the plaintiff and that defendant 1 was herself in possession of the property but that the sale-deed in question was executed without any legal necessity. Accordingly he passed a decree in favour of the plaintiffs declaring that the alienation of the properties in favour of defendant 2 is invalid and not binding upon the plaintiffs "after the death of defendant 1." The reversioners felt themselves aggrieved by the last few words, namely, "after the death of defendant 1" and preferred an appeal to the District Judge. The learned District Judge held that it was agreed between the parties according to the terms set forth in the compromise petition filed in the land registration case that

> "if Mt. Sakalbasi Kuar (widow) makes any transfer or creates any incumbrance that will be null and void and there will be no injury to the title of Jadunath Singh and Palakhdhari Singh and their heirs and representatives."

The learned District Judge accordingly held that the alienation made by defendant 1 was null and void and that it conferred no title upon the alienee the appellant. Upon this finding the judgment of the Court below was varied. The transferee of defendant 2 has therefore preferred the present appeal to this Court. It is contended on his behalf that the terms of the compromise petition could not be used in evidence inasmuch as it purported to affect immovable properties of over Rs. 100 in value and therefore required to be registered under S. 17, Registration Act 3 of 1877. The learned Subordinate Judge had given effect to this contention but there is no reference of this in the judgment of the learned District Judge. Apparently the point was not taken in appeal before him. There is no mention of this plea in the written statement filed by any of the defendants. The plaintiffs based their claim upon the terms of the compromise petition and filed a certified copy of it and also of an order sheet of the land registration case wherein the Deputy Collector directed a decree to be prepared in terms of the compromise. No decree however appears to have been filed and perhaps no decree was prepared by the land registration department, but there can be no doubt that the compromise petition was given effect to inasmuch as the name of defendant 2 was registered. It was in respect of the property about which there was a dispute between the parties in the land registration department that the clause in question was inserted curtailing the right of defendant 1 to transfer or incumber the property. On behalf of the appellant it is contended that the enquiry held by the land registration department for the purpose of registration of the

rival claimants, was not a judicial proceeding, or an enquiry by a Court.

There does not appear to be any substance in this contention regard being had to the definition of the word "Court" given in the Evidence Act, S. 3, which says Court includes all Judges, Magistrates and all persons except arbitrators legally advised to take evidence. Ss. 52 and 53, Land Registration Act, require the officer holding the enquiry under the Act to take evidence. Be that as it may, there can be no doubt that the compromise petition itself purported to give defendant 1 the right of a Hindu widow, neither more nor less. The terms of that compromise referred to above, namely, that the transfer made by her will be null and void and would not in any way prejudice the right of the reversioners and their heirs and representatives, are intended to give her a life estate with such powers and limitations as are vested in a Hindu widow. This is obvious from the position of the parties and from a true interpretation of the terms of the compromise. All that appears to have been intended is that alienation made by the widow should not be binding upon the reversioners, at all. There is no intention that the widow shall not be able to deal with the property as a Hindu widow under the Hindu law. This appears to be the view of their Lordships of the Privy Council in the case of *Bibi Sahodra* v. *Rai Jang Bahadur* (1) dealing with a compromise petition exactly of the nature that we have in this case.

The finding of fact in this case has not been challenged that the alienation by the widow was without any legal necessity. Apart from the compromise petition the result is the same under the Hindu law that the alienation in question, namely, the sale-deed executed by defendant 1 in favour of defendant 2, the appellant, is invalid and not binding upon the plaintiffs. This is the only relief that we can give. There is no occasion for adding to the decree the words "after the death of defendant 1" as was done by the learned Subordinate Judge, or in holding that the alienation was absolutely void and conferred no title upon the alienee as held by the learned District Judge. The plaintiffs themselves do not want to disturb the possession of the lady; they simply want a declaration that the alienation is not valid and not binding upon them. This is obvious from relief No. 1 in the plaint. In supersession of the decree of the Court below, a fresh decree will be prepared in terms of this judgment. The appeal is decreed in a modified form. There will be no order as to costs. The cross-objection relates only to the order of the Court below whereby no costs were given to either party. I think that the learned District Judge is right in holding that no party was entitled to any costs.

Coutts, J.—I agree.

V.S./R.K. *Appeal partly allowed.*

(1) [1882] 8 Cal. 224=8 I. A. 210=4 Sar. 294 (P. C.).

A. I. R. 1918 Patna 291

MULLICK, J.

Basirul Huq —Defendant—Appellant,

v.

Mohammed Ajimuddin — Plaintiff—Respondent.

Second Appeal No. 841 of 1916, Decided on 3rd May 1917, from decision of Dist. Judge, Patna.

(a) Mahomedan Law—Gift — Delivery of possession—Gift of interest in land—Donor need not transfer corpus but only possession of that interest—Donor doing all that lies in his power to transfer interest—Omission to deliver corpus is immaterial.

Where a gift is made of an interest in land, the donor is not required to transfer the corpus of the property but only possession of that interest and if the donor has done all that lies in his power to transfer that interest, the omission to deliver the corpus is immateriai.

The father of *A*, *B* and *C* owned two housee and allowed *A* and *C* to occupy one of them and *B* to occupy the other, and subsequently made a gift of the first house to *A* and *B* and of the second to *C*. *B* instituted a suit for declaration of title and recovery of possession from *C* as donee of the first house and *C* took the defence that there being no delivery of possession, the gift was invalid :

Held : (1) that *C* being only in permissive possession of the house it was sufficient for the father to direct *B* to take possession of it ; (2) that even if *C* were regarded as being in adverse possession, the father having done all that he could have possibly done under the circumstances the transaction was complete and gave the donee or transferee a complete title to recover possession inasmuch as to allow a person claiming adversely to the true owner to set up the invalidity of the gift would be to put a premium on acts of violence. [P 293 C 2]

(b) Practice—New plea—Point of law requiring investigation into fact cannot be raised for first time.

A point of law that requires investigation into facts cannot be allowed to be taken for the first time in second appeal. [P 294 C 1]

(c) Mahomedan Law—Gift—Mushaa—Gift of, is not invalid on subseqaent possession (*Obiter*).

(*Obiter*) A gift of a share in property is not invalid on the ground of mushaa, if the defect has been cured by subsequent possession. [P 294 C 1]

(d) Burden of Proof—Evidence Act (1872), S. 115.

In order to establish estoppel the party alleging estoppel must show that a representation was made by the opposite party and that the former acting upon that representation has changed his position. [P 294 C 2]

(e) Civil P. C. (1908), O. 41, R 24—Appellate Court not making special mention of document—It does not show that it has not considered it at all.

The mere fact that a Court of first appeal has not made special mention of a document which is a piece of relevant evidence, is not sufficient to show that it has not considered it at all.

[P 294 C 1, P 295 C 1]

Ganesh Dutta Singh and *Sant Prasad* —for Appellant.

Hassan Jan—for Respondent.

Judgment. — The plaintiff's case is that his father Farhat Hussain was owner of two houses described in these proceedings as house No. 9 and house No. 11, within the Municipality of Behar and that by private arrangement with the father defendants 1 and 3, two brothers of the plaintiff, occupied house No. 9 and the plaintiff occupied house No. 11 ; that in October 1913 the father made a gift of house No. 9 to plaintiff and defendant 3 in equal shares and of house No. 11 to defendant 1 as sole proprietor that the plaintiff and defendant 3 did occupy house No. 9 for some time but that on 27th April 1914 defendant 1 refused to allow the plaintiff to carry out certain alterations and asserted an exclusive claim thereto. The plaintiff thereupon, on 21st July 1914 brought the present suit for a declaration of title to house No 9 and for recovery of possession thereof. Defendant 1 denied the title of his father to house No. 9 altogether and set up the title of his mother and a partition subsequent to the death of his mother, by which he alleged the whole of house No. 9 was assigned to him and house No. 11 to the plaintiff. He therefore denied the right of the plaintiff to declaration of title and recovery of possession.

The Munsif found that the alleged deed of partition was not a deed of gift but a will. There was an allegation by the defendant that the deed was fraudulent, but there is no finding by the Munsif upon this point beyond a statement to the effect that the deed was collusive. The learned Munsif does not find that the father of the plaintiff did not execute the deed with full knowledge and consent. It is not understood what the learned Munsif means by the term "collusive." It was open to the father to divide the property as he liked and in the absence of any finding that there was undue influence or fraud it must be assumed that the deed was operative. The learned District Judge does not agree with the Munsif's view that the document was a will and does not make any reference to the finding of collusion. It would seem that the only point argued before the learned District Judge was whether the document was a will or a gift, and the question of undue influence or fraud was not raised before him. I have myself examined the document and I find nothing in it which would suggest that it could be construed as a will. It is a gift under the present Transfer of Property Act, subject to the condition that the donor would have a right of residence in the houses.

The validity of that condition is not in question and the only point for determination is whether or not upon the face of it the document is a will. I agree with the learned District Judge that it is not a will but a deed of gift. There is a clear statement of the transfer of proprietary rights to the donees. The learned Munsif found that defendant 1 was in possession of house No. 9 long before the date of the deed and the delivery of possession was never made to the plaintiff by the donor. He accordingly held that the gift was for this reason invalid. He has dismissed the plaintiff's suit firstly, on the ground that the plaintiff's father had no title to the house, and secondly, on the ground that even if he had a title the deed of gift was invalid under the Mahomedan law. The learned District Judge has found that the property belonged not, as alleged by the defendant, to his mother but was the ancestral property of the plaintiff's father. He found that the gift passed title to the plaintiff and he has accordingly decreed the suit with costs.

The first ground raised in second appeal on behalf of defendant 1 who is the appellant before me, is that the deed of gift was invalid because no delivery of possession was made. It is urged that

defendaut 1 had been always in possession on the allegation of a title derived from his mother and that till the plaintiff's father had ejected him and put the plaintiff in possession, the gift could not become operative.

The hearing of this appeal was begun yesterday and the learned vakil for the appellant had ample time to refer to his authorities but I regret to say that although he has taken an hour and a half in arguing the case to-day he has not been able to give me any material assistance with regard to the law. He has relied upon a number of rulings which merely lay down the proposition that a gift under the Mahomedan law is not valid without delivery of possession. But the question has to be examined with reference to the particular facts of each case. In this case according to the plaintiff the defendant 1 was in permissive occupation of house No. 9 together with defendant 3 under the will and pleasure of his father. In my opinion it was sufficient for the father at the time that he made the gift to say to his son the plaintiff:

"I give you this house, defendant 1 is in permissive occupation, go and take possession of the house which I have given to you."

The learned vakil for the respondent goes further and submits that even if defendant 1 was not in permissive occupation, but was claiming adversely to the true owner, the gift under such circumstances would be valid, and that it was not necessary for the plaintiff's father to eject defendant 1 before executing the deed of gift. The principle underlying the Mahomedan law in this respect is the same as that which underlies cases of gifts or sales in other systems. Where the donor, or transferor, has not done all that was necessary to complete the transaction a suit by the donee or other transferee does not lie to compel him to do what he has not already done. If the donor or transferor has done all that he could have possibly done under the circumstances then the transaction is complete and gives the donee or transferee a complete title to recover possession. The case of *Kalidas Mullick* v. *Kanhaya Lal* (1) deals with a gift made by a Hindu donor. Their Lordships of the Privy Council observed that the Hindu texts appeared to rest on principles which had nothing to do with the feudal rules and that the analogy most applicable in European Law was that of voluntary contracts or transfers where if the donor has not done all he can to perfect his contemplated gift, he cannot be compelled to do more. In that case the donor had done all she could to complete her gift and there was no question of compelling her to do more. It was held therefore that the donee was competent to sue to recover possession of the property transferred.

The principle of the above mentioned case was followed in regard to a Mahomedan gift in *Mahomed Buksh Khan* v. *Hosseini Bibi* (2). It is true that in that case the donee took possession after the gift but from the generality of the proposition laid down by their Lordships in the case of *Kalidas Mullick* v. *Kanhaya Lal* (1) above referred to, it is clear that in their Lordships' opinion the gift was valid as soon as the donor had done all that was possible for him to do by making a transfer. To like effect is the case of *Anwari Begam* v. *Nizamuddin Shah* (3). In that case the property was under attachment by the Collector and it was held that although the donor had not transferred physical possession to the donee, the transfer was valid. It is instructive to notice that one of the reasons given by their Lordships for so holding was that to allow a person claiming adversely to the true owner to set up the invalidity of the gift in such a case would be to put a premium on acts of violence. Their Lordships further justified the gift on the ground that where the transfer is of an interest in land the donor is not required to transfer the corpus of the property but only possession of that interest and if he has done all that lies in his power to transfer that interest then the omission to deliver the corpus is immaterial.

Here the donor has been examined and has deposed in the plaintiff's favour. It also appears that after the transfer he applied to the Municipal authorities to remove his own name and to substitute the name of the plaintiff in respect of house No. 9. On the authorities above cited it was unnecessary for the donor to deliver physical possession. The delivery of possession of all the rights of

(1) [1885] 11 Cal. 121=11 I. A. 218 (P.C.).

(2) [1880] 5 Cal. 684=15 I. A. 81 (P.C.).
(3) [1899] 21 All. 165.

the donor was sufficient to give the plaintiff the relief which he seeks in the present suit. The learned Munsif has found that defendant 1 was in occupation of house No. 9 and that he never occupied house No. 11, but the learned Munsif has not found, although the learned vakil for the appellant contends that he has, that defendant 1 was in exclusive occupation of house No. 9 and that the plaintiff never entered into occupation after the deed of gift.

The plaintiff's case is that he entered into occupation and did occupy the north eastern half of the house while defendant 3 occupied the south-western half. The learned District Judge has found the title of the plaintiff's father and although he does not specifically record the finding that the plaintiff entered into possession of his half share, I think, by implication he must be taken to have found that the plaintiff's story is correct and that the defendant's story is false. It was however unnecessary in view of the law for him to come to any finding as to delivery of physical possession of the house to the plaintiff but if such a finding was necessary I think that his judgment contains that finding by implication. Then the learned vakil for the appellant attacks the gift on the doctrine of mushaa. He contends that as the donor did not demarcate by metes and bounds the respective shares of the plaintiff and defendant 3 in house No. 9 the gift is invalid. This point does not appear to have been taken in any of the Courts below. It has been taken for the first time in second appeal and its determination depends upon a question of fact, namely, whether the plaintiff and defendant 3 have in fact occupied distinct portions of the house after the gift. There seems to be some conflict as to whether occupation after the gift will be sufficient but on the view expressed by Sir Roland Wilson in his Digest of Anglo-Mahomedan Law it would appear that the gift is valid if the defect as to mushaa has been cured by subsequent possession.

In this case it will be necessary to take evidence in order to come to a finding upon this point and it is the rule of our Court that where a point of law requires investigation into facts, that point of law cannot be allowed to be taken for the first time in second appeal. The objection therefore is not entertainable. But even if it had been entertainable, I think there is material upon the pleadings of both parties to show that there was in fact occupation by the plaintiff and by defendant 3 of their distinct half shares of the house. The plaintiff in his plaint says that he occupied the north-eastern part and defendant 3 occupied the south-western part. This would lead to the inference that the portion occupied by defendant 3 was a distinct and separate part of the house, para. 9 of the written statement corroborates this. Therefore both upon the ground that this new point is not entertainable for the first time in second appeal and on the ground that even if it is entertainable there is sufficient material upon the pleadings to show that the plaintiff and defendant 3 occupied two distinct portions of the house this objection raised by the learned vakil for the appellant must fail.

The third point raised by the learned vakil is that the plaintiff is estopped from maintaining this suit because it has been shown that he has mortgaged house No. 11 treating it as his own; but in order to establish estoppel the defendant must show that a representation was made by the plaintiff and that the defendant acting upon that representation has changed his position. The facts necessary to establish estoppel are altogether wanting. The learned Munsif's finding on this point is contained in his judgment on issue 3. He does not adequately dispose of the matter and the point does not appear to have been raised before the learned District Judge. In the absence of evidence which is necessary for the determination of the point it cannot be said that any case of estoppel has been made out.

Finally the learned vakil for the appellant relies upon an error of procedure. He says that the learned District Judge's judgment is not in accordance with law because he has failed to consider an item of evidence, namely, Ex, A. Ex. A is a mortgage executed by the plaiutiff in respect of house No. 11. It is relevant only to the question of title and there is nothing to show that the learned District Judge has not taken it into full consideration in finding that both the houses belonged not to the mother but to the father of the plaintiff. The mere fact that he has not made special men-

tion of the document is not sufficient to show that he has not considered it at all. The learned Mnnsif relied upon this document in disposing of the question of title and it must be presumed that the learned District Judge fully considered it in coming to the contrary conclusion that the houses belonged tc the plaintiff's father. The result therefore is that the decree of the District Judge must be affirmed and the appeal must be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 295

ROE AND ALI IMAM, JJ.

Alice Thorp—Applicant.

v.

Shamat Lal—Opposite Party.

Civil Revns. Nos. 60, 61 and 65 to 71 of 1917, Decided on 8th November 1917, against an order of Small Cause Court Judge, Motihari, D/- 19th December 1916.

Succession Certificate Act (1889), S. 4—Suit by heir of deceased against debtor is maintainable without certificate.

What is barred under S. 4 is the passing of a decree in favour of a person, claiming to be entitled to the effects of a deceased person against a debtor of the latter for payment of the debt, without the production of a certificate as required by the section. The section is no bar to the maintainability of such a suit. [P 295 C 2]

Soroshi Charan Mitter—for Applicant.

Khurshed Hasnain — for Opposite Party.

Ali Imam, J.—Civil Revisions Nos.60, 61 and 65—71 of 1917 arise from a decision of the Small Cause Court Judge of Motihari. The facts of these cases shortly are that the appellant, Mrs. Alice Thorp, instituted a certain number of rent suits against Shamat Lal and others who are defendants in these cases. The Court below, exercising powers under the Small Cause Courts Act, dealt with these cases together, and has dismissed them on the ground that the status of the plaintiff to prosecute her suits is not established. The Court below at the end of the judgment deals with this aspect of the plaintiff's suits in these words: (1) 'The suits are not maintainable under S. 4 Succession Certificate Act." The reason why he has so worded his judgment is given in a few sentences above the passage quoted. In that he refers to the fact that although the plaintiff Mrs. Thorp was said to have succeeded to the estate of her husband and probate had been taken, yet neither a certificate of succession nor the original probate or copies thereof had been filed. Reading this part of the judgment of the learned Small Cause Court Judge we cannot but hold that he is under the impression that the suits under notice could not be maintained by the plaintiff unless and until she produced either the certificate or the probate papers. We think the learned Judge has fallen into an error, which is an error of law. The learned Judge has relied for his view of the case on S. 4, Succession Certificate Act. A reference to that section shows that there is no bar to the maintenance of a suit under the circumstances referred to above, but what is barred is the passing of a decree in such circumstances. It appears to us therefore that the Small Cause Court Judge misdirected himself on the question of the maintenance of these suits. The suits are perfectly maintainable and S. 4, Succession Certificate Act, was by no means a bar to their maintenance. The question of the decree on the other hand is a question which is altogether separate from the question of the maintenance of suits, and it appears to us that if this view of the law had been presented to the mind of the learned Judge he might well have, in a case like this, allowed time to the plaintiff to produce these papers before he gave her a decree. Evidently he did not consider the question as to whether time should or should not have been given to the plaintiff to produce these papers.

In the circumstances we set aside the order passed by the learned Judge and now that we are satisfied that the plaintiff Mrs. Thorp had as a matter of fact obtained probate of the will of her husband and that as such had the status to proceed with those cases and ask for decrees being passed in her favour, we think in this case we should not only reverse the order passed by the learned Judge but decree the suits in question. We pass no orders as regards costs.

Roe, J.—I concur. I entirely agree that a marked distinction should be made between an error of law and an exercise of discretion. In the case before us it seems to me that there was not merely a refusal to grant a postponement of the case to admit of the production of the probate but rather a refusal to allow it

to be produced after the case had been commenced.

V.S./R.K. *Suits decreed.*

A. I. R. 1918 Patna 296 (1)

ROE AND COUTTS, JJ.

Debendro Nath Sah Deo—Appellant.

v.

Deo Nandan Singh—Respondent.

Appeal No. 588 of 1917, Decided on 18th July 1918, from appellate decree of Sub-Judge, D/- 12th February 1917.

Impartible estate—Alienation—Right of maintenance—Custom of right of maintenance of junior members must be proved to exist before transfer can be made subject to such charge.

Where it is alleged that a transfer of impartible property is subject to the right of maintenance of the younger members of the family of the transferor the allegation must be supported by proof of a custom to that effect existent in the family. [P 296 C 1]

Amir Hasan for *Mohammed Fakhruddin*—for Appellant.

Gurusaran Prosad—for Respondent.

Judgment. — The appllant in this case was a purchaser of an impartible estate situated in Chota Nagpur the respondent being one of the younger brothers of the transferor. The suit by the respondent was for the recovery of a 1/3rd share of the property transferred. The learned Munsif dismissed his suit. The learned Subordinate Judge, on the ground that the respondent was entitled to maintenance out of the property alienated, held that in equity the respondent was entitled to a decree for a share in the property in lieu of the maintenance that he had lost by the transfer, and in this view of the case gave a decree for a 1/4th share of the property transferred. Against that decision there is an appeal and a cross-appeal.

In our view the appeal must succeed. The authority quoted by the learned Subordinate Judge *Durgadut Singh* v. *Rameshwar Singh* (1) cannot be interpreted in the way suggested by him and indeed it was interpreted in a directly contrary fashion in the Munsif's Court. Where there has already been a grant made for maintenance from impartible property we may concede that the transfer of the property would not destroy the grant made but where it is alleged that the transfer of such impartible property is subject to the right of maintenance that is in the younger members of the family, that suggestion must be supported by proof of a custom existent in the family. It is brought to our notice that there are still other properties left with the head of the family. It will be open to the plaintiff to institute any suit against his own family for suitable maintenance. The appeal must be decreed and the cross-appeal dismissed, and the plaintiff's suit dismissed in all Courts with costs.

V.S./R.K. *Appeal decreed.*

(1) [1909] 36 Cal. 943=4 I. C. 2=36 I. A. 176 (P. C.).

A. I. R. 1918 Patna 296 (2)

MULLICK AND ATKINSON, JJ.

Sakina Bibi— Judgment-debtor—Appellant.

v.

Ganesh Prasad Bhagat—Decree-holder—Respondent.

Appeal No. 1 of 1917, Decided on 17th July 1917, from appellate order of Dist. Judge, Cuttack, D/- 12th December 1916.

Civil P. C. (1908), S. 48—S. 48 does not apply to revival of antecedent application held in suspense by reason of some bar—Such application is governed by Limitation Act (1908), Art. 181.

Section 48 applies only to a fresh application for leave to issue execution. It has no application whatsoever to the case of a revival of an antecedent application for execution which has been in suspense by reason of some bar or which has been stayed pending the determination of subsequent litigation. The limitation applicable to such a case is that provided by Art. 181, i. e,, three years from the time when the bar is removed. [P 297 C 1]

B. N. Singh—for Appellant.

Tinkori Banerjee—for Respondent.

Atkinson, J—The plaintiff brought an action on foot of a mortgage and recovered judgment on 23rd May 1900. The plaintiff made many attempts to execute this decree and I believe eight executions, or attempts at execution, were instituted. However the last petition for leave to issue execution was filed on 20th May 1912. The defendants subsequently brought a suit after the property had been sold contending that the same was not the property of the judgment-debtor but that it formed their own property. Consequently the plaintiff's application for leave to issue execution was stayed by order of the High Court dated 13th November 1912. The defendant's suit was finally disposed of and dismissed by the High Court on 20th May 1916. The last petition for leave to issue execution was filed three days before the 12 years had expired from the date of the

decree, and therefore the application was within time within the meaning of S. 48, Civil P. C. It is contended now that the plaintiff is not entitled to issue execution or to revive the antecedent application for execution that was made on 20th May 1912, because he did not proceed with his application for revival within three days from the date of the dismissal of the defendants' suit on 20th May 1916—that is to say that the plaintiff after the determination of the defendants' suit had three days only in which to file any application that may have been necessary to revive the previous application to issue execution. As a matter of fact the plaintiff applied on 6th July 1916, to revive the application for leave to issue execution and this was granted. The learned Judge declined to yield to the contention of the defendants and held that the plaintiff was entitled to issue execution within the period of three years from the date of the bar for leave to issue execution or the carrying into effect of the last petition for execution filed on 20th May 1912. It is argued before us that S. 48, Civil P. C., applies. That section would only be applicable if it was a fresh application for leave to issue execution. It has no application whatsoever to the case of a revival of an antecedent application for execution which had been in suspense by reason of some bar or which had been stayed pending the determination of subsequent litigation. The Article which seems to apply and which was designed to apply to this case is Art. 181, formerly Art. 178, of the general Limitation Act and that Article provides that where no limitation is expressly provided by the Act for the doing of any particular act the period of three years is to be deemed to be the period of limitation from the date on which the right accrued. In this case the right accrued at the date when the bar was removed; and the plaintiff must be deemed to have three years from that date within which he would be entitled to revive the application of 20th May 1912, for leave to issue execution. The defendants contend that this is very hard. It may be hard but it is very just because it is very right and proper that the plaintiff should be entitled to a reasonable time at any rate from the date of the removal of the bar to issue execution and to hold that he is entitled to only three days would in my opinion be very unfair and unjust more especially when the defendants deliberately set themselves to endeavour by every means in their power to defeat the execution proceedings. I think that the learned Judge was right in the conclusion at which he arrived and I would dismiss this appeal with costs.

Mullick, J.—I agree.

V.S /R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 297

MULLICK AND THORNHILL, JJ.

Maula Bux—Plaintiff—Appellant.

v.

Raghubar Ganjhu — Defendant—Respondent.

Appeal No. 279 of 1917, Decided on 3rd July 1918, from appellate order of Judicial Commissioner, Chota Nagpur, D/- 22nd May 1917.

(a) Civil P. C. (1908), S. 47—S. 47 does not apply to proceedings to set aside execution sale—In such case order is not a decree.

It is not open to a party to impeach an execution sale under S. 47 and if a Court does, professing to act under S. 47, set aside a sale on the objection of the judgment-debtor in a proceeding between the judgment-debtor and the decree-holder, the order setting aside the sale will not be a decree. [P 298 C 2]

(b) Civil P. C. (1908), O. 21, R. 90—R. 90 includes fraud committed after publishing sale.

The language of O. 21, R, 90 Civil P. C., which gives a Court power to set aside sales on the ground of fraud in publishing and conducting the sale, is wide enough to include cases where fraud is committed after the publication of the sale proclamation. [P 298 C 2]

(b) Civil P. C. (5 of 1908), O. 21, Rr. 90 and 92—Agreement not to proceed with sale if amount paid within time fixed—Sale proceeded with inspite of agreement—Held Judgment-debtor can successfully apply under R. 90—No second appeal lies against order setting aside sale.

Where a decree-holder agreed not to proceed with an execution sale on a promise by the judgment-debtor to pay up the whole of the decretal money within two months, but nevertheless proceeded to sell the property in contravention of his agreement :

Held: (1) that the conduct of the decree-holder amounted to fraud in the matter of conducting the sale and that the proper provision under which the judgment-debtor could come and impeach the sale was O. 21, R. 90 ; (2) that no second appeal lay against the order setting aside the sale. [P 298 C 2]

Rai Gurusaran Prasad—for Appellant.

Uma Charan Laha—for Respondent.

Mullick, J.—The plaintiff got a decree against the defendant for money and the execution with which we are concerned

was one which was lodged on 8th February 1915. In pursuance of that execution petition the plaintiff attached some immovable property belonging to the judgment-debtor, the sale being fixed for 15th May 1915. The judgment-debtor paid Rs. 40 and got the time for the sale extended till 15th June, promising not to take any further objection to the regularity of the sale proclamation. On 15th June the judgment-debtor did not appear and the property was duly sold and purchased by the decree-holder for Rs. 412, which represented the balance due on the decree. The sale was confirmed and delivery of possession was made on 29th July 1915. In August 1915 the judgment-debtor filed an application before the execution Court alleging that after 15th May the decree-holder agreed not to proceed with the sale on a promise by the judgment-debtor to pay up the whole of the decretal money within two months. The judgment debtor alleged that by this fraud on the part of the decree-holder he was kept out of all knowledge of the sale till 29th July. The execution Court as well as the District Judge on appeal have held that the story told by the judgment-debtor is true and that there was fraud on the part of the decree-holder, and the sale has therefore been set aside. The present second appeal is filed by the decree-holder against the order setting aside the sale.

Now it is clear that a second appeal will not lie if there is no point of law involved. Upon the appellate judgment of the learned District Judge it is not clear that there is any point of law which requires our interference. The learned Judge has disposed of the case upon the merits and has found as a fact that there was fraud on the part of the decree-holder. The learned vakil who appears for the appellant before us however urges that as the execution case was finally concluded with the delivery of possession, it cannot be said that there was any execution proceeding in the course of which the judgment-debtor was competent to make an objection under S. 47, Civil. P. C. He says that the order made by the execution Court was an order under S. 47 and that it was a decree and that therefore a second appeal lies. It is quite clear that the order of the execution Court was not a decree, having regard to the definition of decree in the Civil Procedure Code (S. 2). As the law now stands, it would appear that it is not open to a party to impeach a sale under S. 47, Civil P. C., and that, in any event, if a Court does, professing to act under S. 47, set aside a sale on the objection of the judgment-debtor in a proceeding between the judgment-debtor and the decree-holder, that order will not be a decree. O. 43 of the Code now gives a right of appeal against all orders setting aside sales on the ground of irregularity or fraud in the matter of publishing or conducting a sale and therefore an order purporting to have been passed under S. 47, setting aside a sale, would not be a decree within the meaning of S. 2, because under O. 43 it has been made specially appealable otherwise than as a decree. Therefore the order, if made under S. 47, not being a decree no second appeal will lie.

The learned vakil then falls back upon another contention, namely, that O. 21, R. 90, which gives a Court power to set aside sales on the ground of fraud in publishing and conducting the sale, does not include cases where fraud has been committed after the publication of the sale proclamation. He contends that to obtain relief for such a fraud the judgment-debtor must bring a separate suit. In my opinion the language of O. 21, R 90, is sufficiently wide to cover fraud such as has been found in the present case. Here the decree-holder promised not to hold the sale if payment was made within a certain time but he then fraudulently proceeded to sell the property in contravention of the arrangement made with the judgment-debtor. This would, in my opinion, be fraud in the matter of conducting the sale. Therefore the proper provision of the Civil Procedure Code under which the judgment-debtor could come and impeach the sale was O. 21, R. 90, and against an order under that section there is only one appeal allowed by O. 43. A second appeal does not therefore lie. The result is that the appeal is dismissed with costs.

Thornhill, J.—I agree.

V.S /R.K *Appeal dismissed.*

*A. I. R. 1918 Patna 299

SHARFUDDIN AND ROE, JJ.

Benode Behari Bose—Defendant—Appellant.

v.

Hira Singh and *others*—Plaintiffs—Respondents.

First Appeal Nos. 64 and 75 of 1916, Decided on 3rd July 1917, against decision of Sub-Judge, 1st Court, Shahabad, D/ 18th February 1916.

***(a) Transfer of Property Act (1882), S. 52—Mortgagee holding two mortgages—Decree on first mortgage—Mortgagee consenting to grant time for paying off mortgage by loan from third person—S. 52 does not apply.**

The essence of S. 52, T. P. Act is that a transaction entered into during the pendency of a suit cannot prejudice the interests of a party to the suit who is not a party to the transaction. [P 300 C 1]

A mortgagee, who held two mortgages on the same property, obtained a decree on his first mortgage and during the execution of that decree consented to the postponment of the sale and the granting of time to the mortgagor to enable him to pay off the mortgage with money borrowed from one *H*:

Held: that *H*. by paying off the first mortgage obtained a lien over the mortgaged property prior to the second mortgage, and that the transaction being acquiesced in by and being presumably for the benefit of the mortgagee, S. 52, T. P. Act had no application to it. [P 300 C 1]

***(b) Contract Act (1872), S. 74—Mortgage decree providing interest at certain rate—Execution Court granting time on condition of payment of higher rate—Increase is penalty.**

Where a mortgage-decree provided for the payment of interest at a certain rate, but in execution the Court granted the judgment debtor time to pay off the decretal amount on condition that he paid interest at a higher rate:

Held: (*semble*), that the increase in the rate of interest was in the nature of a penalty. [P 300 C 2]

Naresh Chandra Sinha and *Sisir Kumari Mitter*—for Appellant.

Kulwant Sahay and *Achalendra Nath Das*—for Respondents.

Judgment.—On 24th April 1907 Ambika Charan Mitra and Amrita Krishna Mitra, his son, mortgaged certain properties to Kumar Promatha Nath Malia, who obtained a decree on 9th August 1909 and transferred it on 14th January 1911 to Rai Benode Behari Bose Bahadur. Rai Benode Behari Bose being of opinion that the property was worth more than the amount secured under the decree which he had purchased from the former mortgagee decree-holder, advanced further sums upon a second mortgage to the Mitras on 16th January 1911 and 8th May 1911. In 1913 Rai Benode Behari put the second mortgage into suit; and subsequently obtained a decree and purchased the property himself. The sum realized in execution of this decree exceeded the amount due under the decree by a considerable sum. Pending the suit upon the second mortgage Rai Benode Behari put up for sale the mortgaged property upon the decree obtained on first mortgage and the proceedings in execution reached the stage of a date being fixed for the sale after due issue of the sale proclamation. Upon the date fixed for the sale the judgment-debtor came into Court with a petition asking for time to raise money from Hira Singh to pay off the mortgage decree. Rai Benode Behari himself signed this petition and upon this joint petition of Rai Benode Behari and the judgment-debtor time was granted to borrow money from Hira Singh and to pay off Rai Benode Behari's debt.

In due course the debt of Rai Benode Behari upon the first mortgage was extinguished by payment made admittedly from the purse of Hira Singh. Hira Singh on 9th May 1913 took a mortgage for Rs. 7,000 from the Mitras, wherein it was distinctly stated that the mortgage lien held by Rai Benode Behari was to be kept alive for the benefit of Hira Singh who was paying the money. Upon the purchase of the property by Rai Benode Behari and possession being taken thereof, Hira Singh has brought the present suit for an account upon the first mortgage and for a declaration that the amount now due upon the mortgage, which can be traced to the payment of the debt of Rai Benode Behari, should rank as a charge upon the property prior to the charge obtained by Rai Benode Behari by virtue of his purchase under the decree upon the second mortgage. Hira Singh also claims that Rs. 1,000, the amount of rent which was paid from a loan taken from him by the Mitras, should be a charge upon the properties mortgaged. The learned Subordinate Judge has refused to give the plaintiff a charge in regard to the sum advanced for payment of rent; but has made a decree directing that an account be taken and that all sums now due on account of the payment made in satisfaction of the first mortgage decree of Rai Benode Behari do rank prior to the second mortgage-decree

of Rai Benode Behari; and that all other sums due under Hira Singh's mortgage shall be postponed to the second mortgage. Rai Benode Behari appeals against that portion of the decree which gives priority to Hira Singh's charge upon the property; and Hira Singh appeals against the order refusing the charge in connection with the payment made for rent. The appeal of Hira Singh, First Appeal No. 75 of 1916, is not seriously pressed. We need say with regard to it only that there was no payment of rent made by Hira Singh.

There was merely a further loan granted to the mortgagor. Though the money borrowed was actually deposited to set aside the sale of the mortgaged lands, the transaction created no charge. The appeal of Hira Singh is therefore dismissed with costs. The appeal of Rai Benode Behari will also be dismissed. The petition filed for time to be given for borrowing the money from Hira Singh makes it unnecessary for us to discuss the nice question whether in all cases a transaction resulting in subrogation can be held to be covered by S. 52 T. P. Act. The essence of S. 52 is that a transaction entered into during the pendency of a suit cannot prejudice the interests of a party to the suit who is not a party to the transaction. Rai Benode Behari himself consented to the postponement of the sale upon the first mortgage in order that money might be borrowed from Hira Singh. He therefore knew that Hira Singh was about to lend money to liquidate the mortgage debt. The passage to be found at p. 1046 in Vol. 10, Indian Law Reports, Calcutta Series [in the case of *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (1)], which report begins at p. 1035, must be taken as conclusive that irrespective of the clause in Hira Singh's document definitely keeping alive the mortgage of Rai Benode Behari, the payment of the mortgage-debt by Hira Singh was in itself sufficient to warrant the presumption that the prior mortgage would be kept alive. We must presume that Rai Benode Behari was, when the petition for time was filed, within reach of legal advice.

He must have been aware that the entry of that third party would create a lien prior to his second charge. He nevertheless acquiesced in the granting of time for the entry of the third party with the deliberate intention of realizing his money as rapidly as possible. We must presume that the transaction as a whole was for his benefit as he thought at the time, and was not a transaction calculated to prejudice his interests as contemplated in S. 52. We hold that this part of the case was rightly decided by the learned Subordinate Judge and that Hira Singh, the plaintiff, is entitled to ask for an account upon his prior charge and to recover the sum advanced for the payment of the first mortgage-debt of Rai Benode Behari. The learned Subordinate Judge has however given no indication in his judgment as to the rate at which interest should run. The interest due under the mortgage document was Rs. 1-8-0 per cent per mensem. At the time that Rai Benode Behari's debt was paid a decree had been made and the property was up for sale. The terms of the decree were that interest should run after 10th February 1910 at 6 per cent per annum. We are informed that one of the conditions of the granting of time to pay the decreetal amount was that the rate of interest should be increased to 12 per cent per annum. This appears to have received the sanction of the Court on 18th January 1911. The increase of the rate of interest from 6 per cent to 12 per cent seems to us suspiciously like a penalty; and indeed the debt having been extinguished, so far as Rai Benode Behari was concerned, on the date of the payment made by Hira Singh, interest should not be calculated at more than 6 per cent per annum in making up Hira Singh's account. We modify the learned Subordinate Judge's decree to this extent; that in taking that account interest be calculated at 6 per cent. The appeal of Rai Benode Behari will be decreed in part with costs to the extent of success and failure on both sides.

V.S./R.K. *Decree modified.*

(1) [1884] 10 Cal. 1035=11 I. A. 126 (P. C.).

A. I. R. 1918 Patna 300

MULLICK, J.

Lachman Ram and *others*—Petitioners.

v.

Dhiru Dusadh—Opposite Party.

Criminal Revn. No. 341 of 1918, Decided on 30th September 1918, from order of Magistrate, Ranchi.

Criminal P. C. (5 of 1898), Ss. 144 and 145 —S. 144 does not apply to disputes about

possession of land but applies only to temporary orders of nuisance.

Section 144, is applicable only to temporary orders in urgent cases of nuisance or apprehended danger. It is not applicable in cases where there is a dispute as to land for the settlement of which S. 145 provides the appropriate remedy. [P 301 C 1]

S. K. Sahay—for Petitioners.

Panchanan Banerji — for Opposite Party.

Order.—The remedy adopted by the learned Deputy Magistrate was misconceived. S. 144, Criminal P. C., is applicable only to temporary orders in urgent cases of nuisance or apprehended danger. It is not applicable in cases where there is a dispute as to land for the settlement of which S. 145, Criminal P. C., would seem to provide the appropriate remedy. The Magistrate should have proceeded under that section or S. 107, Criminal P. C. His order under S. 144, Criminal P. C., is set aside on the ground that it was made without jurisdiction.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 301 (1)

JWALA PRASAD, J.

Dhabari Mian—Petitioner.

v.

Gorakh Prasad—Opposite Party.

Criminal Revn. No. 161 of 1918, Decided on 16th May 1918, from an order of Magistrate, Motihari.

(a) Criminal P.C. (5 of 1898), S. 145 (4)—"Hearing parties" include arguments on conclusion of case — Refusal to hear arguments invalidates final order as being in excess of jurisdiction.

The words "the Magistrate shall hear the parties" in Cl (4), S. 145, Criminal P. C., include the argument on the conclusion of the evidence on both sides, and the refusal of the Magistrate to hear the arguments of the parties vitiates the final order passed under S. 145 as being in excess of jurisdiction. [P 301 C 2]

(b) Criminal P. C. (5 of 1898), S. 145—Procedure prescribed for summons case should be followed.

It is clear from the nature of the inquiry required by S. 145 that the procedure under that section should be regarded on all points as that prescribed for summons cases. [P 301 C 2]

G. C. Pal—for Petitioner.

Ganesh Dutta Singh — for Opposite Party.

Judgment.—This Rule must be made absolute. The ground of grievance of the petitioner is that the learned Magistrate did not hear the arguments in the case although his legal representative wanted to be heard. The facts connected therewith are set out in paras. 5 and 6 of the petition before me. The Magistrate in his explanation does not deny the allegations made by the petitioner but he justifies his procedure on the ground that he "did not consider the hearing of the argument necessary." The test is not what the Magistrate thought but what the party thought. If the party considered that the argument on his side would be beneficial to his interest the Magistrate was bound to hear him. Cl. 4, S. 145, clearly provides "that the Magistrate shall hear the parties." This includes the argument at the conclusion of the evidence on both sides as the procedure prescribed in S. 244 of the Code for summons trial. It was pointed out in the case of *Hurendro Narain Singh Chowdhry* v. *Bhobani Prea Baruani* (1) that although it is nowhere declared in the Code as to whether the procedure for inquiry under S. 145 should be that of a summons case or warrant case it is clear from the nature of the inquiry that the procedure should be regarded on all the points as that prescribed for summons cases. The wording of S. 244 relating to summons cases is almost identical with that of Cl. 4, S. 145, so far as this point is concerned. It was further pointed out in the authority quoted above that the Magistrate was wrong in refusing to hear the arguments of pleaders and that it is not improbable that if he had heard their arguments he would have had his attention directed to the point in favour of the petitioner and probably passed a different order from what he has passed in the case. Very recently in a case of this Court *Jatan Singh* v. *Dukhia Singh* (2) it was held that the refusal of the Magistrate to hear the argument of the parties vitiated the final order passed under S. 145 as being in excess of jurisdiction. The order of the Magistrate is therefore set aside and the case remanded for a fresh decision after hearing the arguments of the parties.

V.S./R.K. *Rule made absolute.*

(1) [1885] 11 Cal. 762.
(2) [1917] 38 I. C. 434.

A. I. R. 1918 Patna 301 (2)

DAWSON-MILLER, C. J. AND MULLICK, J.

Agabeg—Petitioner.

v.

Mt. Sundari—Opposite Party.

Civil Revn. No. 300 of 1917, Decided on 11th January 1918.

Civil P. C. (1908), O. 40, R. 1—Creditor appointed manager and put in possession—In suit by another creditor receiver appointed—Objection by manager creditor for appointment of receiver dismissed—Order is appealable.

The applicant advanced money to one *T* and in consideration of that was appointed manager of *T's* estate and was put in possessiou of it. Subsequently certain creditors of *T* obtained a decree against him and in execution of that decree a Receiver was appointed and put in possession of *T's* estate. Thereupon the applicant preferred an objection to the appointment of the Receiver and to the delivery of possession of the estate which was dismissed:

Held: that the order dismissing the applicant's objection came within O. 40, R, 1, and was appealable under O. 43, R. 1 (s) of the Code.

[P 302 C 2]

Susil Madhab Mullick and *Bama Charan Lahiri*—for Petitioner.

Pugh and *Naresh Chandra Sinha*—for Opposite Party.

Judgment.—In this case an application is made on behalf of Mr. Alfred A. Agabeg asking us to exercise our powers under S. 115, Civil P. C. and review a decision of the Subordinate Judge of Deoghur, dated 27th September 1917. It appears that the applicant advanced money to one Thakur Ashutosh Deo, Ghatwal of Rohini, and in consideration of that he was appointed manager of his estate on 4th May 1914, put into possession and Thakur Ashutosh Deo received apparently a monthly allowance. A little later on the applicant was served with a notice of discharge. Thereupon he instituted a suit and obtained a declaration to the effect that he was entitled to remain in possession and to collect the rent to pay off the debt in accordance with the terms of the agreement which was a written agreement entered into on 4th May 1914. Subsequently he appears to have advanced some further money and got a usufructuary mortgage in respect of Basuri Mahal which was the same or part of the same property. On 17th July Mt. Sundari and Debi Prasad Marwari obtained a decree against Thakur Ashutosh Deo for a sum of Rs. 4,725, and in execution of that decree a Receiver was appointed and he was put in possession of the property in respect of which the present applicant was already exercising or claimed that he was exercising rights of possession. Thereupon a written objection was filed by the applicant to the appointment of the Receiver and to the delivery of papers and demanding a return of the papers already delivered.

This objection came on before the same Court that is the Court of the Subordinate Judge at Deoghur and was decided on 27th September 1917, and the objection by the present applicant was dismissed. Now the question arises whether we are entitled under S. 115, Civil P. C. to exercise our powers of revision upon that order passed by the Subordinate Judge of Deoghur dismissing the objection of the applicant. The parties appear to have been somewhat uncertain themselves, whether they were entitled to come before us by way of revision or whether there was in fact an appeal from the order of the Subordinate Judge and therefore an appeal has also been lodged but the appeal would in the ordinary course come before the District Judge. The question as to which is the proper procedure to adopt depends upon O. 40, R. 1. If the order dismissing the applicant's objection comes within O. 40, R. 1, then no doubt there is an appeal from such an order and we have got to consider in this case whether it does come under that order cr not. It seems to us that the order made by the Subordinate Judge of Deoghur was clearly within the terms of O. 40, R. 1. It did in effect remove the applicant from possession or custody of the property and that being so, the exact wording in which the order was made does not seem to be very material if it did in effect carry out the powers provided by O. 40, R. 1. In a case which was recently before this Court which has not been reported but which has been brought to our attention, an objection was taken that no appeal lies in a similar sort of case. We are informed that although the objection was taken the point was not seriously argued and the question was not thoroughly gone into before the Court but it appears that the Court in that case seems to have said quite shortly:

"This objection must be given effect to as Deo Narain was not a party to the suit (he was the applicant) and therefore he has no right of appeal to this Court."

Thereupon the Court assumed jurisdiction under S. 115 to exercise its powers of revision and issued a Rule but that decision was given, I understand without any real argument upon the point and I do not think the authorities were considered. But the High Court of Calcutta in the case of *Rowland Hudson* v. *John Pier-*

pont Morgan (1) considered this question and in a considered judgment they came to the conclusion that in a case on all fours with the present case a right of appeal did lie. It was said in that case as it has been said here that as the appellant was not a party to the order that is the order appointing the Receiver he had no right of appeal. That point was duly considered amongst others and the Court determined that in cases of this sort a right of appeal did lie. We entirely agree with that decision and that being so we think that the application before us today to review the decision of the learned Subordinate Judge cannot be entertained. The case will go in the ordinary course before the District Judge on appeal the subject matter of the appeal will be determined by him and this application will be dismissed. There is also an application made to us to transfer the case from the file of the Subordinate Judge to this Court but we do not think sufficient grounds have been made out for granting that application and it will accordingly be refused. The Rule will be discharged with costs.

V.S./R.K. *Rule discharged.*

(1) [1909] 36 Cal. 713=11 C. 356.

A. I. R. 1918 Patna 303

DAWSON-MILLER, C. J. AND CHAPMAN, J.

Ramkishen Lal—Applicant.

v.

Manna Kumari—Opposite Party.

Application in Privy Council Appeal No. 72 of 1917, Decided on 16th November 1917, from decision of Chapman and Jwala Prasad, JJ, D/- 4th April 1917, in 1st Appeal No. 272 of 1915.

Civil P. C. (1908), Ss 109, 110, 112 and O. 44, R. 1—Appeal to His Majesty in Council—High Court has no power to grant application for leave to appeal in forma pauperis.

The High Court has no jurisdiction to grant an application for leave to appeal to His Majesty in Council in forma pauperis. [P 303 C 2]

Order 44, does not apply to appeals to His Majesty in Council. R 1 of the order contemplates an appellate Court perusing the judgment of a subordinate Court, and not the Court whose judgment is appealed from perusing its own judgment: the very fact that O. 44 requires an investigation into the merits of the appeal before allowing the application introduces an element inconsistent with the principle underlying Ss. 109 and 110. [P 304 C 1]

Lal Mohan Ganguli—for Applicant.

Dawson-Miller, C. J.—This is an application in the form of a petition praying for leave to file and prosecute an appeal to His Majesty in Council in forma pauperis. The original suit was instituted by the present applicants as plaintiffs in the Court of the Subordinate Judge of Bhagalpur. The suit was dismissed and an appeal to this Court proved equally unsuccessful. In the original suit and in the appeal leave to proceed as paupers was granted. The applicants being aggrieved with the decree of this Court desire to appeal to His Majesty in Council and have lodged a petition asking a certificate under S. 110, Civil P. C. They now pray the Court to allow them to file and prosecute that appeal as paupers, and the question arises whether Court has jurisdiction to grant such an application. We have not been referred to nor am I aware of any provision in the Code of the Civil Procedure or the rules made thereunder, or in the rules of this Court, which in terms gives jurisdiction to this Court to grant the relief asked for and in my opinion the Court has no such jurisdiction. As the question has been raised in an appeal to His Majesty in Council, we think it desirable to state our reasons for the decision arrived at. The Code of Civil Procedure deals with appeals to the King in Council in Ss. 109 to 112. Ss. 109 and 110 give a right of appeal to His Majesty in Council from any decree or final order passed on appeal by the High Court or any other Court in British India of final appellate jurisdiction where the subject matter in dispute, or the property in respect to which the claim is made, is of a certain value, provided that where the decree or final order affirms the decision of the Court immediately below the appeal must involve some substantial question of law. They also give a right of appeal from any decree or order where the case is certified to be a fit one.

The machinery for obtaining such certificate is found in O. 45 and must be applied for by petition to the Court whose decree is complained of. S. 111 bars appeals from the High Court in certain cases and S. 112 saves the royal prerogative to receive or reject appeals at His Majesty's pleasure. The effect of granting a certificate under O. 45 that the case fulfils the requirements of the sections of the Code mentioned is inter alia, to oblige the applicant to furnish security for costs and to deposit a sum to meet the expenses of preparing and forwarding the

record of the suit. The effect of allowing the suit to be filed and prosecuted in forma pauperis would be to excuse the appellant in that suit from finding security or depositing the usual fees, and where no express power is given to the Court to make an order involving the consequences referred to, I see no reason why we should infer such power to exist by implication.

It is contended however that O. 44, R. 1, applies to appeals to His Majesty in Council. I am unable to accept this view. There are two orders in the rules which deal with proceedings by paupers. The first is O. 33 which relates to original suits and has clearly no application to appeals, and the other is O. 44 which relates to appeals and is relied upon. R. 1 of the latter order provides that the Court shall reject the application to be allowed to appeal as a pauper unless upon perusal thereof, and of the judgment and decree, it sees reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. The rule, in my opinion, clearly contemplates an appellate Court perusing the judgment of a subordinate Court and not, as would be the case if the applicant's contention is accepted, the Court whose judgment is appealed from perusing its own judgment. It would be very difficult and well nigh impossible for anyone to obtain the order contemplated in the rule, if one of the conditions were that he should first persuade the Court which made the decree that its own decree was contrary to law or erroneous or unjust. Further the very fact that O. 44 requires an investigation into the merits of the appeal before allowing the application. introduces an element inconsistent with the principle underlying Ss. 109 and 110 of the Code of which they form a part. In the sections mentioned no such restrictions on the right of appeal are found. Moreover, it would appear that the Judicial Committee itself in considering the propriety of allowing special leave to appeal in forma pauperis is by no means so exacting: see R. 8 of the Judicial Committee's Rules, 1908. There are other reasons appearing from the wording of O. 44 itself which seem to me clearly to indicate that it was not intended to apply to appeals to His Majesty in Council.

The Calcutta High Court in 1912 in the case of *Jagadananda Asram* v. *Rajendra Roy* (1) had to decide a similar question, the only difference between that case and the present being that there leave to appeal had already been granted before the application was made to prosecute the appeal in forma pauperis. The Chief Justice and Sir Richard Harington decided that the Court had no jurisdiction and dismissed the application, and with that judgment and the reasons given therein I entirely concur. This application will be dismissed. This however will not prevent the applicants from petitioning His Majesty in Council for special leave, if they should be so advised.

Chapman, J.—I agree.

V.S./R.K. *Application rejected.*

(1) [1913] 18 I. C. 129.

A. I. R. 1918 Patna 304

MULLICK, J.

Badrul Hasan and *another* — Petitioners.

v.

Mt. Chamela—Opposite Party.

Criminal Revn No. 295 of 1918, Decided on 3rd October 1918, from order of Sess. Judge, Gaya.

(a) Criminal P. C. (1898), S. 520—S. 520 empowers Court to order restitution where just.

Section 520 differs from the corresponding provision in the Code of 1882 and contemplates that the Court of reference or revision shall order restitution if justice so requires. [*P* 305 C 1]

(b) Interpretation of Statutes — Remedy allowed but no procedure to enforce it provided—Court can enforce order in suitable manner.

Where a remedy is allowed by law it must be assumed that the legislature intends that the tribunal invested with jurisdiction shall enforce its order in the manner it considers most suitable even though there is no express provision for doing the same. [P 305 C 1]

Muhammad Hasan Jan — for Petitioners.

Panchanan Banerji — for Opposite Party.

Judgment.—In consequence of an information lodged before the police on 13th January 1918 by one Mt. Chamela, the house occupied by the petitioner Badrul Hasan, his son Nurul Hasan and the petitioner Mt. Haku, the wife of Nurul Hasan, was searched and a quantity of jewellery and one 10 rupee note, which were claimed by the prosecutrix Chamela were seized by the police. Subsequently Nurul Hasan was arrested while going along a road in Gaya town

and a sum of Rs. 230 in currency notes was found upon his person. This sum of money was also seized by the police and sent to the Magistrate along with the other property. Nurul Hasan and Badrul Hasan were then prosecuted on a charge under S. 411, I. P. C., but Nurul Hasan having died after the commitment inquiry Badrul Hasan alone was prosecuted before the Sessions Court. He was acquitted on 7th March 1918, on the ground that it had not been established that there had been any theft or dishonest retention of stolen property. Thereupon an application was made to the Sessions Judge by Badrul Hasan and Mt. Haku, who claimed to have succeeded to the estate of Nurul Hasan for an order to deliver to them the currency notes of the value of Rs. 230 which were found upon Nurul Hasan's person. The Sessions Judge refused the application and directed the petitioners to apply to the Magistrate. The petitioners applied to the Magistrate but upon objection being made by the prosecutrix Mt. Chamela the Magistrate on 8th April 1918 directed the notes to be made over to Mt. Chamela on the ground that they were her property.

The petitioners then moved the Sessions Judge, Mr. Foster, who had succeeded the officer who tried the original case. Mr. Foster has declined to revise the order of the Magistrate on the ground that S. 520, Criminal P. C of 1898, does not appear to confer any power of restitution. The petitioners now invoke the revisional jurisdiction of this Court for an order directing restitution of the notes. Although the affidavit attached to the petition before me states that the notes in question were marked as an exhibit in the Sessions trial and that it was therefore within the competence of the Sessions Court to deal with them under S. 517 of the Code and although a similar statement appears in the order passed by Mr. Foster, I find on referring to the record itself that the notes were not before the trial Judge and that they were certainly not marked as an exhibit. That being so the trying Judge was right in declining jurisdiction under S. 517 of the Code and in directing the petitioners to apply to the Magistrate for necessary action. In this connexion I desire to observe that the affidavit is worthless as the person swearing the same was not in a position to state the source of his knowledge in regard to the averment in question, and I desire to draw the attention of parties to the necessity of complying with the rules of this Court in this important matter. The notes were however made an exhibit in the trying Magistrate's Court and therefore that officer had full jurisdiction to make the order which he did under S. 517. The only question is whether Mr. Foster was right in declining to make an order for restitution on the ground that S. 520, although it gave him the power to interfere with the Magistrate's order, did not permit him to make an order for restitution.

In my opinion S. 520 differs from the corresponding provision in the Code of 1882 and contemplates that the Court of reference or revision shall order restitution if justice so requires. The words "and may make any further orders that may be just" seem to me to be very wide and to have been inserted for the purpose of meeting cases such as that now before me. No express judicial authority has been shown to me on the point since the Code was amended but having regard to the language of the amendment and to the fact that the amendment was made in spite of decisions under the Code of 1882 laying down that restitution could not be made by the Court of reference or revision, it seems to me clear that the contention of the petitioners before me is correct.

Then arises the question as to how restitution is to be enforced. In my opinion where a remedy is allowed by law it must be assumed that the legislature intends that the tribunal invested with jurisdiction shall enforce its order in the manner it considers most suitable even though there is no express provision for doing the same. In the case before me there is however express provision in S. 547 of the Code for realizing the money value of the notes as a fine, and I take it that it would also be competent to the Sessions Court to enforce its order by putting the penal law in motion relating to the disobedience of lawful orders. In my opinion it is eminently just and proper that the currency notes found upon Nurul Hasan should be returned to his representatives in interest and that on default restitution should be made by payment to them of the money

value thereof. The learned Magistrate's view that the notes were the property of Mt. Chamela appears to me to be based upon no judicial evidence whatsoever. I fail to see how the learned Magistrate, in the face of the finding of the Sessions Court that there had been no theft or dishonest retention could substitute a finding of his own at variance with that of the trial Court.

The learned vakil for the opposite party contends that the order of the learned Magistrate was made under S. 523 of the Code and that it is in the nature of an executive or administrative order which is not revisable by the High Court. In my opinion the order is clearly one under S. 517 but even if it had been an order under S. 523 it must be viewed as a judicial order and the provisions of the Code as regards revision are in my opinion clearly applicable.

It is not clear whether the petitioners have established their right to administer the estate of the deceased Nurul Hasan. The order therefore that I shall make is that upon the petitioners establishing within three months from this date before the learned Sessions Judge that they are entitled to administer the estate, the learned Sessions Judge will make an order of restitution in their favour in the terms proposed. On their failure to establish the necessary title, the application will be rejected.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 306

MULLICK AND THORNHILL, JJ.

Kamaruddin Mandal and *others*—Judgment-debtors—Respondents.

v.

Raja Thakur Barham and *others*—Decree-holders—Respondents.

Appeal No. 142 of 1917, Decided on 20th June 1918, from original order of Sub-Judge, Gonda, D/- 20th August 1916.

(a) Civil P. C. (1908), Ss. 47 and 144—"Parties" in S. 144 includes representatives—Sections must be read together.

Sections 47 and 144 must be read together and the word "parties" in S. 144 must be taken to include their representatives. [P 307 C 1]

(b) Civil P. C. (1908), Ss. 47 and 144—"Representatives" means also representatives in interest.

Representative does not mean only a party's legal representative but it means his representative-in-interest, and includes a purchaser of his interest who so far as such interest is concerned is bound by the decree. [P 307 C 2]

(c) Civil P. C. (1908), S. 144—Assignee can take advantage of S. 144.

Where an assignment takes place even after the appellate decree which is the basis of the claim for restitution, the assignee is entitled to the benefits of S. 144. [P 307 C 1]

Muhammad Tahir—for Appellants.

Surendra Mohan Dass, Lachmi Kanta Jha, Naresh Chandra Sinha and *Baranasi Prosad Jhunjhunwala*—for Respondents.

Mullick, J.—This is an appeal against an original order made by the Subordinate Judge of Gonda in an execution proceeding in enforcement of a mortgage decree obtained by Jeeban Ram Marwari and others against Raja Thakur Barham, who is described in these proceedings as the original judgment-debtor. In execution of that decree a sale was held, on 27th July 1904, of a certain six annas share of Tappa Patasanda. That sale was confirmed on 18th November 1904 and a sale certificate was issued on 21st December 1904, and possession was delivered on 26th December 1904. It seems to be admitted that although a six annas encumbered share of Tappa Patasanda was sold on 22nd July 1904, possession was in fact given to the auction-purchaser of a six anna unencumbered share. The judgment-debtors thereupon appealed first to the High Court of Calcutta and then to the Privy Council, who by their judgment, dated 25th November 1913, held that the order of the Subordinate Judge confirming the sale and granting a certificate in respect of the six anna unencumbered share must be set aside, as well as all subsequent proceedings on the part of the auction-purchasers based thereon. The decree of the Privy Council was transmitted by the High Court of Calcutta to the Subordinate Judge in May 1914 and is now under execution.

In the course of the proceedings relating to that execution the heirs of the Burham, judgment-debtor, have, under S. 144, Civil P. C., asked for restitution of the six anna unencumbered share of which delivery of possession was given to the auction-purchaser. After leave had been obtained and while the appeal to the Privy Council was pending, the original judgment-debtor, Raja Thakur Barham sold three annas three pies of the unencumbered share to certain persons who are described in these proceedings as the Mandals and who were added as

co-appellants in the appeal before their Lordships. Before the Subordinate Judge they claimed that they had a right to be joined with the Barhams in their application for restitution. The Barhams resisted on the plea that the sale to the Mandals was without consideration or with inadequate consideration and that the vendor had no authority to transfer the shares of certain minors who were unrepresented. The Subordinate Judge without going into the merits held that an assignee could not come in under S. 144, Civil P. C. It is against this order that the present appeal has been presented. Now, the question is, what is, the meaning of the word "parties" in S. 144. Mr. Das on behalf of the respondents before us contends that 'parties' must be read as 'parties" only, and that it cannot include legal representatives whether by assignment or devolution. On the other hand it is contended on behalf of the appellants that S. 144, Civil P. C., must be read with S. 47 and that "parties" include legal representatives.

Clearly the respondents' contention, if pushed to its logical extreme, would exclude heirs and I have not been furnished with any answer as to how this conclusion is to be avoided if S. 47, Civil P. C., is not to be read with S. 144. On the other hand, *Jamini Nath Roy* v. *Dharma Das Sur* (1) is clear authority for the proposition that when an assignment has taken place even after the appellate decree which is the basis of the claim for restitution, the assignee is entitled to the benefits of S. 144, Civil P. C. Mr. Das contends that the learned Judges in this case strained the law, but he is unable to show any authority which has dissented from this decision. In the absence of any authority to the contrary, I think, we must follow *Jamini Nath Roy's* case (1) and reject the contention that restitution can only be obtained by persons who were impleaded as parties at the time of the decree of the trial Court. Convenience would certainly seem to suggest that the view of their Lordships of the Calcutta High Court should be followed. More than this we are not asked to decide at present. The learned counsel for the appellants admits that if we decide in his favour in this appeal, he will have to prove the validity of his conveyance and his right to restitution after proper investigation. I see no hardship in allowing these matters to be investigated by the executing Court and indeed the law enacts that a separate suit will not lie for such investigation. The result therefore is that the appeal is decreed with costs and the case is remanded for disposal according to law. The order of the Subordinate Judge will be set aside and it will be declared that the appellants will be entitled to restitution under S. 144, Civil P. C., if they succeed in proving their assignment and if they are not otherwise debarred under the law.

(1) [1906] 33 Cal. 857.

Thornhill, J.—Ss. 47 and 144, Civil P. C., must be read together *Jamini Nath* v. *Dharma Das Sur* (1): "Representative" does not mean only a party's legal representative, but it means his representative-in-interest, and includes a purchaser of his interest, who so far as such interest is concerned is bound by decree: *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (2). There is no doubt but that the Mandals were bound by the decree at the time they became purchasers of three annas odd share. They also took the precaution of becoming parties by having their names added as party appellants. In *Maganlal* v. *Doshi Mulji* (3) it was held that the section did not cover a question between a party to a suit and his representative, but in the present case the Mandals, representatives of three anna odd share, have become parties to the suit and both they and the judgment-debtors claim possession of the six annas unencumbered share as against the auction purchasers. It has been repeatedly held that a wide and liberal construction should be placed on the section so as not to drive parties to an independent suit, unless the case be clearly outside the scope and purview of the section, so that all questions which can possibly be determined in the execution proceedings should be so determined. Under the circumstances I agree with the order proposed by my learned brother.

V.S./R.K. *Case remanded.*

(2) [1897] 24 Cal. 62.
(3) [1901] 25 Bom 631.

A. I. R. 1918 Patna 308

ATKINSON AND MANUK, JJ.

Sunder Buksh Singh and *others* — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 148 of 1918, Decided on 24th October 1918, from order of Sess. Judge, Saran.

(a) Criminal P. C. (1898), S. 309—Sessions trial for rioting — Accused's possession over land in dispute admitted—Accused pleading private defence — Court must point to assessors' significance of the fact—General question whether rioting is proved or not is not sufficient.

In a case of rioting where the dispute arises over the possession of a piece of land and the Crown admits the possession of the accused and the accused themselves urge the piece of private defence, it is the duty of the Sessions Judge to explain to the assessors the legal aspect of the plea put forward by the accused, and to direct their attention to it by putting specific questions to them on the point.

In such a case general questions such as "Has the offence of rioting been proved against any of the accused ?" are utterly insufficient.

[P 310 C 2]

(b) Penal Code (1860), S. 148 — Case of rioting when private defence is pleaded must be decided on facts proved.

Cases of rioting in which a plea of right of private defence is raised should be decided strictly on their own facts and previous decisions are only useful in so far as they indicate the general principles which may apply to an approximately similar set of facts. [P 311 C 2]

(c) Penal Code (1860), S. 148—On learning that crop was being cut information to police sent — Accused collecting men going to field in dispute—Complainant assaulted—Fight ensued — Accused are justified in collecting men to protect crops before arrival of police — Complainant having started, accused were justified to assault in private defence.

Where the accused, on learning that their crop was being cut by the complainants, sent information to the thana and collecting their men went to the field in dispute where they were assaulted by the complainants, with the result that a fight ensued and several persons were injured :

Held : that the accused were justified in collecting their men and arming them sufficiently to prevent the crops being removed from their field in the event of the police not arriving in time ; (2) that a breach of the public tranquillity having been forced on the accused by the complainant before the arrival of the police, the right of private defence of person immediately arose in favour of the former and that the complainants were solely responsible for the subsequent fight. [P 311 C 2]

S. Sinha and *G. C. Pal* — for Appellants.

Government Pleader—for the Crown.

Manuk, J. — The appellants, five in number, have been convicted at a trial held by the Sessions Judge of Saran with the aid of assessors as follows:

Sunder Bux Singh, appellant 1, has been convicted under Ss. 148 and 326, I. P. C., and been sentenced to three years' rigorous imprisonment under S. 326, there being no separate sentence under the other section. The other four appellants, Ram Khelawan Singh, Reka Singh, Ram Tahal Singh and Patti Singh, have been convicted under S. 147, I. P. C., and sentenced to 18 months' rigorous imprisonment each. The common objects set out in the charge under S. 148 were to enforce the right or supposed right of Sunder Bux to a field, the gram crops of which Ghansham and Biran were harvesting and to assault them. In their appeal to this Court the learned counsel on their behalf has raised an important question involving the right of private defence of both property and person, which calls for a narration of the facts in some detail. As the success or failure of such a plea invariably turns upon the facts found, it is necessary to clear the facts before we proceed further.

The case for the prosecution was that on the day in question, in the morning at 2 gharies after sunrise, Biran Singh, P. W. 1, and Ghansham Ahir, P. W. 2, were cutting gram in a field in Hakma village, which field Ghansham Ahir claims as his, when Sunder Bux, appellant 1, came with a mob of 16 or 17 persons, including the other four appellants before us, armed with various weapons, such as swords, garansas and lathis. Sunder Bux asked Ghansham why he was cutting the crops. Ghansham replied that he was cutting the crops because he held the field on batai under the zurpeshgidar and, on being requested to leave the field, Ghansham refused to do so. Sunder Bux and his companions then prepared to assault Ghansham and so the latter retreated a little way from the field. Sunder Bux then hit one Biran Singh, who was with Ghansham, with a sword on the left side of the head causing an incised injury, for which Biran was treated in hospital for over 20 days. The second appellant Ram Khelawan also hit Biran a slight blow with a garansa on the top of his head. Biran fell and received other injuries including a spear wound on the leg. Ghansham ran away and Biran remained lying in the field unconscious. When he recovered consciousness every-

one had gone. According to the medical evidence, except the injury on the head which was severe all the other injuries were slight in nature.

The Crown case in the lower Court was somewhat different from the above version, which was really the case alleged by the private prosecutor. The Crown case was that besides Biran and Ghansham who were actually cutting the crops, there were also a number of men armed with weapons on their side in the field and that when Sunder Bux turned up with his party, a fight ensued in the course of which Beni Singh was killed by one of Ghansham's men and Sunder Bux and Ram Tahal, the two appellants before us, were assaulted and received several injuries, whilst on the other side Biran received the injuries mentioned above.

With regard to the possession of the field there was also a complete conflict between the case of the private prosecutor and the case of the Crown. Into the details of that dispute it is not necessary for us to go, for it has been found by the learned Sessions Judge, and accepted by the Crown here as it was in the lower Court, that Sunder Bux had all along been in possession both de jure and de facto of the field in question up to the morning of the occurrence, when Ghansham's party unlawfully trespassed upon the field in the absence of Sunder Bux and began to get the crops cut. The defence version of the occurrence may best be stated by quoting Sunder Bux's own first information in the counter case lodged at Garkha Thana at 11-30 in the morning of the 23rd March, on which date the occurrence took place. A summary of that report is as follows:

At about two gharis after sunrise on the 23rd March he was informed by his nephew Ram Khelawan, one of the appellants, that Ghansham, Biran, Narsingh and Din Dayal were cutting his gram crop, so he went there alone to remonstrate. They threatened to kill him so he returned to the village and then came back to the field with his servant Beni Singh (subsequently killed in the riot) and with Rekha Singh, son of Beni and Ram Khelawan, his nephew. He saw a number of men, including one Ram Kishun Singh, armed with various deadly weapons sitting upon the eastern boundary of the field. He asked them why they were getting his field looted; Ghansham then assaulted Sunder Bux with a lathi; then Beni Singh pushed Sunder Bux aside and remonstrated with the people. The mob on the bundh stood up and Ram Kishun Singh ran up and struck Beni with a garansa on the left side of the neck and killed him on the spot. The assailants then ran away.

It is important to mention here that the thana is 1½ miles from the place of occurrence, which in its turn is something under a mile from the village in which the appellants reside. It is also an admitted fact that Sunder Bux, after seeing the prosecution party on his field interfering with his crops, sent one Mohit, Choukidar of the village, to the thana with a report of what was going on. That report was recorded by Muhammad Rafique, Writer Head Constable, a witness in this case, at 10-30 that morning in the Station Diary. No explanation of his somewhat dilatory journey has been elicited. It appears that the Writer Head Constable with two constables then proceeded to the spot and on the way met Sunder Bux, Reka and Ram Khelawan with the corpse of Beni Singh. The Writer Head Constable took the party back to the thana and recorded Sunder Bux's first information report at 11-30 at the thana. The counter first information was not recorded till 8 o'clock that night.

In this conflict of the evidence with regard to the incidents of the actual occurrence which led to a serious breach of the public tranquillity and to the death of one man and the causing of grievous injuries to several others, we expected some assistance from the findings and conclusions arrived at by the learned Sessions Judge who had the advantage of hearing the witnesses and appreciating their truthfulness, but on turning to the judgment for assistance on this point we are much disappointed to find that the judgment in this respect was of little or no use to this Court in helping it to come to a conclusion on the facts. It is obvious that if possession is once conceded, as it has been conceded, and was conceded at the trial in the Sessions Court, to the appellants, the findings of fact on the sequence of events which led up to the occurrence are of the utmost importance in deciding the question of law as to whether the appellants were protected

by the provisions of the Code with regard to the exercise of their right of private defence of property, or person, or both. The learned Sessions Judge has no doubt in one part of his judgment discussed in a superficial manner this question of the right of private defence. He observes:

"Now I am of opinion that Sunder Bux was not justified in his collecting a number of men in this way, and in going to the field in order to prevent the crop from being cut. The thana was close at hand (about, a mile or 1/2 miles away)."

He then proceeds to say that as Sunder Bux had sent Mohit Chowkidar to the thana, he should certainly have awaited the arrival of the police, and further that as the police arrived on the scene shortly afterwards and only a very small quantity of gram was actually cut, Sunder Bux was not justified in acting as he did. Now, these general observations are of no use when it is first necessary, as we have said, to come to precise findings both with regard to the sequence of events and the part played by each party to the occurrence.

Getting no assistance from the learned Sessions Judge's judgment, we appealed to the learned Government Pleader, who finds himself in the difficult position of being compelled to admit that it is impossible from the judgment to gather what are the findings of facts so important to the decision of the question of the right of private defence. He therefore invited us to enter into the evidence of the witnesses and constitute ourselves a Court of first instance in order to supplement the judgment of the lower Court. We have heard those portions of the evidence which he wished to place before us read out, but they gave us little or no assistance having regard to the admitted fact that the witnesses from whom they come are obviously witnesses of untruth. They come to support a totally false story of Ghansham's possession. The Crown itself has had to reject their version on this point. Their narrative of the events both before and during the occurrence is unconvincing and their attempt to fix upon Sunder Bux, the principal accused, the only serious injury caused to one of their party is, to say the least of it, extremely suspicious, We, therefore, deem it highly dangerous to accept their evidence as a basis for our findings. Nor would it be fair to the appellants to do so, having regard to the fact that the learned Sessions Judge has, so far as we can gather, preferred the version given by Sunder Bux himself in his first information report. I say "so far as we can gather" advisedly, because even this is not clear from the judgment. He has used it as against the appellant Sunder Bux for another purpose but, as the learned Judge nowhere indicates that he does not accept this version, we are of opinion that it is only fair and proper for us to accept it as the foundation for our findings. It is in any case the most reliable evidence to act on in this record.

Failing to get any assisstance from the learned Government Pleader through no fault of his, for he has in his usual courteous, fair and able manner helped us to the best of his ability, we were anxious to know what the assessors had thought of the evidence on the important questions of fact involved in the case. On turning, however, to the record of their opinion to be found at the head of the judgment, we were once again disappointed to find that though they were asked numerous questions, nothing specific as to the incidents of the occurrence had been put to them and that, therefore, they, as laymen, had naturally floundered in the generalities of such questions as "Are any of the accused persons guilty of any offence?" "Is the offence of rioting proved against any of the accused?" Now, whatever may be said as to the sufficiency of these general questions in an ordinary case of rioting, there can be no two questions that they are utterly insufficient in a rioting case in which the Crown has admitted the possession of the accused and the accused themselves have strenuously urged the plea of private defence. It should be remembered by the Sessions Judges of our province that assessors are laymen to whom the niceties of the law of private defence are a sealed book. Without assistance, in the shape of specific questions, concerning the facts upon which the law will turn, they would naturally, in answer to questions such as I have quoted above, reply, as they have replied; "It appears to me proved that he committed rioting." "In my opinion all the accused persons are guilty." These are verbatim extracts from the record of their replies. It is however interesting to see that in spite of the absence of any assistance from the

learned Judge, one of the assessors undoubtedly had at the back of his mind a dimly conscious feeling that merely because there had been a breach of the public tranquillity and people had been injured, it did not follow that the accused, were, in the circumstances of this case, guilty. To the question: "Is the offence of rioting proved against any of these accused?" the first assessor answered as follows: "Sunder Bux Singh collected a mob for his own field". There is a distinct indication in that answer that the assessor was of opinion that the mob had been collected not necessarily with an unlawful common object, but in order to protect the property of Sunder Bux. That answer should have given the learned Sessions Judge a clue to what was working in the mind of the assessor, namely, a desire to be instructed as to the facts on which the question of the guilt of the accused, in the circumstances of the case, might turn. But instead of welcoming this indication the next question the learned Sessions Judge put was: "Is it proved that Sunder Bux Singh committed rioting?" And the answer was only what one might expect. "It appears to me that he committed rioting". It is difficult to see how the assessor could have got out of giving this answer having regard he had just said, namely, "Sunder Bux Singh collected a mob for his to what own field".

Speaking for myself, I hold very strong views about the duties of Sessions Judges as regards the questions they should put to the assessors, especially in cases of this class where the eventual decision turns on a mixed question of fact and law. I speak from personal experience in a case conducted in this province before a learned Sessions Judge and assessors in which the accused raised a plea of the right of private defence. The assessors, who were ignorant of the law of private defence, were asked general questions. Their replies were in the same general terms unfavourable to the accused. On my pressing the learned Sessions Judge to expound to them even shortly what the position would be having regard to the provisions of the law of private defence or to put them more specific questions, he readily acceded, with the result that the assessors immediately turned round and said that in that case they found the accused not guilty. It is therefore that I have entered into this question at some length in the hope that these observations from this Court will bear fruit.

To turn to the case itself, the only question that remains is to decide whether, even accepting the first information report of Sunder Bux as the true version of the occurrence, it is open to the accused to successfully raise the plea of the right of private defence of property or person, or both. Mr. Sinha, for the appellants, has strenuously urged that Sunder Bux did all he possibly could do and showed great forbearance, although confronted with a dishonest and criminal interference with his rights; that he sent information to the thana and that it was not his fault that before the thana authorities arrived on the scene a breach of the public tranquillity was forced on his party. The learned Government Pleader on the other hand has equally strenuously urged that it behoved Sunder Bux to wait quietly in his village before taking any steps and to wait on apparently for an indefinite amount of time, until the police authorities arrived. He therefore argues that the appellants are barred by S. 99, Cl. (3), I. P. C., from raising the question of the right of private defence. Now, cases in which this question is raised must be decided strictly on their own facts and previous decisions are only useful in so far as they indicate the general principles which may apply to an approximately similar set of facts. No hard and fast rule can be laid down and the boundary line is often so fine that a single circumstance may turn the scales either in favour or against the party asserting this right.

The answer to the learned Government Pleader's contention in my opinion is that if Sunder Bux, after sending information to the thana, had quietly remained in the village till the thana authorities appeared, it was more than possible that those who trespassed on his field would have carried away the whole or a portion of his crops before the authorities could arrive. He was therefore justified in collecting his men and arming them if necessary sufficiently to prevent the crops being removed from his field in the event of the police not arriving in time.

The next question is and this to my mind is the crucial question in the case:

what happened when Sunder Bux and his party arrived on the field? As I have said we accept the version given by Sunder Bux in his first information report even as the learned Judge has apparently accepted it. That being so we find that when he arrived on the field with his party, Sunder Bux asked the trespassers why they were getting his field looted. This was a perfectly legitimate question for him to put. On this Ghansham immediately assaulted him with a lathi. We are of opinion that the moment this assault on Sunder Bux took place the right of private defence of person certainly and of property as well probably immediately arose and that for the subsequent events the prosecution party in this case is to be held entirely and solely responsible. Had Sunder Bux on reaching the field immediately ordered his party to assault the trespassers, I might not have been disposed, speaking for myself, to accede to the plea of the right of private defence having yet arisen; but the circumstances here are entirely different. The quarrel was forced on Sunder Bux when he went merely to protect a possession which was his. He was therefore entitled if violence was used to meet violence with violence and there is nothing whatever to indicate that he would not have been prepared to wait for the arrival of the police, if the initial violence had not proceeded from the prosecution party. Had the thana been further away or public authority more difficult of access, I would have been prepared to hold that Sunder Bux had a right to drive the trespassers from his fields provided he did not exceed that right. Under these circumstances we are of opinion that the convictions and sentences in this case must be set aside and we hereby do so; and direct that the appellants be immediately released or discharged from their bail.

I desire to add one more word on the question of the sentences. In the counter-case (Criminal Appeal No. 120 of 1918) in which my learned brother has just delivered judgment with which judgment, I am in entire agreement the learned Sessions Judge imposed sentences of two years' rigorous imprisonment on each of the only two persons who were convicted out of the 17 persons put on trial. We find it difficult to appreciate the learned Judge's methods of apportioning sentences. On the side of Sunder Bux one man was killed as I have said, two others received several injuries. On the other side only one man had a severe injury. Possession of the field lay admittedly with Sunder Bux and on the learned Judge's own findings the riot which occurred originated with the wrongful acts of Ghansham and his party. Yet we find that in this case the learned Sessions Judge has thought fit to sentence one of the appellants to three years' rigorous imprisonment and the others to 18 months' rigorous imprisonment each. It is sufficient to say that these sentences, in our opinion, are even if the accused could not have successfully pleaded the right of private defence owing to some technicality, much too severe and based upon a complete misappreciation of the extreme and sustained provocation which the accused in this case received.

Atkinson, J.—I concur.

V.S./R.K. *Convictions set aside.*

A. I. R. 1918 Patna 312

ALI IMAM, J.

Bhairo Prasad—Petitioner.

v.

Harihar Prasad—Opposite Party.

Civil Revn. No. 6 of 1918, Decided on 8th April 1918, from an order of Dist. Judge, Saran.

Criminal P. C. (1898), S. 195-(7)—Order as to sanction to prosecute by Subordinate Judge—Appeal lies to District Judge and not to High Court.

Where a sanction to prosecute is granted or refused by a Subordinate Judge, an appeal against the order lies to the District Judge, and not to the High Court, even where the value of the suit out of which the proceeding for sanction has arisen is beyond the appellate jurisdiction of the District Judge. [P 313 C 2]

Ram Prasad—for Petitioner.

P. K. Sen and *Sivanandan Rai*—for Opposite Party.

Judgment.—The facts of this case are shortly these: The petitioner was defendant in an account suit before the Subordinate Judge of Saran and the opposite party was the plaintiff. The suit was valued at Rs. 19,000. It appears that there was a compromise recorded and the defendant was under the compromise to pay Rs. 4,000 to the plaintiff. Some payments were made, and it appears that at one stage of the case an application was made by the plaintiff to execute the compromise decree to the extent of

about Rs. 3,000. A question was raised before the Subordinate Judge as to whether or not by the various payments made by the defendant the decree obtained had been satisfied. This question culminated in an application by the defendant to the Subordinate Judge, praying for sanction to prosecute the plaintiff under various sections of the Penal Code, and amongst them S. 210 of that Code. The learned Subordinate Judge duly granted the sanction under the latter section. There was an appeal preferred by the plaintiff to the learned District Judge praying for revocation of that sanction. The learned District Judge entertained the application and revoked the sanction granted by the learned Subordinate Judge. The petitioner, being dissatisfied with the order of revocation passed by the learned District Judge, has approached this Court and prays for the setting aside of that order. His application was admitted on the ground that the learned Judge had no jurisdiction to entertain an application with reference to a decree made in a suit valued at above Rs. 5,000.

The contention of the petitioner is that the District Judge had no jurisdiction to revoke the sanction. Bubu Ram Prasad, who appears on behalf of the petitioner, contends that on a proper interpretation of S. 21, Act 12 of 1887, it would be clear that the District Judge is not the authority to whom appeal from the Subordinate Judge ordinarily lies, and he contends that if that proposition be sound, under sub-Cl. (a), sub-S. 7, S. 195 of the Code, the District Judge would have no jurisdiction. I have carefully examined the language of S. 21 of that Act. It is evident that the legislature intended to classify the cases under which appeals would lie to the District Judge and to the High Court respectively. The legislature also makes it quite clear that the position of any proceeding arising out of an original suit should be on the same plane with the suit itself in matters of appeals therefrom. A reading of S. 21 of that Act therefore gives the result that all original suits not exceeding in value Rs. 5,000 or any procedure arising out of such suit would be subject to the appellate jurisdiction of the District Judge and that any other case, whether an original suit or any proceeding arising therefrom would be subject to the appellate jurisdiction of the High Court. Reading as I do this section, I feel no hesitation in holding that the learned Subordinate Judge's Court is one from which some appeals lie to the High Court and some to the District Judge. In view of the provision contained in S. 195, Cl. (a), sub-Cl. (a), it is evident that the Court of inferior appellate jurisdiction would be the Court to which application for revocation of sanction must be made. I therefore hold that the District Judge had jurisdiction to entertain the application on which he passed his order revoking the sanction granted by the Subordinate Judge.

Babu Ram Prasad contends that inasmuch as the proceeding, in the course of which the alleged offence was committed and with reference to which sanction was given, was one in execution of a decree in an original suit of the value of more than Rs. 19,000, the jurisdiction of the District Judge was barred. This is a contention with which I am unable to be in sympathy. The point is concluded by the decision given in *Maduray Pillay* v. *Elderton* (1) and *Ganga Dei* v. *Sher Singh* (2). These authorities have laid down that the valuation of the original suit, or for the matter of that of the proceeding arising therefrom, is immaterial to the question as to the Court to which an application under S. 195, Criminal P. C., for revocation or for order granting sanction should be made. As I have held before, the question of valuation of the suit is of no importance for the disposal of the present application. The point is concluded by the language of sub-Cl. (a), sub-S. (7), S. 195 of the Code. In the circumstances the application is rejected.

V.S./R.K. *Application rejected.*

(1) [1895] 22 Cal. 487.
(3) [1895] 17 All. 51.

A. I. R. 1918 Patna 313

ROE AND COUTTS, JJ.

Azhar Hussain—Appellant

v.

Sawlal Marwari—Respondent.

Appeal No. 393 of 1917, Decided on 17th July 1918 from appellate decree of Dist. Judge, Gaya.

(a) Registration Act (1908), S. 74 — Enquiry under S. 74 is summary — Enquiry as

to genuiness is to be made in suit under Specific Relief Act (1877), S. 39.

It is the intention of the Registration Act that the enquiry made under S. 74 should be a summary one and that the real enquiry as to the genuine character of the document should be made in a suit brought under S. 39, Specific Relief Act. [P 314 C 2]

(b) **Registration Act (1908), Ss. 74 and 82 Result of criminal proceedings under S. 82 can be taken into consideration by Registrar when making enquiry under S. 74.**

A criminal Court has full jurisdiction to enquire into the fact of execution of a document, when the party denying execution is present before it as an accused under S. 82 and the result of that enquiry can be taken into consideration by the Registrar when making an enquiry under S. 74, of the Act. [P 314 C 2]

Krishna Sahay and *Kailaspati* — for Appellant.

Kulwant Sahay and *Nirsu Narain Singh*—for Respondent.

Judgment.—The plaintiff in this case asked for a declaration that a document which had been registered under S. 75, Registration Act, was a forgery, and in the alternative for a declaration that it was not registered in accordance with law. The finding of the Court below was that it is not a forgery and that it was duly registered. The finding as to the genuine character of the document is a question of fact into which we cannot go. The allegation that the document was not duly registered is based upon the fact that on receiving a petition nominally under S. 72, the Registrar treated it as a petition under S. 73, but instead of summoning witnesses as contemplated under S. 74 awaited the result of criminal proceedings in which the executant who had denied his signature had been prosecuted for false denial of execution. The plaintiff was convicted of falsely denying execution. The enquiry made by the Registrar under S. 74 consisted solely of an examination of the criminal proceedings and recording findings in accordance with them. It is suggested therefore that his order under S. 75 was without jurisdiction. In this connexion the case of *Mata Dayal* v. *Queen-Empress* (1) is quoted. Now in the first place this case has reference to the criminal rights of the parties, not to the civil rights, and in the second place it cannot be denied that the Registrar has no power to delegate his enquiry to a Sub-Registrar and that therefore any enquiry that the Sub-Registrar might make would be an enquiry without lawful authority and the result of it should not be considered in coming to a conclusion upon the question of execution.

But it cannot be denied that a criminal Court has full jurisdiction to enquire into a fact of execution when the party denying execution is present before it as an accused under S. 82, Registration Act, and undoubtedly the result of that enquiry would be a fact which might have been taken into consideration in the Registrar's Court. It is not clear moreover from the order sheet whether the alleged executant asked for any witnesses to be summoned, or suggested that any further enquiry should be made in the Registrar's Court. In any case it seems to me that it was the intention of the Act that the enquiry made under S. 74 should be a summary enquiry, and that the real enquiry as to the genuine character of the document should be made in a suit brought under S. 39, Specific Relief Act. I cannot say that the proceedings of the Registrar should be ignored as being entirely without jurisdiction or that his order for registration of the document was absolutely void. In this view the appeal must be dismissed. The appeal is dismissed with costs. If the security for costs ordered by the learned Registrar took the form of a cash deposit, the appellants are entitled to withdraw the cash deposit.

V.S./R.K. *Appeal dismissed.*

(1) [1897] 24 Cal. 755.

A. I. R. 1918 Patna 314

ROE AND ALI IMAM, JJ.

Soukhi Chand Sao—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 328 of 1917, Decided on 17th December 1917, against order of Sess. Judge, Monghyr, D/- 20th July 1917.

(a) **Penal Code (1860), S. 380 — Accused going to railway godown with carter—Carter removing bag consisting of pilferings — Accused accompanying carter to his house and taking delivery of bag — Accused and carter are jointly guilty of theft.**

The accused went to a railway godown with a carter. The latter removed a bag from the godown and the accused accompanied the carter to his house and there took delivery of the bag. The bag consisted of pilferings from a number of bags consigned to different persons :

Held : that the bag being in the possession of the railway as bailee until it left the godown, the actually taking it out of the godown was

theft and that the accused and the cartman were jointly guilty of theft. [P 315 C 1]

(b) Criminal P. C. (1898), S. 439—Courts below have to find facts—Conviction under wrong section—High Court can revise section under which conviction is recorded.

It is for the Courts below to find the facts and if they convict under a wrong section in a case in which no charge is framed, it is open to the High Court, if necessary, to revise the section under which the conviction has been recorded without any further proceedings. [P 315 C 1]

Gour Chandra Pal—for Petitioner.

Mahommad Fakhruddin — for the Crown.

Judgment.—The facts found in this case are that the petitioner Soukhi Chand went with a carter to a railway godown, that the carter removed a bag from the godown and that Soukhi Chand accompanied the bag to his house and there took delivery of it. The bag was not goods that had been consigned to Soukhi Chand but consisted of pilferings from a number of bags consigned to others. On these facts Soukhi Chand and the cartman have been convicted under S. 411. The cartman is not before us. Soukhi Chand applies that this conviction and sentence be revised on the ground, firstly, that the manner in which the bag was made up was a pure surmise on the part of the Court below and, secondly, that the property, not having been identified as stolen from a particular person, cannot be held in law to be stolen property.

On these two points we can see no reason for interfering with the conviction. The property was in the possession of the railway as bailees until it left the godown. The actually taking it out of the godown was theft, and it is clear that Soukhi Chand and the cartman were jointly guilty of theft. The learned vakil suggests that this was not a case made against him in the Court below and that he is therefore entitled to a retrial We are of opinion that it is for the Courts below to find the facts, and if they convict under a wrong section in a case in which no charge is framed, it is open to the High Court, if necessary, to revise the section under which the conviction has been recorded without any further proceedings. We therefore alter the conviction of Soukhi Chand to a conviction under S. 380, and direct that the sentence of three months' rigorous imprisonment be maintained. The petitioner will therefore surrender to his bail and serve out the remainder of the sentence.

V.S./R.K. *Conviction altered.*

A. I. R. 1918 Patna 315

MULLICK AND THORNHILL, JJ.

Boukai Sahu—Decree-holder—Appellant.

v.

Mosaheb Ali and *others* — Judgment-debtors—Respondents.

Appeal No. 258 of 1917, Decided on 2nd July 1918, from a decision of Dist. Judge, Purneah.

(a) Civil P. C. (1908), O. 34, R. 6—Mortgage decree — Application for personal decree—Mortgagor can raise objection not adjudicated upon in suit.

Plaintiff obtained a mortgage decree against the defendant which however made no mention of the plaintiff's right to proceed under O. 34, R. 6, The sale proceeds of the mortgaged property did not prove sufficient to satisfy the decree and the plaintiff made an application under O. 34, R. 6. The defendant objected that part of the amount covered by the decree was barred at the time of the institution of the suit:

Held: that the defendant was not estopped from raising the objection inasmuch as it had not been adjudicated upon in the suit. [P 316 C 1]

(b) Suits Valuation Act (1887), S. 11—Objection to pecuniary jurisdiction not raised—It cannot be raised before High Court.

Where an objection to the pecuniary jurisdiction of the lower appellate Court based on the valuation of the suit is not raised before that Court and the jurisdiction of that Court is accepted the objection cannot be raised for the first time before the High Court. [P 316 C 2]

Sivanarain Bose—for Appellant.

Sadhanshu Kumar Mitra—for Respondents.

Mullick, J.—The plaintiff sued upon a mortgage and obtained an ex parte preliminary decree in the following terms:

"The plaintiff's claim being proved it is ordered that the suit be decreed ex parte with costs and interest at 6 per cent. The defendants shall pay the decretal amount within six months from today. In default of payment the mortgaged property shall be sold in satisfaction of the decree."

It is alleged that the sale of the mortgaged property has not satisfied the decree and the plaintiff desires to proceed under O. 34, R. 6, Civil P. C., against the other properties of the judgment-debtor. Now the Subordinate Judge declined to allow the judgment-debtor's objection in regard to this application and to go into the question whether part of the amount covered by the decree was not barred at the time of the institution of the suit. The Dis-

trict Judge in appeal has come to a different conclusion and he thinks that as the judgment-debtors had no opportunity of adducing evidence upon this point in the trial of the mortgage suit it is open to them in the proceedings under O. 34, R. 6, to raise this point. In my opinion the learned District Judge is right. The decree made by the Subordinate Judge makes no mention of the plaintiff's right to recover against the other properties of the mortgagors, although the plaint contained a prayer to this effect. I do not in these circumstances see how there can be any estoppel against the mortgagors. It is true that they had an opportunity of raising the defence that they now wish to raise and did not do so, but nevertheless the Court's decree was not founded upon the allegation of the plaintiff as regards his rights to recover from the other properties and there can be in my opinion no estoppel either legal or equitable which would prevent the judgment-debtors from asking for an adjudication upon a point which was not then adjudicated. This disposes of the merits of the appeal.

A somewhat technical argument was next advanced as regards jurisdiction. It is said that the suit was valued by the plaintiff at Rs. 4,999-15-0 and there was in the plaint a prayer for interest pendente lite. It is to be noted that the plaintiff was careful to keep the value under Rs. 5,000, but it is contended that the real value of the suit was over Rs. 5,000 and the defendants ought to have appealed not to the District Judge, but to the High Court. The valuation of the suit must be taken upon the value which the plaintiff put upon his own plaint. He did not value the interest pendente lite which he claimed nor does it appear that the Court took any notice of the prayer because I do not find any mention in the decree of it. The question as to what is the actual value of the claim is a question of fact and we have no evidence before us to show that the valuation was more than Rs. 5,000 and so it was accepted without any objection by any party in the Court of the District Judge. Therefore we have no materials here for holding that the valuation exceeded Rs. 5,000 and the principle of *Gulab Khan* v. *Abdul Wahab Khan* (1) does not apply. Moreover S. 11, Suits Valuation Act, seems to be an answer to the present contention in appeal. The contention not having been raised at any stage in the Courts below and the jurisdiction of the District Judge having been accepted we do not think it is open to the appellant to raise it now for the first time in the High Court. The appeal therefore will be dismissed with costs.

Thornhill, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(1) [1904] 31 Cal. 365.

A. I. R. 1918 Patna 316

MULLICK AND ATKINSON, JJ.

Bechu Sahu—Defendant—Appellant.

v.

Arjun and *another*—Plaintiffs—Defendants and Respondents.

First Appeal No. 77 of 1916, Decided on 9th November 1917, from decision of Sub-Judge, Ranchi.

(a) Transfer of Property Act (1882), S. 68—Provisions of S. 68 are designed to indemnify mortgagee against disturbance in peaceful enjoyment of property—Mortgagee is not precluded from suing person without title, as trespasser.

The provisions of S. 68 are designed for the purpose of indemnifying the mortgagee against any disturbance in his peaceful enjoyment of the property. They are provisions of an enabling nature, but they do not preclude a mortgagee who has been disturbed by a person claiming without title from suing the trespasser according to the general law and claiming as against him a declaration of title and recovery of possession.

[P 317 C 2P 318 C 1]

(b) Transfer of Property Act (1882), S. 68—Mortgagee can assert his rights against trespasser alone without claiming indemnity under S. 68.

There is nothing in law to debar the mortgagee from asserting his rights against the trespasser alone without claiming the indemnity which S. 68 empowers him to claim from his mortgagor.

[P 318 C 1]

Rai Guru Saran Prosad — for Appellants.

Baikuntha Nath Mitter— for Respondents.

Mullick, J.—Defendants 4 and 5 executed a zarpeshgi mortgage in favour of plaintiff 1, Arjun Sahu, in respect of a half share in mauza Idri on 25th August 1900 for a period of four years from 1900 to 1904. They were unable to pay either the principal or the interest and on 30th April 1910, a new contract was executed between the plaintiff and his son on the one hand and the defendants on the other. In this contract, defendants 1, 2 and 3, who were relatives of the plaintiff Arjun Sahu, were brought in as additional mort-

gagees and it was stipulated that the two plaintiffs now before us and these three additional mortgagees would advance a total sum of Rs. 8,832 to defendants 4 and 5, taking as security a zarpeshgi of the whole mauza for a period of eight years ; that is from 1967 to 1975 Sambat, corresponding to the years 1910 to 1918. In the sum secured by this mortgage, the share of the plaintiffs on account of principal and previous interest due was assessed at Rs. 5,000 ; that of defendant 1 at Rs. 1,624 ; and that of defendants 2 and 3 at Rs. 2,208. It is to be noticed that a few days before the execution of this mortgage, namely, on 16th March 1910, plaintiff 1 executed an am mukhtearnama in favour of defendant 1, empowering him to deal with the mortgaged property as his agent.

We hear nothing further about the property till 1913, when we find that on 23rd April of that year defendants 4 and 5 gave a mukarrari and zarpeshgi of the land to defendant 1 for a consideration of Rupees 8,999. The present suit has been brought by the plaintiffs on the ground that defendant 1, after having secured the management of the property, has dispossessed the plaintiffs from their share and declined to pay them any part of the usufruct. The primary prayer which the plaintiffs therefore make is one for declaration of title as mortgagees in the property. They also ask that it be declared that their share in the principal mortgage money is Rs. 5,000 and that their interest in the 16 annas of the property is represented by the fraction 9-7/23 They allege that defendant 1 has dispossessed them and they ask for a declaration of title and recovery of possession. As an alternative prayer they ask for refund of their share of the principal money and of the usufruct which has been misappropriated by defendant 1. Defendants 2 and 3 and the cosharers of the plaintiffs did not enter appearance and written statements were filed only by defendant 1 and defendants 4 and 5. The main contention of defendant 1 was that after having obtained the mukarrari and zarpeshgi he came to a private arrangement with the two plaintiffs and defendants 2 and 3, i. e., all his co-mortgagees, by which they agreed to release the property on receipt of their shares of the mortgage money and that he (defendant 1) paid to plaintiff 1 the sum of Rs. 5,000 on 8th June 1913. He also alleges that he has paid defendants 2 and 4 in full but the exact dates of these payments are not disclosed. The learned Subordinate Judge found that the story of payment either to the plaintiffs or defendants 2 and 3 was absolutely and entirely false.

Defendant 1 tendered the mortgage bond of 30th April 1910 at the trial and asserted that the endorsement on the back of the bond showing the payment of Rs. 5,000 to the plaintiff Arjun Sahu on 8th June 1913 was genuine and valid. He also alleged that as an additional precaution, he took a receipt from Arjun Sahu for this amount; that receipt was at his instance marked as Ex. D. at the trial. The defendant contends that his possession of the bond is proof of its satisfaction. It is no doubt a circumstance in his favour, but I am satisfied that the plaintiff's explanation that the plaintiff entrusted him with the bond because he was the plaintiff's agent is correct. As for the endorsement and the receipt the learned Subordinate Judge, after a very exhaustive examination of the evidence in the case, came to the deliberate conclusion that they were forgeries. There was a faint prayer in the plaint requesting the Court to give the plaintiffs a partition of the mauza. The learned Subordinate Judge refused that prayer on the ground that the interest of the mortgagees was not a permanent one, but he granted a decree for declaration of title and recovery of possession. It became therefore unnecessary to give the alternative relief for recovery of the plaintiffs' appropriate share of the mortgage money. Against the above decree defendant 1 now appeals to us.

The learned vakil for the appellant has relied mainly upon a point of law. He alleges that the plaintiffs are not entitled to any relief against defendant 1. He contends that if the plaintiffs have been dispossessed either from the whole or part of their security, their procedure is to ask for relief under S. 68, T. P. Act ; and that they ought to proceed in the first instance against the mortgagors, defendants 4 and 5. In my opinion there is no substance in this contention. The provisions of S. 68, T. P. Act, are designed for the purpose of indemnifying the mortgagee against any disturbance in his peaceful enjoyment of the property. They are provisions of an enabling nature,

but they do not preclude a mortgagee who has been disturbed by a person claiming without title from suing the trespasser according to the general law and claiming as against him a declaration of title and recovery of possession. There is nothing in law to debar the mortgagee from asserting his rights against the trespasser alone without claiming the indemnity which S. 68 empowers him to claim from his mortgagor. In this connexion the learned vakil for the appellant has relied upon *Pargan Pandey* v. *Mahatam Mahto* (1). But we have carefully examined that case and do not find anything in the decision of their Lordships of the Calcutta High Court which could reasonably support the argument which the learned vakil has addressed to us today. Therefore so far as the point of law is concerned, it fails.

The crux of the case however lies in the question of the repayment of the sum of Rs. 5,000 alleged to have been made by defendant 1 to the plaintiffs on 8th June 1913. It is quite clear that defendant 1 is not a rich man and I accept the reasons given by the learned Subordinate Judge for the finding that on the date of the alleged payment he could not possibly have had so large a sum of money. The defendant's story is that he paid defendants 4 and 5 the full amount of the consideration of the mukarrari and zarpeshgi; namely, the sum of Rs. 8,999, and that out of this sum defendants 4 and 5 kept in deposit with him (defendant 1) the sum of Rs. 4,416, for the purpose of paying off plaintiff 1. If that was the case, and defendant 1 asserts on oath that this was so, why did defendant 1 resort to a series of loans for the purpose of raising a sum of Rs. 5,000? No explanation has been given for borrowing a sum of Rs. 5,000 when, if he had Rs. 4,416 in hand, only the sum of Rs. 500 was required for the purpose of paying off the plaintiff. The learned vakil for defendant 1 has suggested that possibly the balance was required for the purpose of paying off defendants 2 and 3 and other creditors. But that is not the case which defendant 1 sought to make before the Court below. He has adduced evidence showing the various loans by which he collected the sum of Rs. 5,000 and he has maintained throughout that the money borrowed, partly from his father, partly from Budhu Sahu and partly from Madhu Sudan Bhagat, were required solely for the purpose of making up the Rs. 5,000 due to plaintiff 1.

Turning next to the actual evidence by which these loans are supported, we find at the outset that defendant 1 has no corroboration for his story that the sum of Rs. 2,100 was paid to him by his father. The learned Subordinate Judge has commented very strongly upon the fact that the father has studiously avoided giving evidence in Court, and we agree that the absence of this witness raises a very strong suspicion against the defendant's case. We should have expected that if the money had in fact been paid the father would have been in a position to come forward and explain from what source that money was derived, and to negative the contention of the plaintiffs that the father is a poor man and that it was quite impossible for him to find so large a sum as Rs. 2,100 in order to assist his son. Then as regards the sum of Rs. 500 alleged to have been lent on a hand note by Budhu Sahu to defendant 1, the probabilities are very strongly against the defendant's story. Budhu has deposed in the case. He admits that at the time that he lent this sum to the defendant, namely, in Jeyt 1970 Sambat, defendant 1 owed him another sum of Rs. 500 which was secured by a registered mortgage deed. It is impossible to believe that a creditor would have been so foolish as to make an advance of Rs. 500 on a mere hand note, which by the way has not been produced at all, when the debtor was still in arrears in respect of a similar debt secured by a registered document. Then again the evidence is conflicting as to the date of the re-payment of this loan of Rs. 500. According to the defendant the money was not paid till the following Agran, but Budhu himself tells a totally different story and says that the money was paid two months after the date of the loan, which would be the month of Sraban.

Finally there is the sum of Rs. 2,400, which is said to have been realized from an old debtor named Madhu Sudhan Bhagat who owed money to defendant 1. In support of the re-payment of this sum of Rs. 2,400, defendant 1 produces an endorsement, dateed 9th Chait 1970, upon

(1) [1907] 6 C. L. J. 143.

the back of a mortgage deed executed by Madhu Sudhan. Madhu Sudhan's story is that he had only Rs. 1,200 in hand and was obliged to borrow Rs. 3,000 from one Jagarnath, out of which a sum of Rs. 1,800 was applied towards the re-payment of old loans due to Jagarnath and the balance Rs. 1,200 was paid to defendant 1. Now the mortgage deed in favour of Jagarnath has not been produced. The oral evidence is that the deed was executed after the money was paid by Jagarnath to Madhu Sudhan. It is difficult to believe that Jagarnath would have paid so large a sum as Rs. 1,200 without first of all getting his security. The story of a verbal loan followed by a mortgage has, in my opinion, been concocted for the purpose of corroborating the endorsement of Chait 1970 at the back of Madhu Sudhan's mortgage deed.

So far therefore as the cash loans go, there is strong circumstantial evidence to support the story of the plaintiffs and to discredit the story of the defendants. It is also a suspicious circumstance that Budhu Sahu, the witness who has deposed in support of the loan of Rs. 500, is the son-in-law of Gopi Sahu who is related to defendant 1 and who is alleged to have played an important part in the fabrication of the forged receipt and the forged endorsement of 8th June 1913. With regard to the evidence in proof of the endorsement and receipt, the learned Subordinate Judge has come to the conclusion that the witnesses who attested these documents are not entitled to any credit whatsoever. Both these documents are proved by the scribe, Awadh Singh, by Harakh Sahu, D. Ws. 4, and by Udai Nath Pathak, D. W. 5.

Awadh Singh is the illegitimate brother of defendant 4, who is alleged to be in collusion with defendant 1 for the purpose of dispossessing the plaintiffs. Awadh Singh's evidence is very unsatisfactory and does not explain one very curious feature of the endorsement. It appears that the endorsement purports to show that the money was received by Arjun Sahu and others. The signature of Arjun Sahu alone appears at the bottom of the endorsement and Awadh Singh, when asked what he meant by the expression "and others," was totally unable to give any satisfactory explanation. All that he tells us is that Arjun Sahu dictated the terms of the endorsement and he wrote what Arjun Sahu wanted. I accept however the inference drawn by the learned Subordinate Judge, namely, that Awadh Singh's original intention was to make it appear that the other mortgagees also had been paid off.

With regard to Harakh and Udai, the learned Subordinate Judge has given good reasons for holding that they are not disinterested witnesses. They are both persons in some way or other connected with defendant 1 or with Gopi Sahu, who is alleged to be one of the persons responsible for the forgeries. It is further a most remarkable fact that although there are several witnesses to the endorsement and to the receipt, none of them are inhabitants of Sillagong where the payment is alleged to have been made, but come from other villages situated at a considerable distance from that village. For instance Udai is a resident of a village six miles off and states that he came there simply at the request of defendant 5. Upon the evidence before him I am quite satisfied that the learned Subordinate Judge was right in refusing to accept the endorsement and the receipt as genuine documents.

Finally there is the circumstance that although defendants 2 and 3 are said to have been paid off, no precaution was taken to get any acknowledgments from them. The learned Subordinate Judge was, in my opinion, perfectly right in drawing the inference that the original object of the endorsement was to show that the whole mortgage had been satisfied ; but it was subsequently considered more prudent to conspire only against the plaintiff Arjun. The learned Subordinate Judge has also commented upon the fact that the plaintiff's son Kanchan Sahu was admittedly not present when the payment was made and that no steps were taken to secure his signature. Having regard to the fact that Arjun is 85 or 86 years old, I think this was a serious and supicious omission. The plaintiff Arjun who has given his evidence in this Court has impressed the learned Subordinate Judge very favourably, and I am satisfied that the learned Subordinate Judge's estimate was correct and that the endorsements and the receipt are clear forgeries.

There is, moreover, very strong and conclusive corroboration in support of Arjun's story. That corroboration lies in

the evidence of Santosh Kumar Banerji, a pleader at Ranchi. That gentleman deposes that in February 1914, defendant 1 and the plaintiff Arjun came to him in order to settle their differences and that defendant 1 in his presence offered to pay to the plaintiff the sum of Rs. 3,000 out of the total Rs. 5,000 due to him on account of the zarpeshgi money; that at the request of defendant 1 the pleader drew up a mortgage deed proposed to be executed by defendant 1 in favour of Arjun. The negotiations however failed and there was some disagreement between defendant 1 and the pleader in consequence of which defendant 1 was turned out of the house. If this pleader is believed, there is a complete end to the defendant's case that the receipt and the endorsement were executed on 8th June 1913. The learned vakil for the appellant has been unable to show us any reason for disbelieving this pleader, whose cross examination in the Court below tends rather to confirm than to shake the statements made by him in his examination-in-chief. It may be urged that the pleader was not in a position to remember the exact time when this conversation in his house took place, but the reply to this is that the learned gentleman entrusted with the case of the defendant in the Court below did not consider it necessary to put any questions to the pleader for the purpose of testing his memory.

The result therefore is that the appeal fails and is dismissed with costs; the inquiry as to mesne profits will proceed. We cannot however leave this case without taking some steps for the vindication of public justice. The endorsement and the receipt put forward by defendant 1 were gross and impudent forgeries and it is necessary, in our opinion, to set the criminal law in motion. We have heard the learned vakils on both sides upon this point and we are satisfied that this is a case in which we should take steps under S. 476, Criminal P. C. We direct that the case be laid before the Deputy Commissioner of Ranchi under the provisions of that section in order that he may summon the accused Bechu Sahu and determine whether he has committed any offence under Ss. 192, 467 and 471 or any other connected sections of the Indian Penal Code. The learned vakil for the respondents undertakes that when required by the Deputy Commissioner or such other Magistrate as is deputed to hear the case his client will submit a list of witnesses for the prosecution.

Atkinson, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 320

ROE AND ALI IMAM, JJ.

Manno Choudhry and *another*—Appellants.

v.

Munshi Chaudhry—Respondent.

First Appeal Nos. 331 and 483 of 1914, Decided on 21st November 1917, from decision of Sub-Judge, Darbhanga.

(a) Partition—Private partition is bar to re-partition.

The existence of a private partition is a bar to the re-partition of property. [P 321 C 2]

(b) Evidence Act (1 of 1872), S. 114—Partition acquiesced in—It can be inferred that parties or their predecessors interested must be parties to it.

Where it is shown that the parties have acquiseced in the result of a partition, it must be presumed that they or their predecessors-in-interest were parties to the original partition. [P 321 C 1]

The fact that the original partition proceedings have been lost in antiquity is not a reason for disturbing divisions which have existed for a long period. [P 321 C 2]

(c) Precedents — Decisions by Board of Revenue though not binding on High Court yet they cannot be overlooked.

An order of the Board of Revenue is not evidence in a case before the High Court, but the latter should not make a decree in dissonance with a decision of the Board without fully considering and giving every respect to the reasons advanced in the making of that decision. [P 321 C 2]

P. K. Sen, Manmatha Nath Mukherjee, Ajindra Nath Mukherji, Hari B. Mukherji and *D. N. Sirkar*—for Appellants.

Abani Bhushan Mukherji, Mritunjoy Lal and *Shashi M. Mullick*—for Respondent.

Roe, J.—These appeals arise out of a decree of the Subordinate Judge of Darbhanga, decreeing the suit of the plaintiff for a declaration that by reason of a former private partition of the Estate No. 4099 known as Harshankerpur Jiwan, an order of the Board of Revenue directing a revenue partition to proceed dated 31st July 1912 is bad, and an injunction restraining the defendants from proceeding further with the partition on the strength of that order. It is not suggested that the suit as framed is not maintainable. It is said only that the

Board of Revenue will not be bound by a decision of this Court. It is clear that S. 25, Estates Partition Act, is no bar to the present proceedings, but we are confident that upon an application made to civil Court for a relief of the character indicated in the plaint in the present suit, made within four months of an order under S. 29, the Board would direct further proceedings to be stayed. We do not feel it necessary to lay down as a rule of law that an order under S. 29 should be regarded as having been made upon that date when its finality is assured by the decision of the Board. These are not matters on which we have jurisdiction to pass orders, and we do not propose to do so. Upon the merits of the case it appears to us that it cannot be for a moment denied that there has been within the meaning of the Board's Rulings contained in Rr. 5 to 7 under S. 7 at p. 7 of the Partition Manual a definite division of the estate Tauzi No. 4099 into separate pattis enjoyed for very many years by the several proprietors without interference by one with the other. It is shown conclusively by the cadastral survey papers that the estate was held in separate pattis in 1897.

The date of the application for the partition was 1911. For 15 years the parties held their lands in accordance with the entries contained in the cadastral survey. The fact that the parties acquiesced in the cadastral survey for this length of time is in our view conclusive proof that even if they were not consulted at the time of the original partition, they acquiesced in the original partition and have been holding their lands for more than 12 years in accordance with the original partition. As a point of law we take it that where it is shown that the parties have acquiesced in the result of a partition, it must be presumed that they or their predecessors-in-interest were parties to the original partition. We cannot allow share-holders in an estate to go on year after year giving the other side occasion to believe that they accepted the arrangements made, and then when the other side has made improvements in that part of the property which has fallen to its share, to claim the benefits of the improvements on the ground that there is no documentary evidence that they acquiesced in the original arrangements. We have read with care the arguments given by the Hon'ble Board in their order directing that the partition should proceed. This order we do not regard as evidence in the case, but we feel strongly that this Court should not make a decree in dissonance with a decision of the Hon'ble Board without fully considering and giving every respect to the reasons advanced in the making of that decision. The order of the Board is apparently based upon a consideration that the alleged partition of the estate divided into two shares of eight annas each is lost in antiquity and it is impossible to say who were parties to that partition. It is further stated that since that partition there have been created innumerable new interests and it is now necessary for these interests to be considered. With the greatest respect to the Hon'ble Board we would point out that it is to be presumed that all such new interests as have been created since the original division of the estate amount merely to devolution of the interests of the two parties who made the original partition.

We must presume further that the holders of these new interests are representatives of the original partitioners, and we must hold that representatives-in-interest of the original partitioners are bound by the acts of the original partitioners. We are satisfied upon the evidence on the record that from time immemorial the parties have been holding these estate in separate shares, and the fact that the original partition proceedings have been lost in antiquity is not in our view a reason for disturbing divisions which have existed for so long a period. We agree with the learned Subordinate Judge that the existence of a private partition is a bar to the repartition of property, and are satisfied that the plaintiff is entitled to a decree he has obtained. We note that one Manno Chaudhry, the appellant in No. 331, is not represented at the hearing and we, therefore note that the definite statement made by him in the civil suit brought in the year 1872 has not been considered by us in evidence as against the appellant Ramdin Singh Chaudhry in First Appeal No 483. Our decision is based on the presumption arising out of the Bengal Tenancy Act. The entries in the finally published record in 1897 must be

presumed to be correct until proved by evidence to be incorrect. The evidence on the record fails to show that the division of 1897 was incorrectly recorded by the cadastral survey party. The appeal is dismissed with costs, in favour of the plaintiff-respondent only. There will be no costs as between the appellants in First Appeal No. 331 and the appellants in First Appeal No. 483.

Imam, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 322

ROE AND COUTTS, JJ.

Mt. Hira Kuer—Plaintiff—Appellant.

v.

Palku Singh and *others*—Defendants—Respondents.

Appeal No. 322 of 1915, Decided on 30th May 1918, from original Decree of Sub-Judge, Patna, D/ 27th April 1915.

(a) Transfer of Property Act (1882), S. 95—Mortgage decree—Payment of decretal amount by co-mortgagor is redemption.

Under S. 95, T. P. Act, where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession. For the purposes of this section the payment of the balance due upon the mortgage is as much a redemption as the payment of the whole sum due in a case in which there has been no previous part-payments. [P 323 C 2]

(b) Transfer of Property Act (1882), S. 95 — S. 95 is not limited to cases of delivery of possession of usufructuary mortgage.

Section 95 is not limited in its scope to cases in which delivery of possession of the property itself is rendered possible by the fact that the mortgage was a usufructuary mortgage. It is also applicable to cases of simple mortgage where the property not being in the possession of the mortgagee cannot be transferred to the party releasing the security. [P 323 C 2]

(c) Transfer of Property Act (1882), S. 95— "Redeem" —Any action to cut bond by payment of money is redemption.

In the ordinary sense the word 'redeem' means to buy back or set free by payment. The property is bound by the mortgage and any action taken to cut the bond by payment of money is redemption. It is immaterial whether the mortgagor so far trusts the mortgagee as to leave the document in his possession or he insists upon the return of it and its cancellation. [P 323 C 2]

(d) Mortgage — Redemption — Right to redeem exists till confirmation of sale.

Where the security is extinguished the property is redeemed by the act which extinguished it. The right to redeem exists up to the time of the confirmation of the sale in execution of a mortgage decree. [P 323 C 2]

(e) Transfer of Property Act (1882), S. 95 — Suit for contribution for payment of mortgage money by co-mortgagor—Suit is maintainable — Art. 132 applies — Limitation Act (1908), Art. 132.

Plaintiff and defendant were co-mortgagors. The mortgagee obtained a decree on foot of the mortgage and part of the decretal amount was satisfied by several payments made by the plaintiff and defendant at different times. The balance of the amount however was paid by the plaintiff alone and the property was thereby finally released from the mortgage. The plaintiff then brought a suit for contribution against the defendant under S. 95.

Held: that the payment made by the plaintiff amounted to a redemption within the meaning of S. 95, and that the plaintiff's suit was therefore maintainable under that section and was governed by Art. 132. [P 323 C 2]

Muhammad Fakhruddin—for Appellant.

Ganesh Dutt Singh, Sivanandan Roy, Jalgobind Prosad Singh, Gangadhar Das, Krishna Sahay, Nagendranath Sen Gupta, Kailash Pati, Mritunjoy Lal and *D. N. Sircar*—for Respondents.

Judgment.—In this case the plaintiffs were co-mortgagors with the defendants in a transaction with the late Babu Salig Ram Singh. Babu Salig Ram Singh obtained a decree upon the mortgage-bond on 6th February 1902 and between that date and the 19th November 1905 several payments were made by one or other of the co-mortgagors in order to avert the sale of the property under S. 89, T. P. Act. On 19th November 1905 the balance of the decretal amount of debt not paid was Rs. 20,940-12-0, and it is not disputed that the whole of this sum was paid into Court by the plaintiff only, nor is it disputed that in consequence of this payment no further action has been taken by the mortgagee-decree-holder or that by the payment made the plaintiff finally released the property. The plaintiff now sues for contribution from his co-mortgagors and seeks to bring his suit within the period of limitation on the basis of S. 95, T. P. Act, by which he may be said to have acquired a charge upon the property mortgaged. The suit being then a suit upon a lien or charge would be covered by Art. 132, Lim. Schedule. The learned Subordinate Judge was of opinion that inasmuch as the co mortgagors had jointly made payments earlier in the history of this mortgage, the payment by the plaintiff of the sum outstanding in November 1905 was not a redemption within the meaning of S 95. He therefore dismissed the plaintiff's suit as

barred by limitation. Against this decision the plaintiff appeals. We are not in sympathy with the reasons given by the learned Subordinate Judge for his dismissal of the suit. Under S. 95, T. P. Act, where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

Without doubt in the ordinary sense of the word "redeem" the payment of the balance due upon the mortgage is as much a redemption as the payment of the whole sum due in a case in which there has been no previous part-payment. The points for consideration and argued before us by the learned Rai Bahadur have been, firstly, that within the terms of the argument at the Bar by Mr. Mahendra Nath Roy and Mr. Digamber Chatterjee in the case of *Bibijan Bibi* v. *Sachi Bewah* (1) the right to pay into Court the amount due under a mortgage decree is not a true right to redeem, but a right to pay up the decretal amount under S. 291, Civil P. C., which does not involve a delivery of the mortgage-deed. And it is urged that decision in case did not constitute in the judgment-debtor a right to redeem in the sense contemplated by Ss. 60 and 95, but merely a right to satisfy the decree made and that both in this case and in the case of *Kedar Nath Raut* v. *Kali Churn Ram* (2) the learned Judges used the words "right to redeem" in a loose sense and not in the strict sense. Granting for the sake of argument that the learned Judges did intend to say no more than that the judgment-debtor had a right to pay up the mortgage-debt, we are required to consider whether under S. 60, T. P. Act, the right to redeem is limited to the right to take back the mortgage document. In our view this would be putting a far too narrow construction upon the section. In the ordinary sense, the word "redeem" means to buy back or set free by payment. The property is bound by the mortgage, and any action taken to cut the bond by payment of money is a redemption. It is immaterial whether the mortgagor so far trusts the mortgagee as to leave the document in his possession or whether he insists upon the return of it and its cancellation. Redemption is effected by the releasing of the security and this is clear from the use in S. 89 of the terms "the right to redeem" and "the security" in conjunction. The clause runs: "And thereupon the defendant's right to redeem and the security shall both be extinguished." We hold that where the security is extinguished the property is redeemed by the act which extinguished it. Upon this conclusion there is no further defence to the suits except upon equitable grounds, for the Full Bench decision which we have quoted is authority for the proposition that the right to redeem exists up to the time of the confirmation of the sale and the decision of the Judicial Committee in the case of *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (3) is authority for the proposition that S. 95 is not limited in its scope to cases in which delivery of possession of the property itself is rendered possible by the fact that the mortgage was a usufructuary mortgage. It is also applicable to cases of simple mortgage where the property, not being in the possession of the mortgagee, cannot be transferred to the party releasing the security. We are therefore of opinion that the suit was wrongly dismissed on the preliminary point. We set aside the order by which it was dismissed and remand the case that it may be now heard upon the merits. The costs of this hearing will follow the final result of the suit. The appellant is entitled to a certificate entitling him to a refund of the court-fees paid on this appeal.

V.S./R.K. *Case remanded.*

(1) [1904] 31 Cal. 863.
(2) [1898] 25 Cal. 703.(F. B).
(3) [1906] 28 All. 482=33 I. A. 81 (P. C.).

A. I. R. 1918 Patna 323

JWALA PRASAD, J.

Sardar Singh and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 438 of 1917, Decided on 19th December 1917, from order of Sub. Divl. Magistrate, Banka, D/- 22nd June 1917.

(a) **Bengal Tenancy Act (1885), S. 23—Tenure-holder can cut trees.**

A permanent tenure-holder is entitled to cut down trees situate within his tenure. He can

only be prevented from doing so by the landlord showing a custom contrary to the right of the tenure-holder. [P326 C 1]

Whatever the tenant, whether he be a tenure-holder or a lessee, has grown upon the land that belongs to him. [P 326 C 1, 2]

(b) Penal Code (1860), S. 425—Cutting down of trees without impairing value does not amount to mischief.

Where there is a dispute between the parties as to the ownership of a tree and one of them cuts it down, the case is beyond the cognizance of a criminal Court and outside the scope of S. 425. The cutting down of a tree does not amount to mischief unless it destroys or diminishes the dignity or value of the tree.

[P 326 C 2]

Lalit Mohan Ghose—for Petitioner.

G. C. Pal—for the Crown.

Judgment.—This is an application against the order of the Sub-Divisional Magistrate of Banka, dated 22nd June 1917, convicting the petitioners under S. 426, I. P. C. Petitioner 2 is the servant of petitioner 1. The conviction is in respect of a *bar* tree said to have been cut by the petitioners in Mauza Ghutia. The plaintiff's master is the mukarraridar of this village. Accused 1 was recorded in the Survey Record of Rights as malguzar istamrari lekin mukarrari nahin. The Record of Rights was finally published in 1917. The plaintiff's master, Jamna Prasad, disputed the correctness of this entry as to the status of petitioner 1 under S. 106, Ben. Ten. Act, but the Assistant Settlement Officer by his decision of 14th October 1909 dismissed the claim of Jamna Prasad and upheld the entry in the Survey Record. The basis of the claim of Jamna Prasad was that petitioner 1 had only a lease of the village for a temporary period and that he was only a mustajir, or lessee, and had no right to remain in possession of the village after the expiry of the lease. He wanted a note to that effect to be made in the Survey Record of Rights. The entry in the Record of Rights amounts to a recognition of petitioner 1 as a permanent tenure-holder. The Assistant Settlement Officer came to the conclusion that the petitioner was in possession of the village by virtue of a patta executed in his favour in 1262. This patta is referred to in the judgment of the Magistrate as Ex. A. By this patta the petitioner obtained right and possession over the village with the trees and the jungles situate therein. The petitioners claimed before the Assistant Settlement Officer that they had been cultivating the lands of the village and had reclaimed jungles. This was accepted by the Assistant Settlement Officer and it was further held that the subsequent kabuliyats said to have been executed by the petitioners did not affect their title, which was corrected by the original lease of 1262. Two of these kabuliyats have been referred to in the judgment of the Assistant Settlement Officer as Exs. 2 and 3, namely, the one dated 24th Paus 1305 and the other 20th Kartik 1315. The latter one was an application made by the petitioner to Jamna Prasad for permission to cut down two *sal* trees for the purpose of using the timber thereof in the house which was being constructed by him.

The trees are said to be situate in Ranicharana and in the orchard of Kuli Roy of Singahua. There is no mention of Ghutia in this application and it is not known therefore whether the application at all related to any trees in the village in question. The decision of the Assistant Settlement Officer was upheld in appeal by the District Judge of Bhagalpur on 30th March 1910. In or about the year 1913 Jamna Prasad brought a civil suit against Sukh Lal and others for recovery of Rs. 120, price of six *sal* trees said to have been cut and removed by the defendants from the Bahera jungle. The suit was dismissed by the Munsif by his judgment of 19th February 1914, upon the ground that it was not proved that the trees were at all cut by the defendants. It was in that case alleged by the plaintiff's witnesses, that one Biranchi cut the trees. The Munsif held that Biranchi was not a defendant and therefore the plaintiffs could not obtain any decree in that case. The Munsif however upon issue 3, which runs as follows,

"Are the tenants of the plaintiff to take wood from his jungle without payment of any price under any custom."

Held that the defendants could not take wood without payment of price. Before discussing this issue, the Munsif prefaced it by saying that it is unnecessary to decide it inasmuch as the suit of the plaintiff was dismissed upon facts. The judgment of the Munsif has also been referred to in the judgment of the Sub-Divisional Magistrate in this case. The above is in short the history regarding the dispute between the parties as to the status of petitioner 1 in the village and as to the petitioners' right in the tree

situate in that village. The present occurrence is said to have taken place on 16th February 1917. It is said that the petitioners cut a branch of a *bar* tree. Jamna Prasad the plaintiff lodged an information before the Police. On 6th March 1917 the Magistrate declined to issue warrants against the petitioners upon the ground that he felt "doubt if the branches had been cut dishonestly" by the petitioners and held a judicial inquiry. On 5th April 1917 he looked into the survey papers referred to above and other evidence adduced by the complainant and after hearing both the parties passed the following order:

"It appears that the *bar* or barged tree with respect to which an offence is said to have been committed stands on a piece of holding belonging to Jhajhu Mahto. The holding is in Mauza Tona Pathar, which is within the mustajri of the accused Sardar Singh. The complainant's master Thakur Jamna Prasad, is the mukarraridar of the Mauza. In the Survey Records it is not mentioned in whose possession the bargad tree is. In the absence of any evidence in the Survey Records to the contrary the tree may be said to be in the holding of Jhajhu Mahto or his representative. The tree does not bear any fruit which is taken by anybody. It is extremely doubtful that the mukarraridar is in the possession of a tree standing on the holding of another. It is questionable as to whether the tenant, or the tenure-holder (the accused) or the superior landlord (the complainant's master) is in actual possession of the tree the branches of which have been cut. I cannot therefore hold that the accused who is the tenure-holder dishonestly cut the tree from the possession of the mukarraridar and so no cognizable offence is made out. Enter non-cognizable, S. 426, I. P. C."

Nine days after the above order on 14th April the complainant filed a complaint before the same Magistrate. In his statement on oath recorded by the Magistrate on the back of the complainant's petition he admitted that "information was lodged at the Thana, but as the case did not proceed I have come to complain." The Sub-Divisional Magistrate straightway upon that complaint ordered the accused to be summoned under S. 426, I. P. C. The complainant stated to him that the matter did not proceed on the information given to him by the Police. The Magistrate had upon a judicial inquiry come to the conclusion that the possession of the tree was not proved to be with the complainant and there was no dishonest intention of the accused in cutting away the tree. I do not know why in the face of his own finding the Sub-Divisional Magistrate thought it fit upon the complainant's petition in respect of the same occurrence to issue summons against the accused persons. It is also not known whether the Magistrate looked into his former order at all, or in the course of the hearing of the present case whether his attention was ever drawn to it. In the judgment in revision the Sub-Divisional Magistrate does not make any reference to his order of the 5th April 1917 referred to above and surely it was expected that he would either before summoning the accused, or in the judgment, give reasons for his taking a different view from what he had taken at the earlier stage of the case. I am therefore entitled to infer from this that if the Magistrate had known of his other order refusing to take cognizance of the offence he would not have summoned the accused in this case. The cutting of the tree is admitted. The question before the Magistrate therefore was as to whether the cutting of the tree constituted mischief under S. 425, I. P. C. All that the Magistrate finds is that the accused knew that they had no right to cut the tree and therefore they acted dishonestly in doing so. This finding is based upon the judgment of the Munsif referred to above of February 1914 and upon the kabuliyat of 1305 and upon the application made by petitioner 1. The two latter documents may be dispensed with summarily. The first document has been already held by the Assistant Settlement Officer as not sufficient to destroy the right of the petitioner which he had got in the village by virtue of the patta of 1263.

The application, as already said above, does not refer at all to this village and even if it did, we do not know the circumstances under which that application was made and it cannot possibly take away the right that the petitioner had in the village and the trees situate therein. The only document of any importance is the judgment of the Munsif. This judgment referred to jungle Bahera and to which the petitioners were not parties at all. It has not been at all contended by the learned vakil for the respondent that the judgment is at all binding upon the petitioners. At the best the judgment may be admissible evidence under S. 13, Evidence Act, as an instance of a transaction in which the custom was set up by

one of the interested parties. The question here is whether the dispute that arose between the petitioner and the opposite party in the survey and thereafter as regards their respective rights in the village has at all been settled by any competent Court. The judgment of the Munsif is not at all binding and cannot be taken as finally settling the dispute. The Assistant Settlement Officer's judgment upheld by the Special Judge under S. 106 is a judgment inter partes. It decides once for all the status that the accused had in the village. The status was that of a permanent tenure holder. The right of the permanent tenure holder cannot be disputed as regards the trees situate within the tenure. In the case of an occupancy raiyat under S. 23, Ben. Ten. Act, a tenant is entitled to cut down the trees. He can only be prevented from doing so by the landlord showing a custom contrary to the right of the tenant. The principle underlying this section applies with greater force in the case of a permanent tenure-holder. It is not for me at this stage to say anything as to the view that was taken by the Munsif in that case, but it is sufficient to say that the onus of the custom lies upon the landlord.

The tree in question stands upon plot No. 1090, khata No. 79, and the entry is ghair ma rua malguzar. The word malguzar is important, for the entry against the name of the petitioner is malguzar istumbari. The entry therefore means that No. 1090 was recorded as being in the khas possession of the petitioner as a tenure-holder thereof. No tree has been shown as standing in this particular plot in the Survey Record of Rights. This is explained by the petitioners by saying that the tree in question was planted on the land subsequent to the Survey Record of Rights which happened in 1907. The complainant has not in this case shown that the tree was planted by him. We have to accept the Survey Record as correct. There was no tree in existence, and even supposing for a moment that the right of the mukarraridar was in respect of the tree, he can possibly have no right in the trees that were planted by the man in possession of the land so long as the lease of the petitioner continues. It is not at all the case of the other side that the lease has expired. Only the status is disputed. Whatever the tenant, whether he be a tenure-holder or a lessee, has grown upon the land, that belongs to him. This fact of the case has not at all been noticed by the Sub-divisional Magistrate. The question is one which could not be decided in any criminal Court. It is obvious from the history of the dispute between the parties that after the survey the parties are trying to assert their right over the trees in the village and to drive the opposite party to the civil Court. A criminal Court should therefore be careful in giving any advantage to any of the parties over his adversary. The learned Magistrate admits that the petitioner is in possession of the village. He claims the trees as belonging to him and he has a right to cut the trees. The opposite party has ample opportunity to go to a civil Court and establish his right. The case is similar to that of *Shakur Mahomed* v. *Chunder Mohun Sha* (1). I will borrow the language of that decision on the particular point, for it seems to me that every word of it applies to the present case:

> "Now, as bamboo is a thing which is grown to be cut, the cutting and removing it does not amount to its destruction or other injury defined above. If there be any dishonest intention, the act of the offender in causing a wrongful loss to the complainant would amount to theft, and not mischief; but it seems to me clear from complainant's own statement and certain documents filed by the accused that there is a dispute regarding the title to the land on which the bamboos said to have been cut and removed were situated. On these grounds I think the order of Deputy Magistrate convicting the accused of mischief is wrong in law and should be set aside."

I have taken pains to give in this judgment at the very outset the facts to show that there is a dispute between the parties. I therefore hold that the case was beyond the cognizance of the criminal Court and outside the scope of S. 425. This is enough to set aside the order of the Sub-divisional Magistrate. There is one thing more which to my mind goes to show that the conviction should be set aside. The facts found by the Magistrate were such as do not warrant any conviction under S. 425. He does not at all find that the cutting of the tree in question did at all destroy or diminish the dignity or value of it. The petitioner is said to have cut it for the purpose of fuel. If the branch of the tree was fit for fuel, then there was no mischief done to it although theft may have been committed by taking it away from the possession of

(1) [1874] 21 W. R. Cr. 38.

the complainant's master. There is no finding upon this point. The attention of the Magistrate was not at all directed to this. The above authorities as well as the case of *Miras Chowkidar, In the matter of* (2), where it was held that the cutting of paddy would not constitute mischief unless it diminished its utility or value on account of its being not ripe, are on all fours with the present case. Upon the above grounds I set aside the conviction and the sentence, and the fine, if paid, be refunded.

V.S./R.K. *Conviction set aside*

(2) [1903] 7 C. W. N. 713.

A. I. R. 1918 Patna 327

JWALA PRASAD, J.

Daroga Lal and *others* —Defendants—Appellants.

v.

Devi Lal—Plaintiff—Respondent.

Appeal No. 694 of 1917, Decided on 29th October 1918, from appellate decree of Sub-Judge, Patna.

Easements Act (1882), S. 13—What is easement of necessity and when it arises stated —Necessity must exist before law will compel a party to grant it.

An easement of necessity can only arise when the property cannot be used at all without the easement, and not where the easement is merely necessary to the reasonable enjoyment of the property. [P 328 C 2]

An easement of necessity points to the fact that there must be absolute necessity before the law will compel a land-owner to submit to so detrimental a right as an easement in his land, a right in reality, though not in theory, imposed on his land against his will. [P 328 C 2]

P. K. Sen—for Appellants.

Syed Mohmud and *D. N. Sircar*—for Respondent.

Judgment.—This appeal relates to a question of easement claimed by the plaintiff. The plaintiff and the defendant are cousins and there was a partition between them in the year 1904, when all their properties, immovable and moveable, were divided between them. There were two contiguous houses owned by them jointly. On partition the eastern one fell to the share of the defendant and the western to that of the plaintiff. Prior to the partition there was a doorway between the two houses and other necessary requirements which were suitable for the enjoyment of the occupants of both the houses. In the building allotted to the plaintiff there is a third storey or second floor, the access to which was through the terrace or mundera appertaining to the building allotted to the defendant. The defendant interfered with this passage and closed up the way to it. The plaintiff therefore instituted the suit out of which this appeal has arisen, for a declaration that the defendant had no right to interfere with the plaintiff in the use of the terrace B C in the map attached to the plaint and for a perpetual injunction against him. This claim in the plaint was based upon the fact that the way to the third storey was in existence prior to the date of the partition and had since been continuously and without any interruption used and enjoyed by the plaintiff up to the time of the interference on the part of the defendant. The right of the plaintiff to use the terrace in dispute was disputed by the defendant. The principal issue raised in the case was issue 3 :

"Has the plaintiff acquired any right of easement in the property in dispute and has he any right to restrain the defendant from closing the door and passage?"

The Munsif who tried the case held that the plaintiff did not prove his right to use the disputed land which is a part of the defendant's building as an easement for 20 years, and therefore had no right accrued to him. In dealing with this issue the Munsif observed that in the plaint the right of easement claimed is said to have been acquired by user. On appeal the learned Subordinate Judge reversed the decision of the Munsif and decreed the plaintiff's suit. The finding of the Munsif that the plaintiff failed to prove that he had acquired under the law the right of easement upon the ground of user has not been disturbed by the learned Subordinate Judge. In this appeal it is not disputed by the learned counsel on behalf of the respondent that the plaintiff's right of easement on the ground of user must fail. The learned Subordinate Judge however has granted the plaintiff's right to the use of the defendant's land as an easement of necessity. It is objected on behalf of the defendant that the lower Court was wrong in giving decree to the plaintiff upon the aforesaid ground as it was not urged in the plaint. The objection was however overruled on the ground that there was nothing to show in the plaint that the plaintiff claimed a right of easement of user and not a right of easement of necessity. Reading the plaint and the

issues, it is difficult to support the Subordinate Judge in this view; but it is not necessary to pursue this point further, for admitting that the plaintiff was entitled in appeal before the Court below to raise the point, it is obvious that the finding of the Court below that the plaintiff is entitled to the right of way claimed as an easement of necessity cannot be supported.

The plaintiff has not produced any partition deed. On the other hand, the deed of the agreement of partition executed by him in favour of the defendant has been produced by the latter and is marked Ex. J. The Munsif clearly says in his judgment that there is no trace in this deed of agreement, Ex. J, of the right set up on behalf of the plaintiff. The Subordinate Judge also has accepted this in the following words:

"On referring to the partition-deed it appears that there is provision for closing a common passage and a drain and it was silent as to the way leading to the third storey which has now fallen into the plaintiff's share."

I have also gone through this deed, and it appears to me that the Courts below are correct in the view that in it there is absolutely no mention of the path claimed by the plaintiff. The right of the plaintiff to the use of the defendant's terrace as a way for the plaintiff to his third storey has not been expressly granted or reserved in the deed. There is no reservation by implication even of any such right in the deed, not even expressions of a general right to the use of the building allotted to him, such as "appurtenances", "appertaining" or "rights and accompaniments" or "existing rights", or "rights used occupied and enjoyed", find a place in the document. It is needless therefore to consider the authorities quoted at the Bar, which have construed the aforesaid expressions as being sufficient or insufficient as conveying the right to the use of certain easements. It is true that the terrace in the defendant's building was used as a passage to the third storey when both the houses were jointly owned hy the plaintiff and the defendant and that the plaintiff has not constructed any other way to the third storey. The finding of the Court below is that

"even after partition the plaintiff has been using this way which is the only way to go up to the third storey and without which the chhat is unapproachable, for a very long time without any objection."

But there is no finding, and my attention has not been invited to any evidence on the record, that the plaintiff could not in any way construct a passage from his own land leading to the third storey in question. No doubt the passage in question might be the most convenient way for the plaintiff and that it was used so long by him. The plaintiff ought to have exhausted all possible ways of communication to the third storey. On the record, as it stands, it is impossible to hold that it was the only way by which the plaintiff could enjoy the use of the house after the partition. Indeed looking again at the plan of the house annexed to the plaint, which might be treated as a part of the judgment, it is obvious that from his own house on different points the plaintiff could construct a staircase leading to the third storey in question. Whatever may have been the views before the question has been set at rest by the decision in the well-known case of *Wheeldon* v. *Burrows* (1) That case was followed in the case of *Union Lighterage Co.* v. *London Graving Dock Co.* (2) and recently in the case of *Roy* v. *Hazeldine* (3). It has been conclusively settled that an easement of necessity can only arise

"when the property cannot be used at all and not where it is merely necessary to the reasonable enjoyment of the property."

and as observed by Goddard : pp. 38, 39, 6th Ed.

"An easement of necessity points to the fact that there must be absolute necessity before the law will compel a land-owner to submit to so detrimental a right as an easement in his land, a right—in reality though not in theory—imposed on his land against his will. It must be borne in mind how detrimental generally it is to an estate to be burdened with an easement, what a nuisance it is to an owner of land to have another person walking at his pleasure over a field . . . . .and how such rights may prevent building on land or using it in any of the ways the owner may desire."

That principle has been embodied in S. 13, Easements Act, which is not applicable to this part of the country. The principle upon which that section was enacted is based upon the English cases and is consonant to reason and common sense. Cl. E of that section says:

"Where a partition is made of the joint property of several persons—if an easement over the share of one of them is necessary for enjoying the

(1) [1879] 12 Ch. D. 31=48 L. J. Ch. 853.
(2) [1902] 2 Ch. 557=71 L. J. Ch. 791.
(3) [1904] 2 Ch. 17=73 L. J. Ch. 537.

share of another of them—the latter shall be entitled to such easement."

The easements mentioned in Cls. A, E and F of S. 13 are easements of necessity. A right of way or passage is not a continuous easement, and therefore it can only be allowed when without the easement in question it is impossible to use the dominant tenements to which the easement is claimed. It has been urged on behalf of the respondent that at the time when the partition took place between the members of the family there was only one way to the third storey, that is by the disputed terrace, and as no other way existed the possibility of the plaintiff being able to construct another passage cannot take away his right of easement of necessity. This point appears to have been disposed of by the Allahabad High Court in the case of *Sukhdei Bibi* v. *Kidarnath* (4), the facts of which case appear similar to this case. The right of way as an easement of necessity after partition of the joint house claimed in that case was disallowed. The observation at p. 472 is that

"he (the plaintiff) certainly can open a door towards the north for access to his share."

It is clear from this that the plaintiff cannot claim the easement of necessity unless he can show that it is not possible for him to construct a new passage for his use; in other words, the plaintiff must make out that the use of the way claimed is one of absolute necessity and not merely necessary or convenient or that it was used so long by him. This view is supported by a string of authorities of all the Courts aud it is unnecessary therefore to mention all of them that have been quoted at the Bar. Suffice it to say that the cases of *Krishnamarazu* v. *Marraju* (5), *Esubai* v. *Damodar Ishvardas* (6), *C. H. Crowdy* v. *L. O' Reilly* (7) and *Ram Narain Shaha* v. *Kamala Kanta Shaha* (8) are dead against the plaintiff-respondent. The authority quoted by the Subordinate Judge, namely. *Charu Surnokar* v. *Dokouri Chunder Thakoor* (9), is based on *Pyer* v. *Carter* (10) which has since been overruled. The case of *Kadambini Debi* v. *Kali Kumar Haldar* (11) refers to a right of light and air, and not to a way which is neither continuous nor always an apparent easement. Perhaps the attention of the Court was not drawn to the later decisions of the same Court. For these reasons the appeal is allowed and the judgment of the Court below is set aside. The appeal is decreed with costs; the plaintiff's suit stands dismissed.

V.S./R.K. *Appeal allowed.*

(4) [1911] 33 All. 467=9 I. C. 628.
(5) [1905] 28 Mad. 495.
(6) [1892] 16 Bom. 552.
(7) [1912] 17 I. C. 966.
(8) [1899] 26 Cal. 311.
(9) [1882] 8 Cal. 956.
(10) [1857] 1 H. & N. 916.
(11) [1899] 26 Cal. 516.

* A. I. R. 1918 Patna 329

ROE AND IMAM, JJ.

Sharfunnessa—Applicant.

v.

Nazni Khanum—Opposite Party.

Civil Revn. No. 146 of 1917, Decided on 15th November 1917, against order of Sub-Judge, Muzaffarpur, D/- 24th February 1917.

*** Civil P. C. (1908), O. 33, Rr. 1 and 5 (b) —Application for permission to sue as pauper by married woman—Husband's means cannot be taken into consideration.**

Where a married woman applies for permission to sue as a pauper, the real point in issue is whether she herself is a pauper within the meaning of R. 1, O. 33, and the fact that her husband has property is not sufficient proof that the applicant herself has property from which court-fees in the case can be paid. [P 329 C 2]

Hasan Jan—for Applicant.

Mohammad Tahir—for Opposite Party.

Roe, J.—In this case the petitioner is aggrieved by an order of the Subordinate Judge of Muzaffarpur refusing her application to sue in forma pauperis, on the ground that her husband is a man of means. There has been no finding and indeed no inquiry as to what the means of the applicant herself are. We are of opinion that the fact that the husband has property is not sufficient proof that the lady herself has property from which court-fees in the case can be paid. We therefore remand the case for retrial and direct that the learned Subordinate Judge direct his mind to the real point in issue, whether or not the lady herself is a pauper within the meaning of the Act, and upon the result of that inquiry dispose of the application in accordance with law.

Imam, J.—I agree.

V.S./R.K. *Case remanded.*

A. I. R. 1918 Patna 330

DAWSON-MILLER, C. J.
AND MULLICK, J.

Srikishun Prasad Panjiar — Appellant.

v.

Mt. Jeohasi Kuer—Respondent.

Letters Patent Appeal No. 113 of 1917, Decided on 20th March 1918.

(a) Bengal Tenancy Act (1885), S. 88—Mere acknowledgment of receipt of rent less than total jama without any indication that it is for portion only of holding does not constitute consent to division of holding.

The mere acknowledgment of receipt of rent less than the total jama without any indication that it is in respect of a portion only of the holding cannot constitute a consent to a division of the holding within the meaning of S. 88 even when continued over a number of years; but if it should clearly appear on the face of the receipt itself that the rent is paid in receipt of a particular portion only of the holding this may be sufficient acknowledgment to bind the landlord. [P 332 C 1]

(b) Evidence Act (1872), S. 106—Authority of gomastha to give receipt recognizing subdivision of tenure or holding denied by landlord—Burden of proof lies on landlord.

Where a landlord repudiates the authority of a gomastha to give a receipt which recognises the subdivision of a tenure or holding, the onus of proof is ordinarily upon the landlord inasmuch as the relations between himself and his servant are a matter peculiarly within his knowledge under S 106. [P 333 C 1]

(c) Bengal Tenancy Act (1885), S. 88—"Express consent by writing" may be given by a rent receipt—Adequacy of consent must be gathered from circumstances.

The "express consent in writing" required by S. 88 may be given by means of a rent receipt, and in each case the adequacy of the consent must be gathered from all the circumstances. A receipt showing the area of the transferred portion and the rent paid therefor should be sufficient to constitute express consent within the meaning of the section. [P 333 C 2; P 334 C 1]

(d) Bengal Tenancy Act (1885), S. 88—S. 88 refers to sole landlord or entire body or joint landlords when there are more than one.

Section 88 refers to a sole landlord or the entire body of joint landlords where there are more landlords than one. A division which does bind the whole body of landlords does not come within the scope of the section. [P 334 C 1]

(e) Bengal Tenancy Act (1885), S. 88—There is no provision which requires landlord to recognise distribution of rent.

There is no provision in the Bengal Tenancy Act which requires a landlord to recognize a distribution of rent. The landlord is authorized to do so, but the authority is derived not from the Act but under the general law as an incident to the ownership of property. [P 334 C 2]

Nirsu Narain Singh—for Appellant.

Dawson-Miller, C. J.—The plaintiff, who is a cosharer malik of Mauza Chak Sobhialias Babhanjawan, instituted a rent suit against the defendant as tenant in respect of a holding said to comprise 5 bighas 1 cottah 13 dhurs for the years 1318 to 1321 F. S. The plaintiff's collection was separate from the other cosharers and he claimed as his share the annual sum of Rs. 13-3-3 out of a total jama of Rs. 20-5-0. In addition to the four years' rent amounting to Rs. 52-13-0 he also claimed Rs. 13-3-3 on account of damages and interest until realisation.

The defendant, who is the widow of Deo Narain Singh, contended that the total rental according to the survey khatian was not Rs. 20-5-0 but Rs. 19 1-3 and further that her late husband Deo Narain, who was the original holder, sold a part of the holding to Uma Singh whose proportion of the total rent amounted to Rs. 10-4-0, leaving a balance of Rs. 8-13-3 payable for the part retained by Deo Narain. At the trial before the Munsif the survey khatian was accepted as showing the total rental and it was proved by a cosharer malik with the plaintiff and by Sheonandan Raut, who acquired Oma Singh's interest, that the holding had been split up and that Uma Singh or his successors had in fact been paying Rs. 10-4-0 annually in respect of their portion of the holding, and the only question was whether this distribution of the rent was binding on the landlord. The Munsif found that it was and ordered that the plaintiff should recover his proportion of the Rs. 8-13-3 payable in respect of that part of the holding which had not been transferred together with proportionate costs and damages. The Subordinate Judge in a somewhat perfunctory judgment upheld this decision, and on appeal to a single Judge of this Court the case was remanded for the Subordinate Judge to determine the question whether the division of the holding had been made with "the express consent in writing" of the landlords or their authorized agent within S. 88, Ben. Ten. Act. The learned Subordinate Judge on remand dealt with the evidence and came to the conclusion that the section had been complied with. The learned Judge of this Court who remanded the case upheld that view, holding that there was sufficient evidence to support the finding.

The plaintiff being dissatisfied with that decision now brings this Letters Patent appeal and contends that the evidence was not sufficient to warrant

the finding that "the express consent in writing" of the landlord had been obtained. Before 1907 the section in question did not contain the word "express" before the words "consent in writing", nor did it contain the words which follow after the words 'consent in writing', and the question we have to determine is whether the evidence is sufficient to prove that the division of the holding or the distribution of the rent payable in respect thereof was made with "the express consent in writing" of the landlord or his duly authorized agent in that behalf. It was conclusively proved that the holding had been split up, as contended for by the defendant, and that for several years the landlords had been in that habit of collecting the rent payable for the transferred portion from Uma Singh and subsequently from his successors-in-title, and further the survey khatian shewed two khatas, one in the name of Deo Narain and the other in the name of Uma Singh but the jama of Rs. 19-1-3 was not apportioned in the survey records. Rent receipts in respect of the portion of the rent then payable by Uma Singh were produced for the years 1309, 1313, 1314, 1315 and 1319 F. S. They shew an annual rent of Rupees 10-4-0 payable by Uma Singh and subsequently by his successors, and Uma Singh is described in the first one as vendee. The first one is signed by Hardeo Panjiar, the plaintiff's father, as well as by Ramasis Pandey, his agent. The others are signed by Ramasis only. They further shew that the holding of Uma Singh was 3 bighas 1 cottah 12 dhurs, which is a portion only of the total holding of 5 bighas 1 cottah 13 dhurs. They also shew that the plaintiff's share of the Rs. 10-4-0 rent was Rs. 6-10-4, the balance Rs, 3-9-8 being that of his co-sharers. The receipt for the year 1319 is for one of the years in respect of which the rent in this suit is claimed. Moreover this receipt acknowledges payment of a further sum of Rs. 6-10-4 as arrears presumably for the year 1318.

It would appear therefore that in regard to the first two years for which rent is claimed in this suit the plaintiff has already received payment for Uma Singh's portion, and on this ground alone he ought not to be allowed to recover it a second time from the present defendant. No evidence was called by the plaintiff to rebut the presumption that arises from the rent receipts and I think it may legitimately be inferred from the receipt of 1319 that the arrears therein acknowledged were for the previous years. This in my opinion disposes of the plaintiff's claim for the first two years so far as Uma Singh's portion of the rent is concerned. As to the rest of the claim it remains to consider whether compliance with the section has been sufficiently proved. A controversy leading to some difference of opinion as to whether rent receipts could in any case constitute "the consent in writing" prescribed by the section was finally set at rest by the decision of the Calcutta High Court in *Pyari Mohun Mukhopadhyo* v. *Gopal Paik* (1). The rent receipts in that case were granted by the landlord's gomasta and contained a recital that the defendant's name was registered in the landlord's sherista as tenant of a portion only of the original holding at a rent less than the original rent. It was held that this fulfilled the requirements of the section as then existing. In 1904 the case of *Jnanedra Mohan Chowdhry* v *Gopal Das Chowdhry* (2) came before the Calcutta High Court. In that case the rent receipts contained nothing beyond an acknowledgment of the receipt of a certain sum from the defendant as rent of a certain taluq. There was nothing to show that the rent was paid in respect of a portion only of the holding or that the defendant's name had been registered in the landlord's sherista as tenant of a divided portion.

In fact the receipt showed nothing from which any inference could be draw as to the division of the original holding or the landlord's consent. The Court held that such a receipt could not be taken as a fulfilment of the conditions of the section. It was laid down that payment by the tenant and receipt by the landlord of a portion of the original rent even extending over a number of years could not in itself afford evidence of the written consent of the landlord to a division of the holding so as to substitute a new contract in place of the old. The facts of those two cases are separated by a wide gulf. In the first case the facts were clearly sufficient to show a written consent by or on behalf of the landlord, in the second they were just as clearly insufficient for

(1) [1893] 25 Cal. 531.
(2) [1904] 31 Cal. 1026.

that purpose. The case now under consideration comes midway between the two, and bears more resemblance to the later case of *Abinash Chandra Chowdhury* v. *Purnananda Khan* (3) decided by the High Court at Calcutta in 1913. In that case several tenants were sued jointly for the rent of a putni tenure. They objected that the suit was not maintainable against them jointly on the ground that the original rent had been apportioned to each of them in separate shares. They producedrent receipts granted to the tenants separately, which shewed the total rent and the portion allotted to each for their respective shares. The Court found on this evidence that there had been a sub-division of the tenure and a distribution of the rent consented to by the landlord. That case was decided after the amendment of the Bengal Tenancy Act in 1907, and once it is conceded that the granting of a rent receipt by the landlord or his agent may amount to "express consent" within the meaning of the section, it is only a question of determining what are the elements necessary to constitute such consent. It seems to me that the principle underlying these cases is that the mere acknowledgment of receipt of rent less than the total jama, without any indication that it is in respect of a portion only of the holding, cannot constitute a consent to a division of the holding even when continued over a number of years; but if it should clearly appear on the face of the receipt itself that the rent is paid in respect of a particular portion only of the holding this may be a sufficient acknowldgement to bind the landlord. The present case is very near the line, and although the conclusion to which I have come has been arrived at with some hesitation I think on the whole the finding of the learned Subordinate Judge was justified by the proved facts of the case. The present receipts clearly show that Uma Singh's proportion of rent was paid in respect of a named area which was less than the total area of the holding and the first in point of date which was signed by the landlord as well as hy the agent described Uma Singh as vendee. This seems to me to amount to an acknowledgment in writing that the holding had been divided and a proportiontae rent allotted to Uma Singh. The plaintiff's cosharer Dhurendhar also supported the defendant's case and the fact that the plaintiff was endeavouring to recover from the defendant rent clearly proved to have been already collected from Uma Singh's successors, although perhaps not a material factor in determining the question under consideration, is one which leads me to believe that the present decision will not work an injustice on the landlord. In arriving at this decision I would point out that there is no intention of disagreeing in any way with the judgment of this Court in the recent case of *Wyatt* v. *Sheo Gobind Sahu* (4). The facts of that case bear no resemblance to the facts of the present case.

It was there admitted that the transfer was a benami transaction and that all along the transferor was treated as the tenant of the land. The remarks as to the authority of the landlord's patwari in that case could have no application to the present where the landlord himself was a signatory to one at least of the rent receipts. It was contended that S. 188 Ben. Ten. Act, rendered the consent of one cosharer landlord nugatory, unless it were proved that he was authorised by the remaining landlords to act on their behalf. It is difficult to see how S. 188 can have any application to a case like the present where the landlords have separate collection of their share of rent; but however that may be, the evidence of Dhurendhar was enough to show that the act of the plaintiff or his predecessor was authorised by the other cosharer. In my opinion this appeal should be dismissed. It has been brought to our notice that the decree of the first Court does not carry out the directions contained in the Munsif's judgment. If that is so we have power under O. 41, R. 33 to set it right. The decree will therefore be modified and in lieu thereof it will be decreed that the plaintiff do recover from the defendant a sum equal to the plaintiff's share, viz., thirteen twentieths of Rs. 8-13-3, for the four years in question together with 12½ per cent per annum interest to date of suit and 6 per cent. thereafter until realisation. There will be no modification of the orders for costs in the lower Courts and save as above mentioned this appeal will he dismissed without costs the respondent not having appeared.

(3) [1913] 21 I. C. 420.

(4) [1916] 36 I. C. 777.

Mullick, J.—I agree with the judgment which has just been delivered. I desire only to add a few observations on the matter urged before us.

The learned vakil who appears on behalf of the plaintiff-appellant before us contends in the first place that the rent receipts upon which the learned Munsif and the Subordinate Judge and the learned Judge of this Court found that a division of the holding had taken place were not binding upon him.

Now it is found as a fact that one of these receipte Ex. A-1, dated 7th Sraban 1309 F. S., was signed by the plaintiff's father and by his gomashta Ram Asis and was given to Uma Singh's brother, while four other receipts for the years 1313, 1314, 1315 and 1319 F. S. were signed by the gomashta only and were given to Uma Singh or his cosharers. All these receipts, if believed, would tend to show that the plaintiff agreed to recognise the transfer of an area of 3 bighas 1 cottah 12 dhurs at a rental of Rs. 10-4-0 inclusive of cesses. The finding of fact as to the signatures is conclusive, but the plaintiff contends in regard to the receipts given by the gomashta that the servant in question had no authority to recognise any sub-division of the tenancy and that the defendant has not discharged the burden which rests on him to prove such authority. Now the case of *Sudaman* v. *Behari Mahton* (5) is clear authority for the proposition that where a landlord repudiates the authority of a gomashta to give a receipt which recognises the sub-division of a tenure or holding, the onus of proof is ordinarily upon the landlord inasmuch as the relations between himself and his servant are a matter peculiarly within his knowledge under S. 106, Evidence Act.

The learned vakil for the appellant, however relies upon the case of *Wyatt* v. *Sheo Gobind Sahu* (4), in which there are observations to the effect that if a patwari gives a receipt recognizing a division of tenancy, the onus of proof is upon the tenant and not upon the landlord. That case however was decided in reference to its own facts, which showed that the patwari concerned was not a person ordinarily entrusted with the duty of recognizing divisions of holdings. In my opinion this case does not conflict with the long line of decisions which have held that in regard to receipts given by gomashtas the onus of showing that the gomashta had no authority to recognize a distribution of rent or division of tenancies lies upon the landlord. In the case now before us this point as to the want of authority in the gomashta Ram Asis was never raised and as neither party has given evidence, the Courts below have rightly assumed that the gomashta had authority to bind his principal. With regard to the receipt, Ex. A-1, which has been found to have been signed by the father of the plaintiff and by the gomashta, it only states that a sum of Rs. 5-2-0 has been paid by Uma Kuer, the vendee, and as it omits to mention the area for which this rent is paid it is inconclusive if taken alone; but taken with the other receipts it tends to corroborate the case of the defendant. It is true the Record of Rights does not show two separate holdings. It merely shows that Deo Narain and Uma Singh were joint tenants though occupying separate parcels of land. There was, however, evidence in the shape of the rent receipts upon which it was competent for the learned Munsif and the Subordinate Judge to come to the conclusion that the plaintiff had recognized a division. In my opinion these receipts have been correctly construed and are binding upon the plaintiff.

The learned vakil for the plaintiff next urges that even if the rent receipts are otherwise binding, they do not operate to have that effect as they do not conform to the conditions of S. 88, Ben. Ten. Act. Now the law previous to 1907 was that a division of a tenure or holding or the distribution of rent payable in respect thereof shall not be binding on the landlord unless made with his consent in writing. In 1907 the word "express" was added and it is therefore now necessary to decide what is meant by "express consent." The learned vakil has not been able to show any authority for his contention that the law has been substantially changed and that the current of decisions of which the case of *Pyari Mohan Mukhopadhya* v. *Gopal Paik* (1) is a type has been in any way overruled. In my opinion "consent in writing" may be given by means of a rent receipt, and in each case the adequacy of the consent must be gathered from all the circumstances. It has been

(5) [1911] 10 I. C. 456.

held that if a receipt shows the total area of the holding and the area of the share transferred and the rent distributed thereon, then that is sufficient consent in writing; *Jnanendra Mohan* v. *Gopal Das* (2). If this is so, I see no reason why a receipt showing the area of the transferred portion and the rent paid therefor should not also be sufficient to constitute express consent within the meaning of S. 88.

If therefore S. 88 had been applicable to the present case, I think that the rent receipts filed by the defendant would have been sufficient to show that the plaintiff had given his express consent in writing to a division of the tenancy. But, in my opinion, S. 88 has no application to a cosharer landlord who is still joint with his co owners. That section enacts under what conditions a division of a tenure or holding is binding upon the landlord. It obviously refers to a sole landlord or the entire body of joint landlords where there are more landlords than one; for, as was held by Rampini, J., in *Kunja Behari Singh* v. *Mt. Roshan Koer*, see unreported decision in Second Appeal No. 28 of 1897, one cosharer cannot bind his other cosharers by any act of his own without authority to do so. It would seem that the earliest enactment bearing upon this point was S. 27, Act 10 of 1859, which required landlords to give effect to all divisions of transferable tenures but at the same time provided that no division was to be binding upon a landlord without his written consent. S. 88 of the present Act reproduced and amplified the proviso by including within its scope the division of holdings. The object of the legislature in both enactments was to protect the landlord's security against unauthorized divisions by the tenant. Therefore, it seems reasonable to suppose that divisions which would not bind the whole body of landlords do not come within the scope of the enactments In this view S. 88 could only apply when the contract between a cosharer and the tenant has the effect of creating a separate tenure or holding. Now it is, in my opinion, settled that even when a tenant executes a kabuliyat agreeing to pay a cosharer landlord his share of the rent separately and also agreeing that this cosharer shall be competent to deal with him as if he were his sole landlord, the contract though it may create a separate tenancy cannot create a separate holding: for a holding being defined in the present Bengal Tenancy Act as a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy, the undivided share of one cosharer landlord in the holding cannot be a parcel within the meaning of the definition, *Hari Charan Bose* v. *Ranjit Singh* (6), *Parbatty Debya* v. *Mathura Nath* (7). As has been pointed out by Banerji, J., in the former of these two cases, the position is otherwise in respect of an undivided share in a tenure which is not required by definition to consist of a separate parcel or parcels.

Therefore in the case now before us Deo Narain's tenancy under the plaintiff was not a holding and it follows that S. 88 which deals with the division of holdings cannot apply. Even if Deo Narain had contracted to treat the plaintiff in all respects as his sole landlord, S. 88 would not be a bar to the operation of that contract. The learned vakil for the appellant next contends that S. 188, Ben. Ten. Act, prohibits the plaintiff from recognizing without the consent of the other cosharers the transfer to Uma Singh and the consequent distribution of the rent. In my opinion this section has no application whatsoever. There is no provision in the Tenancy Act which requires a landlord to recognize a distribution of rent. He is certainly authorized to do so, but that authority is derived not from the Act but under the general law as an incident to the ownership of property. Therefore if neither S. 88 nor S. 188 applies, the question arises what is the effect of the plaintiff's recognition of Uma Singh as Deo Narain's transferee. S. 178, which is the only section which restricts a tenant's power of contract with his landlord, does not in any way operate as a bar here, and, therefore, it was perfectly competent to the plaintiff to recognize the transfer and the distribution of rent so far as his share was concerned. Again as S. 88 does not apply, his consent in writing, whether express or implied, was unnecessary. The defendant is entitled to prove the contract by any legal evidence she pleases and to enforce it. Here she has proved express sonsent in writing. The defendant therefore is only liable for the balance of the

(6) [1898] 25 Cal. 917 n.
(7) [1913] 40 Cal. 29=15 I. C. 453.

rent after deduction of the sum due from Uma Singh. But there is another ground which, in my opinion, is fatal to the plaintiff's claim. Having recognized the transfer to Uma Singh the plaintiff cannot, even if S. 88 had been applicable, be permitted to say that the distribution is not binding upon him merely because the formalities of the section were not complied with. The principle of *Maddison* v. *Alderson* (8) have been applied to this country by their Lordships of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (9), where their Lordships cite with approval the following observations of the Chancellor:

"The matter has advanced beyond the stage of contract and the equities which arise under the stage which it has reached cannot be administered unless the contract is regarded."

The underlying principle is one of universal application, namely, that equity will not fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. Therefore, having acted upon the contract with Deo Narain as disclosed by the rent receipts, the plaintiff cannot take advantage of the defects, if any, in the form in which his consent was signified to Uma Singh so as to bar the enforcement of the contract. In my opinion to support him in such a plea would be to support that which amounts to a fraud.

V.S./R.K. *Appeal dismissed.*

(8) [1883] 8 A. C. 467.
(9) A. I. R. 1914 P. C. 27=42 Cal. 801=28 I. C. 930=42 I. A. 1 (P. C.).

A. I. R. 1918 Patna 335

SHARFUDDIN AND ROE, JJ.

Mosudan Potdar and *others*—Plaintiffs—Appellants.

v.

Satis Chandra Roy—Defendant—Respondent.

Second Appeal No. 584 of 1916, Decided on 26th April 1917, from decision of District Judge, Bhagalpur, D/- 2nd February 1916.

Landlord and Tenant— Mokurrari tenure—Dispossession of tenure-holder from portion of holding — Tenure-holder can withhold rent.

Where a lessor is directly or indirectly concerned in the dispossession of a tenure-holder from a mokurrari, the tenure-holder is entitled to withhold payment of the entire rent to the superior landlord. [P 335 C 2]

Pugh and *Lal Mohan Ganguli*—for Appellants.

P. C. Manuk, *Sultan Ahmad*, *Naresh Chandra Singh* and *Surendra Mohan Das*—for Respondents.

Facts.—The plaintiffs brought a suit in the Court of the Subordinate Judge, Bhagalpur, claiming arrears of rent from the defendant in respect of a mokurrari tenure of 204 bighas comprised in 4 separate plots on a yearly jama of Rupees 484-8-0 besides cesses at a rate of Rupees 2-6-0 per bigha. The suit was contested by the defendant, on the ground that the plaintiffs shortly after making the settlement with him as aforesaid settled an area of 94 bighas, one of the said 4 plots, with certain other persons, which prevented the defendant from obtaining actual possession of the said 94 bighas and that therefore the entire rent for the mokurrari tenure should be suspended.

Sharfuddin, J.—The plaintiffs who are the appellants gave a mokurrari to the defendant of about 204 bighas of land. One of the plots is a plot of 94 bighas odd and this plot of 94 bighas is situated to the north of the river Goghri. The defendant withheld payment of rent, on the ground that through the connivance of the lessors he was dispossessed from that portion of the mokurrari. The Subordinate Judge dismissed the suit; hence the present appeal. On behalf of the appellants it has been conceded that the law is that when the lessor is directly or indirectly concerned in the dispossession of a tenure-holder from a mokurrari, the tenure holder is entitled to withhold payment of the entire rent to the superior landlord, but it was contended that the appellants case depends on a kabuliyat executed by the defendant, wherein it was stipulated that in case of dispossession from any portion the defendant would be entitled to claim a .proportionate abatement of rent. There is no doubt that there is such a provision, but that provision does not say that the defendant will not be entitled to withhold payment of any rent. Besides, we have to consider that clause in relation to what precedes it. Reading the kabuliyat as a whole, it is clear to me that what was provided was dispossession of the lessee from the mokurrari in consequence of litigation or owing to the

action of the river. The clause relied upon is to the following effect :

"If under any circumstances this executant or his heirs and representatives be, in future, dispossessed of any portion of the said land, or if under a decision of the Court any portion of it be taken out of the possession of this executant or his heirs and representatives, then this executant and his heirs and representatives will be entitled to a decree in the rent at the rate mentioned above to the extent to which they will be dispossessed."

If we were to accept the argument on behalf of the appellants it would amount to nullifying the whole mokurrari, because if a wide meaning is given to this part of the kabuliyat, the lessor himself would be able to continue dispossessing the lessee till the latter is absolutely dispossessed from all the mokurrari lands. The meaning seems to me to be this : That in case of dispossession through an action in Court, or if by any act of God the lessee is dispossessed, he will be entitled to claim a proportionate abatement of rent. According to this kabuliyat the lessee was entitled to the produce generation after generation. There is also a very clear provision of the right to claim abatement owing to the action of the river. This being the view I take, I dismiss the appeal with costs.

Roe, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 336

ROE AND COUTTS, JJ

Jodhan Pershad Singh and *others*—Defendants—Appellants.

v.

Nanhku Pershad Singh and *others*—Plaintiffs—Respondents.

Appeal No. 2 of 1916, Decided on 28th May 1918, from original decree of Sub-Judge, Patna.

(a) Limitation Act (9 of 1908), S. 2, Cl. (7)—"Good faith."

"Reasonable view," when used in connexion with the words "good faith" as defined in the Limitation Act, S. 2, Cl. 7, impties that what was done was done with due care and attention. [P 337 C 2]

(b) Limitation Act (9 of 1908), S. 5—Wanton negligence of pleader is no sufficient cause—Appeal filed with insufficient court-fee—Deficit not made up till after expiry of limitation—Gross negligence of pleader—Appeal is not properly filed under Court-fees Act (7 of 1870), S. 4.

Wanton negligence on the part of a legal adviser is not a sufficient ground for the exercise of the Court's clemency under S. 5.

Where owing to the gross negligence of the appellant's legal adviser the memorandum of appeal was filed bearing insufficient court-fee and the deficit was not made up till after the expiry of the period of limitation :

Held : (1) that under S. 4 the memorandum could not be considered to have been properly filed till the deficit in the court-fee was paid : (2) that the deficit in the court-fees having been paid after the expiry of the period of limitation, the appeal was barred by time, and that the negligence of the legal adviser was not a sufficient cause for extending the period of limitation under S. 5. [P 338 C 1]

P. K. Sen and *Abani Bhusan Mukerji*—for Appellants.

Manuk, Ganesh Dutt Singh, Jalgobind Prosad Singh and *Debendra Nath Das*—for Respondents.

Judgment.—A preliminary objection is taken in this case that the appeal is barred by limitation. The facts of the case are that the plaintiff had a mortgage upon property which constituted part of an entire revenue-paying estate. The mortgage had been created by defendant 1 who had sold his interests to defendants 2 to 11. In the deeds of sale transferring the property to these defendants a provision had been made for the immediate payment of the mortgage money to the plaintiff mortgagee. No payment was made in accordance with this contract, but shortly after the transfer of the property the estate was put up for sale for arrears of revenue and purchased by the defendants 12, 13 and 14. The mortgagee in instituting his suit upon the mortgage, alleged that defendants 12, 13 and 14 were not in any sense of the word purchasers at a sale for arrears of revenue ; that in fact the revenue had been purposely withheld and a collusive sale effected in the Collector's Court ; and that there had been no change in the proprietorship of the property, defendants 12, 13 and 14 being mere benamidars or trustees of defendants 2 to 11. He therefore sought to enforce his mortgage notwithstanding the revenue sale. The learned Subordinate Judge found as a fact that the plaintiffs' allegations with regard to the position of defendants 12, 13 and 14 were correct. They were not purchasers of the property, they were merely trustees for the former holders. He therefore decreed the plaintiffs' suit and made an order that the mortgage property be brought to sale. Defendant 15 was a purchaser of the interest of defendant 13 in a four-anna share of the property which purported to have passed by the revenue sale. Defendants 12, 13 and 15 therefore appealed

against the decree the grounds of appeal being as follows :

(1) For that on the evidence adduced the Court below is in error in holding that the appellants are farzidars of defendants 2 to 11. (2) For that on the evidence adduced in the case the Court below has erred in holding that the revenue sale was brought about by the fraud of the defendants second party. (3) For that the Court below ought to have held that the purchase made by the appellants was free from all encumbrances and therefore ought to have dismissed the suit against the appellants. (4) For that the Court below ought to have dismissed the suit against the appellants as barred under S. 36, Act 11 of 1859. (5) For that the Court below has misread and misunderstood the provisions of S. 36, Act 11 of 1859, in holding that the section does not apply in the present case. (6) For that the Court below ought to have dismissed the suit as barred by limitation. (7) For that the Court below has erred in allowing the petition filed by the plaintiff for amendment of the plaint. (8) For that the Court below ought to have held that the appellants were bona fide purchasers for value and that they were not party to the alleged fraud and that their purchase was free from encumbrances. (9) For that the findings arrived at by the Court below are not sufficient in law to prove the purchase to be benami. With the exception of grounds 4 and 5, that the suit was barred by S. 36, Act 11 of 1859, the whole question involved in the appeal was whether the finding of fact that defendants 12, 13 and 15 were mere trustees for defendants 2 to 11 was correct. It was not for a moment denied that if the finding of fact was correct, the legal consequence must be that the property was liable for the mortgage-money.

It must have been obvious, as we think, to anyone of ordinary legal capacity that the immediate consequence of a decree in favour of the appellant defendants upon this question of fact would result in the release of the property from liability under the mortgage. Nevertheless in setting forth the valuation it was stated that;

"the appeal is valued at Rs. 20,000. The appeal relates to a declaration that the revenue sale is not a farzi transaction, and that properties purchased by the appellants at the revenue sale are not liable for the mortgage. As it is not possible to estimate at a money value the subject-matter in dispute, the court-fee of Rs. 10 is paid under Art. 17, Cl. 6, Court-fees Act of 1870."

Mr. Sen for the appellants does not suggest that this was a correct view, He admits that the proper court-fee would at least be ad valorem on the property. But he urges that the view taken by the learned vakil who filed the appeal was a reasonable view. We cannot accept this contention. "Reasonable view," when used in connexion with the words "good faith" as defined in the Limitation Act, S. 2, Cl. 7, implies that what was done was done with due care and attention. The learned vakil was fully aware that the object of the appeal was to release the properties purchased by the appellants at the revenue sale from liability under the mortgage. He states definitely that this is the relief sought, and it cannot be said that it was not possible to estimate at a money value the subject-matter in dispute, for obviously the subject-matter in dispute was not less than the liability, as stated by the decree of the learned Subordinate Judge, or the value of the property, whichever might be the lesser sum. We are of opinion therefore that the filing of this appeal on a court fee of Rs. 10 was not done in good faith within the meaning of the Limitation Act. Further we note that the appeal was filed on 13th July 1915. On 30th July the Deputy Registrar made the following order on the back of the plaint:

"Ask the vakil of the appellant to state why a court-fee of Rs. 10 only has been paid on this appeal."

And in pencil we find below this: "Shown to vakil, 20-8, 24-8, 30-8, 24-11;" and then under this in blue pencil a note: "please put it up on the Lawazima Board to morrow, 21-11-1915.' The initials of the persons making this note are not legible; but under it in ink is written: "I am ready to pay the ad valorem court-fee. (Sd.) H. P. Sinha." The matter was then put upon the Lawazima Board and an order was passed by our learned brothers Chapman and Mullick, JJ.:

"Subject to any objection that may be taken at the hearing, let the deficit court-fee be received, if paid by Monday next."

It was held in *Gaya Loan Office* v. *Awadh Behari Lal* (1) that where a Court definitely allows time for the filing of the deficit court-fee, the plaint must be treated as if the full fee had been paid in the first instance, but in the case before us there has been no definite order made condoning the delay in filing the deficit. Only a conditional order has been made that it will be accepted subject to any objection that might be made at the time of the hearing of the appeal. The Judicial Committee has expressed very strongly its views with regard to this matter in the case of *Krishnasami Ponikondar* v. *Ramasami Chettiar* (2). Their Lordships point out that a question of limitation is one vitally affecting the rights of the parties, and not to be decided in their absence. No question was decided by our learned brothers, Chapman and Mullick, JJ., whether under S. 5, Lim. Act, the appellant had shown good reason for the extension of the period within which his appeal might be filed. Under S. 4, Court-fees Act, the Court is expressly prohibited from receiving a memorandum of appeal which has not been properly stamped. The memorandum of appeal now before us could not be accepted until the deficit court-fees had been paid, and therefore in order to bring the suit within time we are now required to make an order under S. 5, Lim. Act, to the effect that the appellant has satisfied us that he had sufficient cause for not preferring the appeal on a memorandum properly stamped within the prescribed period.

We have already set forth our reasons for holding that no vakil acting with due care and intelligence could have imagined that Rs. 10 was a sufficient court-fee. We have also set forth facts apparent upon the back of the plaint, indicating that the vakil not only failed to exercise due care and intelligence in estimating the court-fee, but also when the deficit in the court-fee had been brought to his notice (a deficit which when he gave his attention to the matter he found it impossible to refuse to admit), he acted with wanton negligence from the end of July to the end of November. It has been so frequently held that wanton negligence by vakils is not sufficient ground for the exercise of the Court's clemency under S. 5, Lim. Act, that it is unnecessary to quote cases. We are of opinion that the failure of the plaintiff in this case to file this appeal on a memorandum properly stamped was due to gross negligence on the part of his legal advisers and therefore refuse leave to extend the time. The appeal is therefore barred by limitation and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(1) [1917] 1 P. L. J. 420=37 I.C. 507.
(2) A.I.R. 1917 P. C. 179=41 Mad. 412=43 I. C. 493 (P.C.).

A. I. R. 1918 Patna 338

DAWSON-MILLER, C. J. AND MULLICK, J.

Fazlur Rahman and *others*—Applicants.

v.

Kali Muzaffar—Opposite Party.

Civil Revn. No. 110 of 1918, Decided on 6th November 1918.

Administration suit—Allowance to proper person pending proceedings can be granted—Discretion should be carefully used—Property by way of allowance should not be handed over unless other assets are sufficient.

Where the administration of an estate is being carried on under the supervision of a Court, that Court has power, in a proper case, to grant an allowance, pending the administration, to any of the parties who will eventually be entitled to share in the property. That power ought however to be exercised with proper discretion and having regard to the claims that are likely to be made upon the estate, and the Court ought not grant to any of the beneficiaries properties by way of an allowance unless it is satisfied that the assets will be sufficient to satisfy the creditors. [P 340 C 1]

Khurshed Hasnain—for Appellants.

Nurul Hasan—for Respondent.

Dawson-Miller, C. J.—This is an application on behalf of the representatives of some of the children of the late Mt. Bibi Fasihan in the course of administration proceedings in respect of her estate. It appears that she died leaving four daughters and three sons. To some of them she had by deeds of gift transferred certain portions of her property. The validity of these deeds of gift was called in question by the remaining heirs and after some litigation all of them were set aside and this Court ordered, in view of the somewhat complicated circumstances that had arisen by reason of the dealings with the shares which had been given to some of the children by the deeds of gift, that the whole estate should be administered under the supervision of the

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

Court and directed a preliminary decree to be drawn up in accordance with that decision. In the course of the administration proceedings a Receiver was appointed and from time to time various applications were made to the District Judge under whose charge and supervision the estate was being administered. On 23rd March 1918, Kali Muzaffar, one of the sons of Mt. Fasihan Bibi whose share of the estate was a 7-anna share and who had incurred certain costs in connexion with an appeal from the decision of this Court to the Privy Council, applied to the District Judge by petition that those costs should be advanced to him out of his share and charged to his account and further that an allowance should be paid to him pending the administration of the estate.

In the result the learned District Judge ordered that the costs incurred by Kali Muzaffar in prosecuting his appeal to the Privy Council from the decision of this Court might be advanced to him and charged to his account out of the share which would ultimately come to him when the estate had been administered. With regard to the allowance he said:

"Receiver should submit a scheme for the payment of the debts due by the estate and an estimate of the mesne profits due by and to each party in order that it may be possible to fix the amount of the allowance."

In pursuance of that order a report was made by the receiver, which dealt with the assets and liabilities of the estate which was a large one, amounting to some 10 lakhs. The report also dealt with the mesne profits which Kali Muzaffar and one or two of the other heirs had received out of that portion of the estate which they had been dealing with under the deeds of gift and before the deeds were set aside. It appeared from that report, which was not final as the assets and liabilities had not then been entirely ascertained, that there would be due from Kali Muzaffar to the estate a sum of something between Rs. 70,000 and Rs. 90,000 in round figures. It further appeared, as far as can be ascertained at present, that making a liberal estimate for the debts and liabilities of the estate, something like 7 or 8 lakhs (take it at 7 lakhs) would be left representing the assets distributable amongst the various heirs. Of this sum Kali Muzaffar will be entitled to a 7-annas share. Out of that 7-annas share he will have to pay a sum of not less than Rs. 73,000 and not more than Rs. [illegible],000. Taking it even at a lakh, that would leave Kali Muzaffar's share at something like 2 lakhs and in the meantime, of course, he would be entitled to the interest on that property in addition to the capital which will eventually become his. In these circumstances the learned Judge, having received the report and presumably considered it, made another order on 10th April 1918 when the previous petition was considered together with a petition made by the other members of the family dealing with various matters. In the course of that order he stated that an allowance of Rs. 400 a month be made to Kali Muzaffar for the present and added: "It does not seem possible to grant an allowance to the other parties at present." The other parties who were apparently asking for an allowance were the daughters of the deceased lady. The learned Judge allowed the application of Kali Muzaffar fixing his allowance at Rs. 400 and refused the application on behalf of the daughters.

We have been asked by the petitioners to say that this order made by the learned Judge was without jurisdiction or that under the provisions of S. 115, Civil P. C, was made illegally or contained some material irregularity. In the alternative the petitioners ask us to say that an allowance should also be made to the three daughters who have moved this Court. The grounds upon which we are asked to exercise our powers of revision are those which I have already stated. It is contended that under the preliminary decree the Court has no power to order any portions of the assets to be distributed at all, but merely has power to make enquiries in order to ascertain what the liabilities were and what the shares of each of the claimants of this estate are after the debts have been ascertained. I cannot accept that interpretation of the decree which has been put before us, for this reason. By the order of this Court a general administration of the estate was ordered and the case was sent down to the District Judge to prepare a decree in accordance with those directions. Whilst it is quite true that the great bulk of the different paragraphs in the decree deals merely with enquiries that have got to be made and accounts which have to be taken

as to the ascertainment of the debts and the shares of the different heirs and as to their rights and liabilities, it was nevertheless a decree made in an administration suit and it is provided in that decree that the commissioner or the parties or any of them are at liberty to apply to the Court for the appointment of a Receiver or for other directions from time to time as they may be advised. A Receiver has been appointed and the administration of this estate is apparently taking longer than was anticipated, and I can see no reason why any of the parties who will eventually be entitled to share in the property should not apply to the Court under whose direction the estate is being administered, asking that they should be granted an allowance, certainly not a very excessive allowance, pending the time when they will come into their own.

It seems to me that that is one of the powers which the Court exercising control over the administration of the estate is certainly entitled to exercise. I quite agree that that power ought to be exercised with proper discretion and having regard to the claims that are likely to be made upon the estate, and that the Court ought not to grant to any of the beneficiaries properties by way of an allowance unless it is satisfied that the assets will be sufficient to satisfy the creditors. Having regard to the report of the Receiver which I have already referred to, it seems to me that it is quite clear that the share of Kali Muzaffar will be able to bear the liability that may attach to it in respect of this advance of Rs. 400 per month. It seems clear that if he gets his share of the income that share of income alone will be in excess of Rs. 400 per month, and moreover the order which was made was merely an order that he should be paid that sum for the present. If owing to the administration being protracted or for any other reason it should appear to any of the parties interested that this allowance should cease, they will certainly be entitled to make another application to the District Judge and he can then consider the question in the light of the altered circumstances which may have arisen.

The alternative suggested by the applicants is that the whole of the assets of this estate should be locked up in the pocket of the receiver and not a penny piece should be paid to any body whatever their ultimate rights thereto may be, until the whole of the somewhat complicated set of circumstances has been ascertained and everybody's definite share has been apportioned. If that were so, it would follow that those who were certainly entitled to share in this estate might be kept out of their only means of subsistence for a considerable time, and I have no hesitation whatever in coming to the conclusion that the administrator has ample power to make an order such as this and there is no lack of jurisdiction nor is there any illegality or irregularity in the order which has been made. The other question which we have been asked to decide is that if Kali Muzaffar is granted an allowance, then the three surviving daughters ought also to be granted a similar allowance. This is a matter for the discretion of the learned Judge. He is not bound in any case to grant an allowance to any one of the parties and no doubt he has exercised his discretion in this matter, and speaking for myself I can see very good reason why Kali Muzaffar, one of the sons who probably is dependent upon the income of his mother's property for his livelihood, should be granted a small allowance such as this merely for his everyday expenses, whereas the daughters who are married have other means of subsistence and there is nothing to show that they are in immediate want or necessity. That is one of the reasons which I imagine affected the decision of the learned Judge in coming to the conclusion at which he arrived. In any case I do not think that this Court sitting in revision ought to substitute its own discretion for that of the Court below in such matters where discretion has to be exercised. That being so, it seems to me that this application must fail and ought to be dismissed with costs. Hearing fee two gold mohurs.

At the same time it does appear that the receiver, who was appointed by the decree to make enquiries and take accounts and ascertain the assets and liabilities of this estate and the shares of the different heirs, was ordered to have his enquiries and account and other matters completed and present a certificate ready for inspection by the parties by 31st March 1918. We are now in November, and it does not appear that

the accounts have been completed and it is impossible to say how far from completion they are even at the present moment. This has been put before us as a grievance on behalf of the applicants. It is not a matter with which we are in a position to deal, not knowing what the actual facts are, nor would it be a matter with which we would be entitled to deal in an application of this sort. At the same time in dismissing this application I think perhaps it might be advisable to bring this matter to the notice of the District Judge in order that he may, so far as he can, take steps either on his own initiative or if an application should be made to him by the parties to see that this administration is pushed on without any unnecessary delay.

Mullick, J.—I agree.

V.S./R.K. *Application dismissed.*

A. I. R. 1918 Patna 341
Special Bench

DAWSON-MILLER, C. J., CHAPMAN AND ATKINSON, JJ.

Ram Sukul Pathak and *others*—Plaintiffs—Appellants.

v.

Kesho Prasad Singh and *others*—Defendants—Respondents.

Letters Patent Appeal No. 53 of 1917, Decided on 23rd November 1917, from judgment of Mullick and Jwala Prasad, JJ., in appeal from original order No. 125 of 1916 D/- 23rd February 1917.

Civil P. C (1908), O. 41, R. 19 — Transfer of appeal—Notice to parties is necessary—Want of notice constitutes sufficient cause for re-admission of appeal.

Where an order of transfer of an appeal from one Court to another is made, it is desirable that notice should be given in every case to the parties or their representatives. [P 342 C 2]

An important order such as the transfer of a case from one Court to another should invariably be communicated to the persons concerned and in token of such communication the signatures of the parties or their pleaders should be obtained and when the signature is not obtained the order sheet should show that the information has been communicated. [P 342 C 2]

Where an appeal was transferred from one Court to another and no notice was given to the parties of the transfer and the appeal was dismissed for default :

Held: that the want of notice of transfer to the parties constituted a sufficient cause for the re-admission of the appeal within the meaning of R. 19, O. 41. [P 342 C 2]

Ganesh Dutt Singh and *Siva Nandan Rai*—for Appellants.

Yunus and *Krishna Sahay*—for Respondents.

Dawson-Miller C. J.—This seems to me to be a very clear case. The appellant brought a suit which came by way of appeal before the District Judge of Arrah, and the appeal was originally put down for hearing on 27th April 1915. On that day the case was adjourned until 16th June of the same year, because the Court at that time was engaged in another case. On 16th June the Court being on casual leave, the case was again adjourned until 16th July. On that day apparently there was a further adjournment until 21st August. In the meantime before 21st August the case being still before the District Judge on 9th August, an order was made that the case should be transferred to the Subordinate Judge for disposal.

In the order-sheet where the order appears, there is a column for the signatures of the parties or their pleaders when necessary, and in the case of many of these orders that column is filled up with the signatures of the parties or their pleaders. With regard to this order, which was made on 9th August, there is no signature in the column to show that the parties or their pleaders were present when the order was made, and indeed as the case had been adjourned on 16th July there was no reason why they should be under the impression that anything further would be done in the case until the date fixed for the hearing, which was 21st August. Therefore one is not surprised to find that there was apparently nobody present before the District Judge on behalf of the parties, when he made the order transferring the case to the Subordinate Judge for disposal on 9th August. The reason why it was so transferred, we are not told. On 10th August the order for transfer having been received by the Subordinate Judge he ordered that the case was to be put up on 21st August, and on that date the case appears to have been called on. Neither party appeared and the reason given by the plaintiff, who is the appellant before us, is that he had no intimation that the case had been transferred to the Subordinate Judge, and although he was present on that day in the Court of the District Judge, which is in the same building, I understand, as that of the Subordinate Judge, he had no idea that his case was to be taken up before the Subordinate Judge. His case is that he waited in the

other Court hoping that his case might come on and he knew nothing of its having been transferred. That was the reason why he did not appear and why his case was dismissed. He then applied under the rules provided in that behalf to have his case restored to the list and tried, and in support of that application he in his petition gave reasons why his case should be restored. The Subordinate Judge having heard the case dismissed it. He said :

"This is an application for restoration of an appeal which was dismissed for default. The applicant's witness deposes that he waited in the Court of the District Judge and was not aware of the transfer of the appeal to this Court. The other side's witness deposes that the applicant did not come. On reference to the order-sheet it appears that the transfer took place on 10th August 1915 and was disposed of on 21st August 1915. I do not believe the applicant. Application is rejected. Rs. 2 is allowed as costs to the other side."

We have to consider the evidence that has been adduced in this case and having regard to the facts, it is quite clear that no intimation was given to anybody as to the transfer of the case to the Subordinate Judge, and prima facie at all events the appellant has made out a good case for excusing his absence when the case was called on in the Subordinate Judge's Court. It appears that not only was the appellant not present when the case was called on, but that the defendants also, who are the respondents before us, were themselves not present, and one would have thought that if they knew all about the transfer they would at all events have been present. The mere fact that the respondents were absent seems to my mind to go a long way to corroborate the plaintiff's story that he had no notice and was not in fact aware of the transfer of the case. For some reason, which I am unable to understand, the Subordinate Judge has come to the conclusion that he cannot believe the appellant. He gives no reason whatever for coming to this conclusion and looking at the evidence, which was given on both sides, which was very sketchy, I cannot help coming to the conclusion that there is no reason whatever to doubt that the story told by the appellant was in the main true. I see nothing in the story told by the other side which would lead one to believe that the plaintiff's story was in any way shaken.

The case then came on appeal to this Court and was tried before Mullick J. and Jwala Prasad J. The learned Judges unfortunately took different views. Their judgments have been read over to us and we have had an opportunity of considering them. It seems to me that this being a matter in which one must exercise one's discretion to some extent, following, of course, the rules which apply to cases of this sort (O, 41, R. 19), one must make up one's mind which of these learned Judges one agrees with. Speaking for myself I have no doubt whatever that having come to the conclusion as I have that the story told by the appellant was in the main true—that he did not know that his case had been transferred and there was no reason why he should know—that this is a sufficient cause within the meaning of O. 41, R. 19, which prevented him from appearing and that therefore he ought to have his case restored to the list and have an opportunity of having it tried. It seems to me that it would be desirable in these cases where an order of transfer is made that notice should be given in every case to the parties or their representatives. I find a passage in the judgment of Jwala Prasad J., which deals with this point and with which I entirely agree. He says:

"To my mind such an important order as the transfer of a case from one Court to another should invariably be communicated to the persons concerned and in token of such communication the signatures of the parties or their pleaders should be obtained and when the signatures are not obtained the order-sheet should show that the information has been communicated."

In this case neither was the signature obtained nor does the order-sheet show that the information was communicated to the parties or their pleaders and I think that the appellant had a very good excuse for not appearing when the case was called on. I think perhaps I ought to say that a matter which rather impressed itself upon the mind of Mullick, J., was the delay between the date when the judgment was given and the date when the petition of appeal was filed. This does not seem to me to be a matter to which too much weight ought to be attached in considering the bona fides of the appellant, because although it is perhaps a long time from the 21st August to the 9th September still one has to consider what has to be done. It

is not merely a matter of going in person to the Judge and asking that the case may be restored. One has got to consult other parties in the case who are interested and one has to consult one's legal advisers and get a proper petition prepared. It does not seem to me that the delay which occurred between these two dates is such as to raise any presumption that there was any mala fides or lack of diligence on the part of the appellant in prosecuting his appeal. The appeal will be allowed, the order of the Subordinate Judge rejecting the application for restoration of the appeal will be set aside and the appeal will be restored to the pending file and disposed of according to law. With regard to costs I do not propose to interfere with the order which was made in the Court below, but I think that the appellant here should have his costs of appealing to-day and I assess them at one gold mohur from each defendant. The reason why I do not interefere with the order for costs below is that the appellant is asking for an indulgence and I think that he ought to pay for that. Each group of defendants who have appeared in this appeal to-day will pay one gold mohur.

Chapman, J.—I agree.

Atkinson, J.—I agree.

V.S /R.K. *Appeal allowed.*

A. I. R. 1918 Patna 343

ATKINSON, J.

Sital Prasad—Petitioner.

v.

Emperor—Opposite Party.

Misc. Criminal Revn. No. 67 of 1917, Decided on 10th January 1918, against order of Deputy Magistrate, Darbhanga.

(a) Criminal P. C. (1893) Ss. 234 and 235—Offences of same kind committed within 12 months — Only three can be tried at a time.

Where an accused person commits more than three offences of the same kind within 12 months by distinct, separate and wholly unconnected acts, he may be tried in batches of three at each trial under separate charges. [P 344 C 2]

(b) Criminal P. C. (1898), S. 235—One and same transaction — Motive for several offences same — They do not necessarily constitute same transaction.

Where the motive or object which actuates an accused in the commission of several distinct offences of the same kind is the same, the offences do not necessarily constitute one and the same transaction within the meaning of S. 235. [P 344 C 2]

Rajendra Prasad—for Petitioner.

Fakhruddin—for the Crown.

Judgment.—The accused Sital Prasad was a servant in the Rayan Sugar Factory and he was charged by the General Manager of the factory with having on 12th March 1917 issued two false receipts to tenants who came to the factory with the object of selling and delivering sugarcane to the factory, the substance of the offence being that the accused Sital Prasad issued receipts for sugarcane which never was delivered in fact and thus enabled tenants to obtain money from the factory for sugarcane which had never been supplied. The accused apparently in the month of March 1917 resorted to this form of deception in a series of transactions. A charge was however preferred against the accused by Mr. Hoskins, the General Manager of the factory, in respect of two false receipts alleged to have been issued by the accused on 12th March 1917 and the accused was charged under Ss. 468 and 477 (a), I. P. C., the charge under S. 468 being for forgery with intent to cheat and the charge under S. 477 (a) being in respect of the falsifications of accounts with intent to defraud. These two transactions by no means formed the entire of the accused's defalcations or wrong-doing, because on 4th and 8th March he also issued two other false receipts to two other tenants who came to deliver sugarcane to the factory for sugarcane which was not in fact supplied. The charge that has been preferred by Mr. Hoskins under Ss. 468 and 477 (a), I. P. C., has been committed to the Court of Session for trial.

A servant of the factory has, since the former case was committed for trial, preferred another charge against the accused under S. 420, I. P. C., in respect of the false receipts issued by him on 4th and 8th March 1917. Apparently from the dates it would appear that these offences, more than three in number, were committed within a space of 12 months from the time the first to the last of these offences were committed. It is contended before me by Mr. Rajendra Prasad who appears on behalf of the accused that inasmuch as the charges which have been now made or preferred against the accused are of the same kind as those with which he is being tried in the Sessions Court and exceed three in number, that therefore under the provisions of S. 234, Criminal P. C., the

accused cannot be tried for any such offences in excess of the first batch of three. The learned Judges who granted this Rule seem to indicate that to try the accused for more than three charges if the offences took place within the period of 12 months, would be contrary to the spirit of S. 234, Criminal P. C. I myself cannot follow that line of reasoning, which is unsupported by any authority and which is inconsistent with the only authority which has been cited before me, namely, the case reported as *Empress* v. *Dononjoy Baraj* (1). The provision contained in S. 234, Criminal P. C., is merely this: that you shall not, at one trial, try an accused for more than three offences of the same kind committed within the space of 12 months from the first to the last. But I do not see any reason for the suggestion that if a person commits 50 different offences within 12 months of the same kind, you can only try him for three and must necessarily abandon the trial of all charges in respect of the remaining 47 offences. In the case referred to as *Empress* v. *Dononjoy Baraj* (1), the learned Judges, considering S. 453 of the old Criminal P. C. which is almost word for word the same as S. 234 of the present Code, say:

"Section 453, Criminal P. C., modifies S. 452, which requires a separate charge and a separate trial for every distinct offence, by allowing three charges of three distinct offences of the same kind and committed within one year of each other to be tried at the same time; but this does not mean that, if at one time or within one year a man commits 50 distinct offences of the same kind, he shall not in one day be prosecuted for more than three such offences."

This decision seems to be directly in point and to be the correct interpretation and construction to be put upon S. 234, of the existing Criminal P. C. In the alternative it is contended that under the provisions of S. 235 the facts out of which the several offences arose formed one and the same transaction and that thus they constituted one offence for which the accused may be charged and tried at one trial as for one offence. The only ground on which it is suggested that these offences formed one and the same transaction is that the motive or object underlying the commission of all these offences was the same, namely, to cheat the factory. It is admitted that the offences were committed on different dates, namely on 4th March, 8th March and 12th March; but it is contended that inasmuch as the motive or object which actuated the accused in the commission of all the offences was the same, that therefore the offences constituted one and the same transaction. Clearly this cannot be the meaning of "one and the same transaction" contemplated by S. 235, Criminal P. C. That section expresses in its own phraseology what constitutes one and the same transaction and provides that if a series of acts are so connected and more offences than one are committed by the same person he may be charged with and tried at one trial for such offences as one offence.

In my opinion in this case the acts were distinct and separate and wholly unconnected, and the accused is thus liable to be tried separately for each one of such offences or, as more than three offences of the same kind were committed within 12 months, then in batches of three at each trial under separate charges. The argument which has been addressed to me that the case which has been instituted against the accused under S. 420, I. P. C. is illegal must therefore fail and this application must be disallowed. Mr. Rajendra Prasad has made a very strong appeal to me on the question of punishment. He says it is undesirable that the cases preferred against the accused being ejusdem generis should be tried by different Courts, because such a course might result in punishment being piled up against the accused by different tribunals, one having no knowledge of the punishment awarded by a different Court in a different case. This argument appeals to me and I consider it right and proper that one Court should have seisin of both cases. I would therefore suggest to the learned Deputy Magistrate who has now seisin of the charge under S. 420, I. P. C., that as soon as the case is ready it would be right and proper to commit it to the Court of Session for trial with the analogous case pending against the accused under Ss. 468 and 477 (a), I. P. C.

V.S./R K. *Application rejected.*

(1) [1877-78] 3 Cal. 540.

**A. I. R. 1918 Patna 345

MULLICK AND THORNHILL, JJ.

Mahabir Prasad and *others*—Plaintiffs —Appellants.

v.

Siri Narayan and *others*—Defendants —Respondents.

Civil Revn. No. 285 of 1917, Decided on 16th April 1918, from order of Small Cause Sub-Judge, Saran, D/- 7th September 1917.

(a) Hindu Law — Debts— Father—Son and grandson are liable to pay suretyship debt of father and grandfather—Suretyship must be of same kind as in Contract Act—Defendant's father selling to plaintiff interest in lease representing that he was collecting rent at Rs. 335—Rent entered at Rs. 303 in mokurrari pattah — Agreement by defendant's father to indemnify plaintiff —Suit against defendant on basis of agreement—Agreement is of indemnity and not of suretyship and defendant is not under pious obligation to discharge liability — Contract Act (1872), Ss. 124, 126 and 132.

A Hindu son or grandson governed by the Mitakshara law is liable for the debt of his father or grandfather due on account of a suretyship for the payment of money. But when the Hindu law enforces liability for the suretyship debts of the father it contemplates suretyship of the same kind as the Contract Act. In order to create a contract of suretyship there must be a creditor, a principal debtor and a guarantor or surety, who makes himself liable for the liability of the principal debtor. The relationship may be established by an agreement between the principal debtor and the surety to which the creditor is a party. It may also be established by an agreement to which the creditor is not a party, where there is a collateral contract between the surety and the principal debtor that one of them shall be liable on the default of the other. But where the contract between the surety and the creditor is not a collateral undertaking but creates an original liability as between these two parties, then the contract is not one of surety but one of indemnity. [P 346 C 1, 2]

Defendants' father sold his interest in a zurpeshgi lease to the plaintiff and represented that he had been collecting rent from the mokurraridar at the rate of Rs. 335. In the mokurrari pattah the rent was entered as Rupees 303, but since the grant of the pattah the Survey and Settlement authorities had recorded the rent payable by the mokurraridar as Rs. 335. The defendants' father also executed an agreement by which he agreed to indemnify the plaintiff for the difference between Rs. 335 and Rs. 303 in the event of the latter failing to realise the former sum from the mokurraridar. The mokurraridar refused to pay the enhancement and the plaintiff's suit to recover it was dismissed. The plaintiff then sued the defendants as the legal representatives of their father on the basis of the agreement :

Held : (1) that the agreement amounted to a contract of indemnity and not to one of suretyship; (2) that the indemnity created a contractual liability and that it was immaterial that the sum to be paid was not an ascertained sum but depended upon the extent of the mokurraridar's failure; (3) that if however the representation made by the defendants' father to the plaintiff was false, the liability to which it gave rise was an immoral one, and that if it was true, the liability was not a usual or customary one, so that in any case the sons were not under a pious obligation to discharge the liability. [P 347 C 1, 2]

(b) Hindu Law -- Debts — Father — Son's liability — Actual receipt of money is not necessary.

In order to create a debt which it would be the pious duty of the son to pay, actual receipt of money by the father is not necessary. [P 347 C 1; P 348 C 1]

(c) Hindu Law—Debts—Father — Contractual liability to pay money constitutes debts binding on son provided transaction is neither immoral nor illegal.

A contractual liability to pay money will constitute a debt which is enforceable against the son, provided the transaction is neither illegal nor immoral and comes within the meaning of the term "Vyavaharika" which has been translated as lawful, usual or customary. [P 347 C 1]

Parmeshwar Dayal—for Appellants.

Kulwant Sahay, *Jadubans Sahai*, *Radha Radhes Prasad* and *Harnandan Sahay*—for Respondents.

Mullick, J.—In this case one Moni Lal was the proprietor of 101 bighas of land. In 1868 he gave a mokurrari pattah for this land to a gentleman named Macdonald at an annual rent of Rs. 303. In 1869 he executed a zurpeshgi mortgage in favour of the same gentleman for a principal sum of Rs. 5,050, it being stipulated that the mortgagee was to retain the whole of the mokurrari rent as interest. The mokurrari is now in the hands of one Basudeo Das. The zurpeshgidar's interest passed by sale first to one Gulam Hosain and then in 1897 to three persons named Debi Prasad, Koshilanand and Gulab Chand. In 1899 Debi Prasad and his cosharers sold the zurpeshgi to the father of the plaintiffs before us for a sum of Rs. 5,000. In the meantime the Survey and Settlement authorities had recorded the rent payable by the mokurraridar Basudeo as Rs. 335 instead of Rs. 303. The vendors, when selling the zurpeshgi to the father of the plaintiffs, represented that they had been collecting at the rate of Rs. 335 from the mokurraridar and executed an ekrarnamah in which they agreed to indemnify the purchaser for the difference between Rs. 335 and Rs. 303 in the event of his failing to realise it from the mokurraridar. The mokurraridar refused to pay the enhancement and the purchaser was

obliged to sue. In 1903 the mokurraridar's plea that his rent was Rs. 303 succeeded and the suit of the purchaser was dismissed. In 1917 the plaintiffs brought the present suit for the amount due to them from the defendants as the legal representatives of their father for the default of the mokurraridar at Rs. 32 per year in respect of the years 1911—1917. The claim for previous years was given up as barred by limitation.

The Subordinate Judge finds that the defendants who, are the sons and grandsons of the vendors, being governed by the law of the Mitakshara, are not liable to pay the claim out of the ancestral property and as there is no other property belonging to the vendors in their hands he has dismissed the suit. The plaintiffs accordingly ask us to exercise our revisional powers under S. 25, Provincial Small Cause Courts Act. It is clear that the contract made by the defendant's father is not one that dies with the promisor and that it is enforceable against his legal representatives. The defendants are the promisor's legal representatives in respect of his self-acquired property inherited by them but the finding of the Subordinate Judge is that there is no such property. In regard to ancestral property in their possession the defendants are under S. 53, Civil P. C., the promisor's legal representatives only for debts payable by them under the Hindu law. It is either admitted or found that there was neither antecedent debt nor legal necessity to render the contract enforceable against the defendants. The learned vakil for the creditor, however contends that the contract created a suretyship for the payment of money and he relies on the *Maharaja of Benares* v. *Ram Kumar Misr* (1) and *Rasik Lal Mandal* v. *Singheshwar Roy* (2). In my opinion although a contrary view was taken in *Hiralal Marwari* v. *Chandrabali Haldarin* (3), a Hindu son or grandson governed by the Mitakshara law is liable for the debt of his father or grandfather due on account of a suretyship for the payment of money. The weight of opinion in the High Courts of Bombay, Allahabad, Madras and Calcutta is to this effect.

The first question to be decided therefore is whether the contract in the case now before us was really one of suretyship. Now the principles applied to cases under the law of contract for determining the difference between a contract of surety and a contract of indemnity appear to me to be of general application and although the English cases are more particularly concerned with the question whether a particular contract falls within S. 4 of the Statute of Frauds, still it seems to me that the conditions required by the English law and by the Indian Contract Act for a contract of suretyship are also required for such a contract in Hindu law. There must be a creditor, a principal debtor and a guarantor or surety, who makes himself liable for the liability of the principal debtor. The relationship may be established by an agreement between the principal debtor and the surety to which the creditor is a party. This is the relationship contemplated by S. 126, Contract Act. It may also be established by an agreement to which the creditor is not a party, where there is a collateral contract between the surety and the principal debtor that one of them shall be liable on the default of the other. This is the contract contemplated under S. 132, Contract Act. But where the contract between the surety and the creditor is not a collateral undertaking but creates an original liability as between these two parties, then the contract is not one of surety but one of indemnity within the meaning of S. 124, Contract Act. The distinction was discussed in *Harburg India Rubber Comb Co.* v. *Martin* (4) and in that case Vaughan Williams, L. J., cited with approval the following observations of Davey, L. J., in *Guild* v. *Conrad* (5):

"In my opinion there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment and a promise to keep a person who has entered or is about to enter into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not."

Now what was the object of the guarantee in the present case? The mokurrari tenancy purchased by Basdeo was created long before the guarantee. The father of the plaintiffs was not in any way induced to do anything or to forbear from doing anything in connexion with the giving of that lease. That lease

(1) [1901] 26 All. 611.
(2) [1912] 39 Cal. 843=14 I. C. 147.
(3) [1909] 1 I. C. 153.
(4) [1902] 1 K. B. 778=71 L. J. K. B. 529.
(5) [1894] 2 Q. B. 335=63 L. J. Q. B. 721

formed no part of the consideration of the assignment of the zurpeshgi between the vendor and the vendee. The guarantee was given not with the object of benefiting the lessee, and securing payment of the rent due from him, but for providing an additional inducement to the vendee for purchasing the zurpeshgi. Incidentally the result of the guarantee may have been to benefit the lessee, but the primary object of the contract was not to answer for his debt or default. In my opinion therefore the contract in this case was not a contract of surety at all but a contract of indemnity. In a sense every contract of indemnity is a contract of guarantee. But, in my opinion, when the Hindu law enforces liability for the suretyship debts of the father, it contemplates suretyship of the same kind as the Contract Act. The argument therefore that the contract being one made by the promisor as surety for the payment of money his sons and grandsons are liable in Hindu law, fails.

The learned vakil for the creditor however relies upon a much wider proposition, which is that under the Mitakshara law wherever the father has contracted a liability the son is bound by a pious obligation to discharge that liability out of the ancestral property in his hands, unless he can show that the liability was illegal or immoral. He contends that in the present case, unless it can be shown that the indemnity was illegal or immoral the plaintiffs are entitled to succeed and that it is wholly immaterial whether or not the transaction was for the benefit of the joint family. In my opinion this proposition is stated in too wide terms. The cases relating to the liability of a Hindu son have been reviewed by Mookerjee, J., in *Chakouri Mahton* v. *Ganga Proshad* (6). It has been held that the actual receipt of money by the father is not necessary. A contractual liability to pay money will constitute a debt which is enforceable against the son provided the transaction is neither illegal nor immoral and comes within the meaning of the term "Vyavaharika," which has been translated as lawful, usual or customary. Indeed the cases have gone so far as to hold that if the father is made liable for damages for breach of civil duty, then upon a decree made against the father the sons are liable to the extent of the ancestral property.

In the present case the indemnity given by the father would undoubtedly be enforceable against himself. If a decree upon it had been obtained against the father during his lifetime then it would be enforceable against the sons after his death provided it came within the list compiled by Mookerjee, J., in the abovementioned case. Here the liability will depend upon whether the act was lawful, usual or customary. The Subordinate Judge has not in terms said that the representation of the father that he had been collecting Rs. 335 per year from the lessee was false. If it was intentionally false and if it deceived the purchaser it might have rendered the father liable to prosecution for the offence of cheating. For myself, having regard to all the circumstances, I find it difficult to believe that it was true. The purchaser's failure to realize the enhanced rate by suit is strong evidence that the representation was not true and the view I take is that the purchaser did not honestly believe that the representation was true. Both parties knew that the true rent was Rs. 303. The purchaser was in no way deceived but intended to gamble on the chance of being able to realize the enhancement recorded by the Survey and Settlement Authorities. This conclusion is supported by the fact that while the original zurpeshgi was created in favour of Macdonald for a principal of Rs. 5,050 on the footing that the mokurrari rent was Rs. 303, the predecessor of the plaintiffs paid only Rs. 5,000 for it in spite of the rent being represented to be Rs. 335. I hold therefore that if the representation was intentionally false the liability created by the indemnity was immoral; if it was not intentionally false, the liability was not usual or customary and therefore not enforceable against the sons as a pious obligation. I agree that a mere error of judgment on the part of the father would not save the sons if the indemnity was an ordinary incident in the ownership of property. In *Durbar Khachar* v. *Khachar Husur* (7) it was held that a decree against the father for damages caused by the erection of a dam was not enforcible against the sons as a pious obligation. On the other hand in *Khalilur Rahman* v. *Gobind*

(6) [1912] 39 Cal. 862=12 I. C. 600.

(7) [1908] 32 Bom. 348.

Pershad (8) it was held that mere imprudence or unreasonableness will not be sufficient.

As this would also seem to be the view taken by Mookerjee, J., in *Chakouri Mahton* v. *Ganga Proshad* (6), I think we must follow the Calcutta Court and judge the indemnity here by the test whether it was usual, that is to say whether it was one which an ordinary vendor might have been expected to give. Having regard to the state of the knowledge of parties and to the fact that the liability was indefinite and practically perpetual, my answer is in the negative. It might be urged that the liability was limited to the duration of the zurpeshgi but having regard to the fact that the zurpeshgi was created in 1869 and has not yet been redeemed, it may be regarded as practically perpetual. It is contended by the learned vakil for the plaintiffs that the indemnity was part of the consideration for the purchase-money and that as there has been failure of that consideration, the sons are liable to pay the present claim by way of partial refund of consideration money. The reply to this is that upon the facts I do not hold that the indemnity was any part of the consideration for the sale. In the view that I take it is not necessary to discuss at any length the contention of the defendants that an indemnity cannot create a debt. The indemnity in this case created a contractual liability to pay money on certain contingency. It is immaterial that the sum to be paid was not an ascertained sum but depended upon the extent of the mokurraridar's failure. In *Pareman Dass* v. *Bhattu Mahton* (9) the learned Judges did not dissent from the view that a right to damages for theft might create a debt. In my opinion such a right does create a debt whether the liability is based on a decree of Court or upon a contract.

But for the reasons given I am of opinion that the defendants are not liable to pay out of the ancestral property to which they have succeeded by survivorship the debt created by the indemnity in the present case. It is useless to give the plaintiffs a decree for execution against any other property, because the Subordinate Judge finds that there is no other property belonging to the promisor in the hands of the defendants. The application is therefore dismissed with costs. Hearing fee Rs. 80.

Thornhill, J.—I concur.

V.S./R.K. *Application dismissed.*

(8) [1893] 20 Cal. 328.
(9) [1897] 24 Cal. 672.

A. I. R. 1918 Patna 348

MULLICK AND ATKINSON, JJ.

Baldeo Sahai—Appellant.

v.

Brajnandan Sahay—Respondent.

Second Appeal No. 1275 of 1916, Decided on 3rd August 1917, from decision of Sub Judge, Saran, D/- 13th July 1917.

(a) Bengal Estates Partition Act (1897), S. 119—Partition concluded after passing of Act of 1897.

The onns of proving that a partition, which was concluded after the Estates Partition Act of 1897 came into operation, was made under the Act of 1876, lies upon the party alleging it. [P 349 C 1]

(b) Bengal Estates Partition Act (1876), S. 149 and Act (5 of 1897), S. 119— Suit by tenant for declaration of title to occupancy allotted to defendant in partition proceedings commenced under old Act but completed under new Act—Court holding suit not maintainable under S. 119 of new Act as entry in Record of Rights was in his favour—Partition being under old Act and S. 149 did not bar such suit—Such suit was maintainable even under S. 119 of new Act.

Where a tenant brought a suit for declaration of his title to an occupancy holding, which had been allotted to the defendant on partition commenced under the old Estates Partition Act of 1876 but concluded after the new Act came into force, the entry in the Record of Rights prepared subsequently under the Bengal Tenancy Act being in his favour, and the Subordinate Judge held that the suit was not maintainable under S. 119 of the new Act.

Held: (1) that the partition was effected under the old Act, as it could be presumed from the facts of the case that an order had been made under S. 63 before 8th December 1897 and that S. 149 of the said Act did not debar a tenant from impugning the entries in the partition papers; (2) that such a suit is maintainable even under S. 119 of the new Act. [P 349 C 1, 2]

(c) Record of Rights—Entry is only presumed to be correct.

An entry in a Record of Rights only carries a presumption of correctness. [P 349 C 2]

Rajendra Prasad—for Appellant.

Kulwant Sahay—for Respondent.

Mullick, J.—The land in suit measures two bighas, nine cottahs, three dhurs and the plaintiffs claim declaration of title to hold it under the defendant as an occupancy holding upon a rent of Rs. 2 per annum. The defendant was a cosharer with the predecessors of the plaintiffs in the parent estate, from which a patti containing the land in suit has been carved out and allotted

to the defendant in a partition made by the revenue officers. The partition commenced in 1894 and was completed in 1909. On 8th December 1897, Act 8 (B. C.) of 1876, which was the Act under which the partition was commenced, was repealed by Act 5 (B. C.) of 1897, which Act is now in force. In 1899 a Record-of-Rights under the Bengal Tenancy Act was finally published showing plaintiffs to be occupancy raiyats with a rent of Rs. 2 in the land in suit. The defendant contends that S. 119, Act 5 (B. C.) of 1897, is a bar to the suit and the partition khasra showing that the land is his zerait is final. The Subordinate Judge has given effect to this plea and held that the suit is not maintainable.

The onus of proving that the partition which was concluded after Act 5 (B. C.) of 1897, came into operation was made under the Act of 1876, is upon the plaintiffs. This they have discharged by referring to a partition map, which curiously enough was filed by the defendant and which shows that the Collector understood that he was carrying out the partition under the old Act of 1876. Act 5 (B. C.) of 1897 states that if an order under S. 63 of Act 8 (B. C.) of 1876 has been made before 8th December 1897, then the Collector shall follow the procedure of the old Act. In the present case a presumption arises that there was such an order under S. 63 and as the defendant has not rebutted that presumption, we are entitled to hold that the partition was concluded under the old Act. If the old Act applies, then S. 149 of that Act is no bar to the present suit. Under that Act no Record of Rights was to be prepared and the Collector had to make a valuation upon the basis of rentals and assets, but was not bound to ascertain the same after measurement and survey. S. 149 debarred a suit for the purpose of setting aside an order approving a partition. The Collector was only concerned to see that the allotment of lands between the proprietor and the distribution of Government revenue were fair. He was not concerned to see whether any third party had a subordinate interest in any land which was valued. Therefore I have no doubt that the present suit is maintainable. But then the learned vakil for the defendant-respondent contends that to allow such a suit is to declare that the value of the land is less than that which was fixed by the Collector and so to modify the partition.

In the first place, it has to be shown that the effect of declaring the plaintiff to be an ocupancy raiyat does modify the valuation. That this is so has not been shown. In the second place, the defendant was a party in the valuation proceedings and if he allowed the Collector to value as zerait land which was in reality in the possession of a tenant and for that reason of less value, then the fault was his own. S. 149 contemplates that no proprietor will be competent to sue another proprietor for the purpose of modifying the valuation. That however does not debar a tenant from impugning the entries in the partition papers so far as they affect him. But having regard to the fact that the plaintiffs and defendant are cosharers, a question of estoppel arises. Having allowed the Collector to enter their raiyati holding as the defendant's zerait land, can they now turn round and say that the Collector was wrong? This issue has not been tried and we think the case must be remanded for its trial along with the other issue which the Subordinate Judge has not yet tried.

In the view that we take of the applicability of Act 8 (B. C.) of 1876, it is not necessary to consider whether S. 119, Act 5 (B. C.) of 1897, bars the present suit. In my opinion however the same arguments apply to this section as to S. 149 of the old Act, and the suit is maintainable even under the new Act. The fact that the tenants are now served with notice to be present at the Record of Rights, which has to be prepared under the present Act does not affect the scope of S. 119. The Collector is not empowered, under Ch. 8 of the present Act, to make any order declaring that every entry in the record so prepared is correct. The entry no doubt carries a presumption of correctness, but that is all. I have to note that it is not clear on what evidence the learned Munsif came to the conclusion that the Record-of-Rights in plaintiffs' favour was correct and that the entry in the batwara khasra was incorrect. That however will be a question for the lower appellate Court after placing the burden of proof upon the defendant. The order which we will make is that the judgment and decree of the lower appellate Court be set aside

and that the case be remanded to him for the decision of the other issues as well as the following additional issue, namely, whether the plaintiffs are estopped from bringing the present suit. The parties will be entitled to adduce evidence before the learned Subordinate Judge upon this issue. Costs will abide the result.

Atkinson, J.—I concur.

V.S./R.K. *Case remanded.*

A. I. R. 1918 Patna 350

ROE, J.

Sheonandan Mahton—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No 3 of 1918, Decided on 25th January 1918, from order of Sess. Judge, Patna.

Criminal P. C. (1898), Ss. 202 and 439—Process postponed—Fact that local investigation is already made does not affect proceedings under S. 202—Perfunctory inquiry made by Police and report considered in perfunctory fashion—High Court will interfere and insist upon provisions of S. 202 being strictly enforced.

If a Magistrate takes it upon himself to postpone the issue of process for compelling the attendance of the person complained against for any purpose at all, he is required either to inquire into the case himself or to direct a local investigation. The fact that a local investigation has already been made does not affect the proceedings necessary under S. 202 when once process has been postponed. [P 350 C 2; P 351 C 1]

If an irregularity in procedure has not resulted in a miscarriage of justice, the High Court will not make an order which can result only in harassment to the parties and waste of public time. In a case in which a perfunctory inquiry has been made by the Police and the report considered in a perfunctory fashion by the Magistrate, the High Court will interfere and insist upon the provisions of S. 202 being strictly enforced. But where the inquiry has been carefully made and carefully considered, the Court will exercise its discretion and refuse to re-open the matter. [P 351 C 1]

Bankim Chandra Dey—for Petitioner.

Bimala Charan Sinha—for the Crown.

Judgment.—On 21st October 1917 the complainant lodged an information at Chandi Police Station to the effect that he was taking his cattle to plough his rabi lands when he saw the accused's cattle grazing in his paddy fields. He made an attempt to seize the cattle but was attacked by the accused and as a result of the attack received a severe injury from a garasa. His brother was also beaten with a lathi. The Sub-Inspector in charge of the thana took up the inquiry and on the 9th November submitted a long report, more in the nature of a judicial pronouncement than a statement of the result of a Police inquiry, to the effect that the complainant had no doubt been struck on the head and his brother beaten by two of the accused's party, but that the whole story of the cattle grazing was obviously false. The real quarrel arose from an altercation between the complainant and a woman of the accused's family. This report did not reach the Magistrate until the 15th November. In the meantime, i. e., on the 13th November the complainant bad filed a complaint before the Magistrate and had been examined on oath and an order made: "Put up at Bihar on the 19th November with Police papers if any." On the 19th November the Police report was considered and the complaint dismissed, and an order recorded on the Police report:

"Enter true S. 324, Criminal P. C., place of occurrence and real subject-matter of dispute changed."

The complainant on the 24th November filed a petition before the Sessions Court asking for further inquiry into his complaint. The learned Judge on the 15th December rejected the application on the ground that in view of the Police report it would be idle to order a further inquiry. On the 3rd January an application was made to this Court in revision. It was admitted by the Criminal Bench of which I was a member. In support of the Magistrate's proceedings a judgment has been shown to me in an unreported case decided by my learned brother Jwala Prasad, J., in which it is held that under S. 203 a Magistrate is entitled to dismiss a complaint if after examining the complainant there is in his judgment no sufficient ground for proceeding, and that there is nothing in S. 203 requiring an inquiry under S. 202. The basis of this decision is that S. 202 deals only with the question of postponing the issue of process, whereas S. 203 deals with the procedure to be adopted in dismissing the complaint. It has been argued before me that if a Magistrate takes it upon himself to postpone the issue of process for any purpose at all, he is required either to inquire into the case himself or to direct a local investigation. The fact that a local investigation had already been made would not affect the

proceedings necessary under S. 202, when once process has been postponed. I am myself of opinion that this argument is sound. But it is not in every case that this Court should interfere in revision. If an irregularity in procedure has not resulted in a miscarriage of justice, this Court will not make an order which can result only in harassment to the parties and waste of public time. In a case in which a perfunctory inquiry has been made by the Police and the report considered in a perfunctory fashion by the Magistrate, the Court will interfere and insist upon the provisions of S. 202 being stringently enforced. But where the inquiry has been carefully made and as in this case carefully considered, this Court will exercise its discretion and refuse to re-open the matter. I have read the Police report with care and am satisfied that there was no cattle grazing and that therefore the whole basis of the complaint was false. In this view of the matter I decline to order any further inquiry.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 351

ROE AND JWALA PRASAD, JJ.

Lalji Sahu—Plaintiff—Applicant.

v.

Lachmi Narain Singh — Opposite Party.

Civil Revn. Nos. 209 and 210 of 1917, Decided on 14th February 1918, against order of Munsif, Jamui, D/- 16th June 1917.

Civil P. C. (1908), O. 9, Rr. 8 and 9—Party not appearing in person—Mere fact that he is standing in Court does not amount to appearance.

A party may appear in two ways, either by person or by pleader. If he is not appearing in person, the mere fact that he is standing in Court does not amount to an appearance within the real meaning of the word. [P351 C 2]

On a case being called on, the parties appeared in Court but the plaintiff did not prosecute the case. The Court dismissed the suit for the plaintiff's default. The plaintiff then applied for restoration of the suit; but the Court now held that the suit was not dismissed for default and that therefore it had no jurisdiction to restore it:

Held: that the order dismissing the suit was an order made under O 9. R. 8, and that the Court was required to deal with the matter under O. 9, R. 9. [P 352 C 1]

Kailaspati—for Petitioner.

Ganesh Dutt Singh—for Opposite Party.

Judgment.—The facts of this case are as follows: The applicant before us was a plaintiff in a suit for a declaration that an entry in a Record-of-Rights was incorrect. The case was instituted on 28th of January 1916. On 26th February 1917 an order was recorded in the order sheet:

"The plaintiff appears on call but does not prosecute the case. Defendant is ready. Ordered that the suit be dismissed for plaintiff's default with costs to defendant."

On 24th March 1917 an application was made for restoration of the case under O. 9, R. 9. The learned Munsif, who had himself recorded that the case was dismissed for the plaintiff's default on 26th February 1917, recorded on 16th June 1917 that it was not dismissed for default and that therefore he had no jurisdiction to make any order restoring it. The plaintiff therefore applies to this Court in revision arking us to set aside the order made on 16th June 1917. It is contended on his behalf that the plaintiff's appearance and refusal to prosecute amounted to a non-appearance, and that the learned Munsif on that date rightly recorded the matter as a case of default, and that therefore the learned Munsif was bound by law to take up, on the plaintiff's application, the question whether under O. 9, R. 9, it should be restored. By the opposite party it is contended that O. 9, R. 9, being appealable, this Court has no power to interfere in revision. It is obvious that there is no order under O. 9, R, 9, against which an appeal would lie. What the Munsif has actually done is to refuse to exercise jurisdiction in the matter at all. We are therefore only concerned with the question whether in fact the order made on 26th February was an order under O. 9, R. 8. We are of opinion that the view taken in the case of *Gopala Row* v. *Maria Susoya Pillai* (1) is correct. A party may appear in two ways, either by person or by pleader. If he is not appearing in person, the mere fact that he is standing in Court does not amount to an appearance within the real meaning of the word. It could not be suggested for instance that if when a case was called on, a litigant stood up at the back of the Court and applied for a few minutes' time to bring his pleader he would be appearing in the true meaning of the word.

We are aware that a different view was taken in *Esmail Ebrahim* v. *Haji Jan*

(1) [1907] 30 Mad. 274.

Mahomed Haji Mahomed (2), but are of opinion that the Madras decision should be followed. The Calcutta cases seem to have gone still further that even when both plaintiff and his pleader are present in Court, if the pleader declines to proceed with the case there is in fact no appearance. It is sufficient for us to say that where the plaintiff is not appearing in person, and his pleader is absent, the presence of the plaintiff in Court is not an appearance. We hold that the order of 26th February 1917 was an order made under O. 9, R. 8, and that the learned Munsif was required to deal with the matter under O. 9, R. 9. He will now proceed to do so.

V.S./R.K. *Case sent back.*

(2) [1909] 33 Bom 475=3 I. C. 992.

A. I. R. 1918 Patna 352 (1)

CHAPMAN AND ROE, JJ.

Srish Chandra Ghose and *another*—Decree-holders—Petitioners.

v.

Sadhu Charan Routra — Judgment-debtor—Opposite Party.

Civil Revn. No. 16 of 1918, Decided on 4th April 1918, against order of Dist. Judge, Cuttack, D/- 15th March 1918.

Civil P. C. (1908), O. 21, R. 90—Proviso—No publication of sale on spot—Substantial injury not proved—Sale cannot be set aside.

A Court is barred under the express terms of the proviso to R. 90, O. 21, from setting aside an execution sale, on the ground that there was no publication of the sale on the spot, without going into the question whether the applicant has sustained substantial injury by reason of the irregularity. [P 352 C 2]

S C. Chatterjee and *S. N. Ray*—for Petitioners.

Facts. — The decree-holders (petitioners) purchased at a Court sale certain immovable properties belonging to the judgment-debtor (opposite party) in execution of a money decree. Before the sale was confirmed, the judgment-debtor applied under O. 21, R. 90, for setting aside the sale on the ground that he had sustained substantial injury by reason of the non publication of the sale-proclamation on the spot due to the fraudulent suppression of it by the decree-holders. The Subordinate Judge found that there had been due publication of the sale proclamation and besides the properties were sold at an adequate price. The District Judge in appeal found that there was no publication of the sale proclamation on the spot, which he regarded as "more than a material irregularity," and set aside the sale without going into the question of substantial injury on the ground that the Court had "its inherent powers to correct abuse of procedure." Against this decision the petitioners moved the Hon'ble High Court in revision.

Judgment.—In this case the learned District Judge in appeal has set aside a sale in execution. It was not sufficient for him to find that there was no publication of the sale upon the spot. It was necessary for him to go into the question whether the applicant had sustained substantial injury by reason of the irregularity. We are of opinion that he was barred under the exp ess terms of the proviso to R. 90 O. 21 from setting aside the sale without going into the question of substantial injury. The judgment and decree in appeal are therefore set aside. The appeal is remanded for fresh disposal after hearing the parties in accordance with the above remarks.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna. 352 (2)

DAWSON-MILLER, C. J., AND CHAPMAN, J.

Kulada Prasad Tewari and others—Defendants—Appellants.

v.

Sadhu Charan Tewari and others—Plaintiffs—Respondents.

First Appeal No. 192 of 1914, Decided on 19th December 1917, from decision of Sub-Judge, Manbhum, D/- 8th April 1914.

Civil P. C. (1908), S. 151—Decree being executed in manner not intended—High Court in its inherent power can order proper execution of its decree.

Where it is brought to the notice of the High Court that a decree passed by it is being executed in a manner manifestly at variance with the purport and intention of that decree, the High Court, under its inherent powers of supervision which are expressly saved by S. 151 can take such action for the ends of justice as may be necessary to enforce the proper execution of the decree. [P 354 C 1]

Atul Krishna Roy—for Appellants.

Gaur Chandra Pal—for Respondents.

Dawson-Miller, C. J.—This is an appeal from an order of the Subordinate Judge of Manbhum in which he gave certain directions to the Commissioner as to the manner in which he should proceed in carrying out a decree of the High Court at Calcutta in a partition suit. The

plaintiffs were the descendants of one of four brothers who were originally co-sharers of a rent free estate known as Mauza Kasmar, Pargana Barrabhum. The defendants were the descendants of the other three brothers and those claiming through them. In 1910 the plaintiffs instituted a suit for partition before the Subordinate Judge of Manbhum. Of the other three branches of the family only one, viz. defendants 9 to 26, offered any serious opposition to the suit. They contended that a partition had taken place between the predecessors of the four different groups some 60 years earlier, when the whole of the hasil and certain other plots had been partitioned and that the parties were now in separate and exclusive possession; and further that they (defendants 9 to 26) had for many years spent money and labour in reclaiming parts of the waste land and in making new cultivable lands and had acquired a title thereto by possession and the plaintiffs' title thereto was barred by limitation. The learned Subordinate Judge decided the suit in favour of the plaintiffs. He found that no earlier partition had taken place and that exclusive possession of the joint lands did not bar the rights of the cosharers, and ordered a partition accordingly of the whole Mauza except the Kasmar Bandh and Balladhibash lands and gave certain instructions to be followed by the Commissioner in carrying out the partition. The effect of these instructions, broadly speaking, was that the parties found in possession of bandhs and tanks and lands brought under cultivation by their own labour and at their own expense should be retained in possession of the same, but that they could not retain possession of ghora and danga lands if the total area in their possession was in excess of the amount they were entitled to as their share in the partition. He further directed that the partition should be based on the map and Khatians of the Survey and Settlement Department except where proved to be incorrect.

On appeal by defendants 9 to 26 to the Calcutta High Court, that Court varied the lower Court's decision by finding that a partition had taken place between the four branches in equal shares some 60 years earlier of the cultivable lands, but that it was impossible on the evidence to determine the precise lands in respect of which the partition took place. The Court also found that parts of the waste lands formerly left joint had been reclaimed and brought under cultivation by the different branches of the family which accounted for the fact that defendants 9 to 26 had apparently brought under their control and cultivation more than the share which could be allotted to them upon a partition of the entire village. The High Court agreed with the Subordinate Judge that possession in such circumstances did not give them a good title to ghora and danga lands as against the plaintiffs. The judgment then proceeded as follows:

"One direction however must be given in modification of the decree of the Subordinate Judge. He has rightly held that each of the parties should be retained in possession of the lands upon which they have spent capital and labour. In so far, however as the appellants are concerned, it must be ascertained in the first instance whether they are really in occupation of more lands than they would be entitled to occupy on a partition. We therefore direct the Subordinate Judge to appoint a Commissioner to make a survey of all the ghora lands of the village and to ascertain the area thereof. The appellants would be entitled to one-fourth share of the total area. If the area thus determined falls short of the area now in their possession they must surrender the excess."

Then followed directions that any excess to be surrendered should be the land last occupied, as to which evidence was to be taken and that rather than divide a compact block, the Subordinate Judge should adjust the matter by the payment of owelty money. This direction applied only to ghora and danga lands and no party was to be deprived of cultivated lands already in their possession. When the High Court's decree came to the Commissioner for execution, a dispute arose as to how it should be carried out and he applied to the Subordinate Judge for instructions. An order was then made by the Subordinate Judge purporting to solve the doubt which had arisen as to whether the ghora and danga lands ordered to be surveyed by the High Court's decree meant those lands only which were not now in occupation or those lands as they originally existed before the partition, and he came to the conclusion that the latter interpretation was correct. But as there might be a difficulty in distinguishing those lands now, he thought the simplest method

would be to ascertain first the total area of the village and then the total area in possession of defendants 9 to 26 and gave directions to this effect. From this order the defendants 9 to 26 appealed to this Court. A preliminary objection was taken by the plaintiffs that no appeal would lie from such an order and strictly speaking this objection is probably well founded, but speaking for myself, it seems to me that if it should be brought to the notice of the High Court that its decree is being executed in a manner manifestly at variance with the purport and intention of that decree —and for this purpose the decree must be regarded as a decree of this Court which has succeeded to the jurisdiction of the High Court at Calcutta in this province—then I think that the High Court under its inherent powers of supervision, which are expressly saved by S. 151, Civil P. C , may in a case of this sort take such action for the ends of justice as may be necessary to enforce the proper execution of the decree. We therefore decided to examine the order of the Subordinate Judge and the decree of the High Court in order to satisfy ourselves on the point. After reading the High Court's judgment and decree it is quite manifest that whatever the exact meaning of the direction to survey the ghora lands, the whole judgment is based upon the assumption that the appellants do not occupy cultivated lands in excess of one fourth of the area of the whole village and that the remaining lands in possession of the appellants are ghora and danga lands. Upon this assumption the Court directed the Commissioner to ascertain first whether the whole of the lands occupied by the appellants including ghora and danga lands exceeded a fourth share of the whole village. Then there is a direction to survey all the ghora lands which I take to include danga lands as well, and this would involve lands of this description in the appellants' control and possession.

A point was raised in the memorandum of appeal that this survey was intended only to comprise ghora and danga lands as now existing, exclusive of lands originally of this description but now brought under cultivation The judgment is not very clear on this point. It was conceded however by the appellants that it was intended that the whole of the ghora and danga lands, as existing at the time of the previous partition should be surveyed. It may not however be necessary to have a complete survey of these lands if the partition can be effected without this. One matter however is beyond dispute. Whatever be the exact intention of the High Court's decree as to the extent of the survey ordered, that decree was based upon the assumption that the appellants were not in possession of more cultivated lands than their four annas share which they would be entitled to on a partition and it must be taken that any excess in their possession beyond their fourth share is to be regarded as ghora and danga lands which are liable to surrender—those last brought into possession being surrendered first. Once the lands in the appellants' occupation are ascertained, it ought not to be necessary to survey more than the amount which they hold in excess of their proper share, if any.

This however must be a matter for the Commissioner to determine on the spot. Subject to this modification, I think the Subordinate Judge rightly interpreted the decree in the order appealed from. How the lands in possession of the appellants are to be ascertained is not stated by the High Court and the learned Subordinate Judge directs that in order to determine this the Commissioner should first ascertain the total area of the village and the total area in possession of the appellants. This direction however, must not be taken necessarily to involve a new survey by the Commissioner of the whole village. He should proceed as far as possible on the maps and Khatians of the Survey and Settlement Department in accordance with Cl. 4 of the instructions in the Subordinate Judge's judgment of 22nd August 1910 and otherwise comply with the same in so far as it is confirmed by the High Court's decree. Each party should bear his own costs.

Chapman, J.—I agree.

V.S./R.K. *Order accordingly.*

A. I. R 1918 Patna 354

CHAPMAN AND MULLICK, JJ.

Raghunath Singh—Appellant.

v.

Achutanand—Respondent.

First Appeal No. 69 of 1916, Decided on 6th August 1917.

Tort— Negligence— Contributory negligence—Suit for removal of obstruction to water course decreed—Subsequent suit for damages—Failure to apply for removal of obstruction held not to amount to contributory negligence—O. 2, R 2 was no bar as obstruction was continuing wrong and damages could be claimed—Civil P. C. (1908), O. 2, R. 2.

Where the plaintiffs had obtained a decree in a previous suit for the removal of obstructions to a watercourse, and subsequently sued the defendants for damages accruing after the institution of the former suit, and the Subordinate Judge dismissed the suit on the ground that the plaintiffs were guilty of contributory negligence inasmuch as they had failed to apply for an order for the removal of the alleged obstructions:

Held: (1) that the principle of contributory negligence had no application to the case, as the plaintiffs' right to apply for that order was in existence for the whole period for which damages were claimed; [P 355 C 2]

(2) that O. 2, R. 2 was no bar to the suit inasmuch as an obstruction to a water-course is a continuing wrong and therefore the plaintiffs' right to damages continued after the institution of the previous suit. [P 355 C 2]

P. R. Das and *Naresh Chand Sinha* —for Appellant.

Krishna Sahay and *Rai Tribhuan Sahay*—for Respondent.

Chapman, J.—This appeal is by the plaintiffs. The plaintiffs are some of them the proprietors, and others the cultivators, of a certain partitioned share in an estate. The plaintiffs instituted a suit in 1909 complaining of the erection of certain obstructions in an irrigation channel from which the plaintiffs' lands were watered, and asking for the removal of the obstruction by the defendants. Their suit was dismissed in September 1909, but in appeal they obtained a decree from the District Judge directing the defendants to remove the obstructions within 15 days and declaring that if they were not so removed, the Court would order their removal at the cost of the defendants. There was an appeal to the High Court against this decree by the defendants, which was dismissed in July 1914.

The suit out of which the present appeal arises was instituted by the plaintiffs in September 1914, asking for damages owing to the failure of plaintiffs' crops caused by the existence of these obstructions during the years 1319 and 1320, that is to say, August 1911 to August 1913.

The learned Subordinate Judge has dismissed the plaintiffs' suit upon the grounds, firstly, that the plaintiffs were guilty of contributory negligence inasmuch as they omitted to obtain an order from the Court for the removal of the obstructions, and secondly that inasmuch as there was a sufficient rainfall during the years 1319 to 1320, therefore, no damage was actually caused. The plaintiffs now appeal to this Court and the first contention in appeal is that the learned Subordinate Judge was wrong in law in saying that the principle of contributory negligence was applicable to the present case. I am of opinion that that principle had no application. The learned vakil for the respondents has conceded that he is unable to cite any authority for the application of the principle to a case where the only negligence alleged against the plaintiffs is their failure to apply for an order of the Court. It is manifest that the plaintiffs' failure to apply for an order by the Court for the removal of these obstructions may have been and was probably due to their expectation that at any moment the defendants might comply with the order of the Court. In any event the plaintiffs' right to apply for that order was in existence for the whole period for which the damages were claimed. They were not compelled by law to make the application before the expiry of three years after the dismissal of the appeal by the High Court in July 1914. In the similar case for a suit for mesne profits after a decree has been obtained for declaration of title and recovery of possession, it has never been suggested that the suit for mesne profits could be met by an allegation that the plaintiff should have obtained delivery of possession from the Court immediately after his decree.

I am of opinion that the only kind of obstacle which could have stood in the plaintiffs' way was R. 2, O 2, Sch. 1 Civil P. C, which debars a plaintiff from claiming what he could have obtained in a previous suit. In the present instance that objection, although made in the first Court, was withdrawn and has properly not been sustained in this Court. It is well-settled law that an obstruction to a watercourse is a continuing wrong and that, therefore, the right to damagas continued after the institution of the previous suit. There was nothing, therefore, in law to bar the plaintiffs suit. Upon the facts found, I am of opinion that the learned Subordinate Judge was

somewhat unfair in the way in which he treated the evidence upon the subject of rainfall.

It appears from the evidence given by witnesses produced by the defendants that there was in fact failure of rain both in the years 1319 and 1320.

In regard to the amount of damages, there is the evidence of the plaintiffs' witnesses, in particular of Mahtab Lal, that the produce for the two years for which damages were claimed amounted from 9 to 20 maunds per bigha. Against this there are road cess returns for the years 1304, 1305 and 1306 Fasli, showing that the landlord's produce for these years amounted to Rs. 2 per bigha. There is also the evidence of witnesses for the defence to the effect that the alleged produce of the lands for the period in suit was six maunds per bigha. The plaintiffs are not bound by the road cess returns, as they belonged to a period 13 years before the years in suit when possibly there was no irrigation. The road cess returns were also produced at a very late stage by the defendants and the plaintiffs had no opportunity of meeting the evidence of the road cess returns. In these circumstances we are disposed to agree with the view which the learned Subordinate Judge says he would have taken, that the average produce was six maunds per bigha. He would have allowed this amount for the year 1319 and 46 per cent. of that amount for the year 1320 in accordance with the notification in the Gazette as the average produce of that year. The value of the produce should be taken at 30 seers per rupee in 1319 and 20 seers per rupee in 1320. For the year 1320 the learned Subordinate Judge would have allowed the plaintiffs 46 per cent. The result would be in round figures Rs. 8 per bigha for the year 1319 and Rs. 6 per bigha for the year 1320. It appears to me that this would be a reasonable amount for irrigated land in Bihar.

The area for which this amount should be allowed may be taken at 178 bighas. In order to make calculation we exclude the 15 cottas odd in excess of 178 bighas. On the total amount for each of these two years we would allow interest at 12 per cent. from the end of each year up to the date of this decree and thereafter at six per cent. till realisation. Costs to be in proportion of success. Defendants 2 to 8 raised the question whether they were responsible for the erection of these obstructions. We are referred to some ambiguous portions of the evidence upon this point. Having regard to the fact that the point was not raised either in the previous suit or in the Subordinate Judge's Court in the present suit, and there being no sufficient material in the evidence to justify our inferring that defendants 2 to 8 took no part in the erection of the obstructions complained of, we are unable to give effect to this contention. The decree will be against all the defendants jointly. There will be one set of costs.

Mullick, J.—I agree.

V.S /R.K. *Appeal allowed.*

A. I. R. 1918 Patna 356

DAWSON-MILLER, C. J. AND JWALA PRASAD, J.

Zakirraza—Defendant—Appellant.

v.

Madhusudan Dass and *others*—Plaintiffs—Respondents.

First Appeal No. 213 of 1915, Decided on 9th April 1918, from decision of Sub-Judge, Purnea. D/- 15th February 1915.

(a) Transfer of Property Act (1882), S. 59—Mortgage deed executed by pardanashin lady—Attesting witnesses need not be actually inside purdah.

In the case of a document executed by a pardanashin lady, it is not necessary that the attesting witnesses should be actually inside the parda: they are deemed to be present at the execution of the document in such a case, although they may be screened off from the executant by a parda. [P 358 C 1, 2]

(b) Pardanashin Lady—Burden of proof—Gift — Bona fides and validity—Burden of proof is on those claiming under it.

The onus of proving the bona fides and validity of a gift executed by a pardanashin lady lies upon those seeking to claim under it. They must point out and prove the circumstances connected with the transaction. [P 358 C 2]

(c) Mortgage — Suit on—Title paramount and independent of mortgagor is not necessary issue—Rule is not absolute.

In an ordinary mortgage suit, title paramount to and independent of the mortgagor is not a necessary issue and should, as far as possible, be excluded from the trial of the suit, but that is not an absolute principle which should apply to the circumstances of each case. Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit. [P 363 C 1]

Sultan Ahmad and *Khurshed Husnain*—for Appellant.

R. L. Dutt and *H. N. Singh*—for Respondents.

Dawson-Miller, C. J.—This is a first appeal from a judgment of the Subordinate Judge of Purnea, dated 15th February 1915. The plaintiffs in this case are money-lenders and they instituted a suit on 22nd September 1913 against the defendants to recover a sum of Rupees 6,435-8-0. being the principal and interest due on a mortgage bond dated 8th May 1909, under which certain properties of the executants of the bond were hypothecated to secure a loan of Rs. 3,000 advanced by the plaintiffs. The executants of the bond are three ladies. They were the widow and two daughters of Ausaf Ali Khan, who died in or before the year 1908 leaving two widows, three sons and two daughters, who succeeded to his property the widows taking a one anna share, the daughters one ninth of the balance and the remainder going to the sons. The estate of Ausaf Ali Khan was somewhat encumbered and he left other debts besides money due on mortgages. These ladies who succeeded in part to his estate found it necessary to borrow a sum of Rs. 3,000 to pay the rent due for their share of the estate in order to save the Patni mahals which had been advertised for sale by the zemindar and there can be no doubt that the mortgage by which they hypothecated a part of their property to secure the loan was a bona fide transaction and justified by the necessities of the case. The widow and two daughters of Ausaf Ali Khan who executed the mortgage in favour of the plaintiffs were Mt. Mahmoudanissa the widow and Mt. Ekbalanissa and Mt. Syedanissa the daughters. Syedanissa is defendant 1. Mahmoudanissa and Ekbalanissa died before the suit was instituted, the widow having before her death made over her property to Ekbalanissa who herself sometime died towards the end of 1912. The other defendants in the suit are the heirs of Ekbalanissa. Defendant 2, Zakir Raza is her son by her first husband Mohsin Raza, who died in 1908. Defendant 3, Roshinara, is her daughter by the second husband. Yusuf Raza, whom she married in 1909. Defendant 4 is her second husband himself. There is another member of this family, named Nawab Afrosanissa Begum who may be conveniently introduced here as she played a conspicuous part in the events which led up to the defence of the suit by defendant 2, Zakir Raza, the infant son of Ekbalanissa who is the only one of the defendants who has appeared to contest the suit. Afrosanissa was Ekbalanissa's mother-in-law being the mother of her first husband and the grandmother of Zakir Raza defendant 2. In 1913, she was appointed guardian of Zakir Raza by the District Judge.

The payment of the principal and interest on the mortgage bond having fallen into arrears, the present suit was instituted against the defendants and as already stated none of the defendants contested the suit except Zakir Raza a boy of some eight or nine years at the time when the suit was instituted who was through his guardian Afrosanissa. His defence was, first, that the mortgage bond was invalid as it was not executed in the presence of two witnesses, and secondly, that Ekbalanissa his mother had transferred to him her whole interests in her father's estate including the mortgaged property by a hiba-bil-ewaz, dated 17th July 1908, that is some 10 months earlier than the mortgage deed. The validity of the hiba-bil-ewaz was disputed by the plaintiffs. The Subordinate Judge found that the mortgage deed was duly executed and attested. He also found that the deed of gift was not a genuine document, there being no bona fide intention to transfer the possession of the property to the donee, and that the whole object of the transaction was to defraud the creditors of Ausaf Ali Khan whose estate he said was heavily encumbered. He was further of opinion that the three mortgaged properties were not in fact included in the deed of gift as they were not specifically mentioned in that document.

The only properties with which we are concerned in this appeal are the share which Ekbalanissa inherited from her father in the three mortgaged properties which are specified in the mortgage deed at p. 5 of the paper-book and which Zakir Raza claims as his own by virtue of the hiba-bil-ewaz. The other mortgagors were content to let judgment go against them. This appeal was argued at considerable length both as to the facts and as to the law and several points of law were argued before us, but as we have arrived at a clear conclusion on the facts of the case it is not necessary to deal with all the points of law which were raised

by the respondents upon the assumption that a different conclusion of fact might be arrived at. As to the first point, I think the evidence was sufficient to justify the finding that the mortgage bond was duly executed and attested.

It is true that the Subordinate Judge treated the scribe Sheo Nandan Das who wrote the bond and signed it as such as if he were one of the attesting witnesses to the bond. He gave evidence and said that the bond was executed in his presence and that he saw the ladies sign, but he said that he signed it as katib and not as a witness. But apart from him there were six people altogether who signed the mortgage bond as witnesses. Some of them have since died but one of them Murad Baksh gave avidence as to the execution and there were in addition five other witnesses called on behalf of the plaintiffs who supported the plaintiffs' case.

The story told by the plaintiff's witneses agreed in all material respects. It was to the effect that the bond was executed by the ladies in the presence of Murad Baksh, who was himself inside the room where the transaction took place and inside the pardah actually in the presence of the executants at the time the deed was executed. The other attesting witnesses were on the other side of the pardah on the verandah. The bond was read over and explained to the ladies. Ekbalanissa signed her own name and also that of Mahmoudanissa, who was illiterate and who made her mark by a thumb impression. Leakat Hussain, who was the husband of the other lady Syedanissa, signed the bond on her behalf as her guardian and he was also present inside the pardah when the bond was executed by the other two signatories. He then took the deed to the other side of the pardah and signed it himself on behalf of Syedanissa in the presence of the attesting witnesses, who then signed the document. The scribe Sheo Nandan was outside the pardah, but says he caught hold of it as it was dangling in the air and saw more or less what was going on inside. He corroborates Murad Baksh as to the manner in which the deed was executed. In the case of a document executed by a pardanashin lady it is not necessary that the witnesses should be actually inside the pardah, and there is ample authority to the effect that they are deemed to be present at the execution of the document in such a case although they may be screened off from the executant by a pardah. The evidence in the present case is, in my opinion, quite sufficient to prove the proper execution of the deed, and that it was attested by at least two witnesses other than the scribe Sheo Nandan. The second defence based upon the hiba-bil-ewaz must also, in my opinion, fail. It is well established that the onus of proving the bona fides and the validity of a gift of this nature executed by a pardanashin lady lies upon those seeking to claim under it. It appears that Ekbalanissa was living with her own people at her late father's house in the Purnea district when she heard of her husband's illness. She at once proceeded to Lucknow where her husband resided and arrived only in time to find him dead. She remained at Lucknow under the care of her mother-in-law and within one or two months of the date of her husband's death the hiba-bil-ewaz was executed.

It purported to transfer the whole of Ekbalanissa's interest in her late father's estate together with a plot of land which she had purchased at Lucknow to her son Zakir Raza, and so far as the evidence goes there is nothing to show that she had any other property at that time. If that is so, the effect of the transfer would be to leave her practically penniless. It is suggested, possibly with some force, that a lady in her position would in all probability be in possession of considerable jewellery and other effects. That may be so, but I have only to observe that in the present case there is no evidence at all to that effect and I may point out that it is for those who are seeking to take the benefit of a gift of this sort to prove clearly that the gift was a bona fide and valid document. One of the questions which is material in cases of this sort is whether the gift in fact transferred all the property of the donor or a portion only. I do not wish to imply that that question is one which in itself and alone would determine the matter. But it is one of those facts which are always taken into consideration and as I have already said, it is for those setting up the deed to point out and prove what the circumstances connected with the transaction were. Reading the evidence in this case, it seems to me that the influence of Ekbalanissa's

mother-in-law Afrosanissa is apparent at every turn. The three witnesses to the deed were relations of Afrosanissa. Wazir Bahadur was her sister's husband. Ashan Raza was her son, a boy of 12 or 13 years. Mirza Inayet Hussain was her mukhtearam or general agent and her brother's brother-in-law. The deed itself was written at the instance of Inayet Hussain and on his own admission he never consulted Ekbalanissa about it or had any conversation with her in regard thereto. Moreover, the whole transaction seems to have been conducted in secrecy and in a hurry. None of the neighbours and none of Ekbalanissa's own people knew anything about it either then or for a long time afterwards. Ekbalanissa had no independent advice nor was any lawyer consulted.

The consideration for the gift was a diamond ring provided by Afrosanissa and which no doubt was handed over formally to Ekbalnissa, but what happened to it afterwards is not known. The deed itself is careful to describe the transferred property as the whole interest of Ekbalanissa in her father's estate, but the specification of the properties transferred is incomplete and inaccurate and no tauzi numbers are given. The Sub-Registrar before whom the deed was registered was not called as a witness.

It is true, as has been pointed out, that one of the witnesses called on behalf of the defendants, who was the scribe who wrote out this deed, does say that when the deed was registered he read it out to Ekbalanissa in the presence of the witnesses, Ekbalanissa being at that time behind the pardah—she is said to have signed it. That is, except for the statement on the registration itself made by the Registrar, the only evidence there is that this deed was ever read over to or explained to Ekbalanissa and it does not appear that this witness, the scribe who read over the document to Ekbalanissa, was personally acquainted with her. Afrosanissa was the only person who is alleged to have discussed the matter at all with Ekbalanissa, and she no doubt could have given very useful and material evidence as to the state of mind of Ekbalanissa before and at the time when this deed was executed, but she for some reason which has not been explained has not given evidence in this case and therefore we have not had the advantage of hearing from anybody anything to shew what was the real state of mind of Ekbalanissa or any evidence to shew that she had ever expressed any intention of executing a deed of this sort or that she ever fully appreciated what the effect of it was. The deed itself recites that the gift is made to Zakir Raza, a minor of tender years, through his paternal grandmother and guardian Nawab Afrosanissa Begum, and it continues in this way:

"I the donor have put in my place the donee through the aforesaid guardian in possession and occupation of the gifted property and I shall get recorded the name of my son, aforesaid donee, in the Purnea Collectorate in the columns of zamindars and patnidars by getting my name removed therefrom."

It may be observed here that according to the Mahomedan law Afrosanissa was not in fact the natural guardian either of the person or property of her grandson, nor had she at that time been appointed guardian. The natural guardian of his property would be his paternal grandfather, who was alive and living apart from his wife Afrosanissa. It has been stated by the learned vakil on behalf of the defendant that the grandfather, Afrosanissa's husband, was of unsound mind but there is no evidence of this before us, and even if it is so Afrosanissa was not the natural guardian of her grandson. This matter is perhaps not one of very great importance, and I would not refer to it but for the fact that when the defendants were confronted with the argument that Ekbalanissa's subsequent conduct in dealing with the property after the hiba-bil-ewaz had been executed was entirely inconsistent with that of a person who had transferred her property, because she both sold and mortgaged parts of the property in her own name, they asked us to treat this dealing of the property by Ekbalanissa as if she were herself the guardian of her child. If that is so, it seems to me that it is entirely inconsistent with the statement in the deed itself that Afrosannissa was the guardian of Ekbalanissa's infant son. Although the deed recited that the son's name will be recorded in the Collectorate and in the columns of the Zemindari and Ekbalanissa's name will be removed therefrom, no attempt was made at any time to transfer the property to the name of Zakir Raza in the Collectorate at Purnea or in the zemindar's sherista, al-

though Ekbalanissa returned to Purnea a few months later and resided there until her death in 1912. It was contended, as I have already said, that Ekbalanissa remained in possession of the property as guardian of her son, but even she was not the legal guardian of his property, and there is evidence that she was in possession as owner and not as guardian of Zakir Raza and that she made her own collections separately from her cosharers and indeed the whole of Ekbalanissa's subsequent action point to the conclusion either that she was not aware of the effect of the deed that had been executed or that she never had any real intention of transferring the property, either of which findings would be fatal to the validity of the gift. No accounts were kept on behalf of the transferee by Ekbalanissa or by anybody else and parts of the property were sold in January 1912 by Ekbalanissa and her cosharers for a sum between Rs. 19,000 and Rs. 20,000 in order to pay off mortgage and money decrees of an earlier date, and the kabalas by which this property was transferred described Ekbalanissa as the owner of her share of this property and so far from making any mention of the hiba-bil-ewaz, they recited that except for the mortgage to pay off which the proceeds of the sale were utilised, no transfer in respect of the land in question had been effected by way of sale, gift, mortgage, etc, of any sort at any place, and the property was transferred to the possession of the vendee.

The Subordinate Judge found that the estate of Ausaf Ali Khan was heavily encumbered at his death and he found inter alia that the hiba-bil-ewaz was executed in order to defraud or delay the creditors of Ausaf Ali Khan. There is some justification on the evidence for arriving at this conclusion, but how far that finding may possibly be justified is a matter of opinion. There certainly was evidence that the estate was encumbered to a considerable extent, but I am not inclined to base my decision upon such a finding. There may have been some such motive in the mind of Afrosanissa which induced her to bring about the transfer, but I am not satisfied the Ekbalanissa was any party to any such proceeding, that is to say, that Ekbalanissa herself ever had any intention of executing this deed with a view to defeating the creditors. It does appear to me however, after a careful review of the whole of the evidence, that the defendants have entirely failed to discharge the burden which is upon them of making out that Ekbalanissa knew and appreciated the effect of the deed or that she ever had any intention of passing the property to her son. At the time in question she was a young woman. Her exact age is a matter of a conjecture, but probably she was not much more then about 20 years old.

The circumstances under which she found herself when she arrived at her mother-in-law's house were calculated to cause her acute mental distress, her husband having just died. She had none of her own people to consult with or advise her, no legal advice was taken and the only person who is alleged to have spoken to her on the subject of the gift was her mother-in-law Afrosanissa, who as I have said, has not been called as a witness and whose interest it was to see that her grandson was provided for even at the expense of the mother. Her motives are not far to seek. Ausaf Ali Khan's estate was to some extent at all events encumbered and there were money debts in addition. Moreover, Ekbalanissa was a young woman who might marry again and have other children, as in fact happened befcre her death. Then again the hurry in which the whole thing was rushed through within two months at most of her husband's death, the secrecy attending the transaction, the absence of legal advice or assistance which is apparent from the careless manner in which the deed is drafted, are matters calculated to cast considerable suspicion upon the bona fides of those responsible for the transaction. No explanation is given of any of these matters and Afrosanissa, whose agent took a leading part, no doubt by her instructions, in carrying the matter through is not called as a witness and the conduct of Ekbalanissa in dealing with the property after the deed was executed is entirely inconsistent with that of a person who had knowingly transferred her property to another. I have no hesitation in holding that the defendants have failed to discharge the burden of proving that the deed of gift was a bona fide document or that the

donor ever had any intention of passing the property therein referred to.

As I said at the beginning of this judgment, there were other defences raised by the defendants upon the assumption that the facts might be found in favour of the appellants. I have already said that in my opinion there was no intention on the part of Ekbalanissa to defraud or defeat her creditors and I need not deal further with that point, but the main contentions of the respondents in addition to those which I have already mentioned were that the gift was invalid, as no sufficient specification of of the properties had been made in the document, that is to say, no sufficient specification of the mortgaged properties had been set out in the deed of gift and that in fact the mortgaged properties were not shown to have been included in the hiba-bil-ewaz and that under the registration law such specification is necessary, and in these circumstances the document must be taken not to have been duly registered and cannot affect the mortgaged properties. The only other point of any substance which was taken was that the deed of gift itself was void under the Mahomedan law of Moosha, on the ground that there was confusion of the property, Having regard to the finding of fact at which I have arrived in this case it is unnecessary to deal with these points.

There is one other matter which I think I ought to deal with before concluding this judgment. It was contended, as I have said, that Ekabalanissa was really after the execution of this deed in possession of the property as guardian of her minor son and that her action in executing the two sales of a portion of the property, which it is contended had been transferred to him, was done by her on his behalf as his guardian, and that these sales were legally justified on the ground that they were made in order to pay off the debts which were due either under mortgages on the property or for money decrees obtained against the estate of Ausaf Ali Khan and that in either case she would be perfectly justified in selling the property to carry out that purpose, that the minor son would be bound by it and therefore that there was nothing inconsistent in her attitude in effecting these sales with the suggestion that she had in fact transferred the property to her son. Once that proposition is accepted, it becomes quite clear that the mortgage in question in this suit, which was executed in order to raise money to pay the rent of the property then due, would be equally binding upon the minor Zakir Raza and, therefore, on that ground alone it would be obvious that Zakir Raza could have no defence to this action brought on the mortgage bond. On realising where the result of their contention led and that if the dealings of Ekabalanissa were justified on the ground which I have mentioned, defendant 2 would have no just grounds for opposing the mortgage deed, at a late stage in the proceedings we were asked to deal with the matter solely upon that ground and to confine our decision to dismissing the suit on that gronnd only, and not to determine the question of whether or not the hiba-bil ewaz was a valid document. We were asked to pass a decree merely in favour of the mortgage suit without deciding whether the hiba-bil-ewaz was a valid document or not. But as from the very start one of the issues in the case has been whether Ekbalanissa made a gift of her property to defendant 2, a point which the plaintiffs were quite justified in asking to have determined as it was a matter set up by the defendants themselves and as the greater part of this appeal has been argued upon the question whether or not this gift to defendant 2 was a valid instrument, I do not feel inclined now to dismiss that part of the case from consideration and merely to grant a decree without deciding the matters which have been raised both in the Court below and on appeal before us. To do so would, in my opinion, merely be encouraging fresh litigation upon a question of fact which has been raised and thoroughly discussed in the present suit, and, therefore, I think that in this suit we are entitled to come to a conclusion upon the question of validity or otherwise of the hiba-bil-ewaz. In my opinion this document cannot stand and this appeal should be dismissed.

There is only one other matter which I wish to say a word about, and that is as to the form of the decree in the Court below. By the judgment of the Subordinate Judge the suit was decreed with costs and he ordered that the de-

fendants do pay the plaintiffs this day six months what will be found due on the bond on taking an account with intereet at the bond rate during the period of grace on the principal sum, and the decree which issued in pureuance of that judgment is in the same form. It was pointed out to us that in awarding interest at the bond rate the learned Subordinate Judge has taken no account of the period between the time when the suit was instituted and the date of the judgment. This is obviously an oversight on his part, and we think it ought to be rectified and the decree ought accordingly to be in a somewhat modified form. It should be ordered that the suit be decreed with costs and that the defendants pay to the plaintiffs within six months from the date of the decree of the Subordinate Judge such sum as shall be found due on the bond on taking an account with interest at the bond rate from the date of the suit to the expiry of the period of grace on the principal sum and after the period of grace the aggregate amount will bear interest at 6 per cent per annum. Costs will also bear interest at 6 per cent per annum throughout. In default of payment as directed, the mortgaged properties should be sold and the sale-proceeds applied to the satisfaction of the decree according to law. The present appeal will be dismissed with costs. The respondents will also get their costs on the principal sum and interest found due between the date of institution of the suit and the date of the decree in the lower Court.

Jwala Prasad, J.—I do not think I can usefully add to the judgment of the learned Chief Justice just delivered.

The suit out of which this appeal has arisen was an ordinary suit to recover sums due, principal and interest, on a mortgage bond, dated 8th May 1909. Defendant 2, who is the appellant here, Zakir Raza, was impleaded as a party to the mortgage suit on account of his having inherited some shares in the mortgaged property from his mother Ekbalanissa. In the plaint there is no reference to the deed of gift set up by defendant 2, nor is there any mention of his having been made a defendant on account of his occupying any other capacity than that of an heir to Ekbalanissa. The other heirs of Ekbalanissa did not enter any appearance. Defendant 2, the appellant, in his written statement set up a title independent of the mortgagor Ekbalanissa, executant of the bond. He asserted that he was in possession of the mortgaged property on the strength of a deed of gift executed by his mother Ekbalanissa long prior to the mortgage bond in suit. The deed of gift was dated 17th July 1908. The defendant therefore raised issue 2 set forth in the judgment of the Subordinate Judge, viz.:

"whether Ekbalanissa made a gift of the property to defendant 2 as alleged by him, and if so, was the mortgage bond binding npon defendant 2."

This issue was seriously pressed by defendant 2 and elaborate evidence to prove the hiba-bil-ewaz and his title to the mortgaged property based upon that hiba was offered in the Court below. Upon the trial of that issue the learned Subordinate Judge held that the hiba set up by defendant 2 was not an operative document and that it was not executed by Ekbalanissa with a view to transfer any interest in the property conveyed by the deed, and that defendant 2 was not in possession of the property on the strength of that deed. In the present appeal before us the same point was strenuously urged by the learned counsel appearing on behalf of the appellant. It was not at all suggested in the course of the long address of learned counsel on behalf of the appellant that the said issue was improper and irrelevant and that it should not have been tried by the Court below and that we in appeal ought to refuse to determine it. Only yesterday the learned vakil who appeared for the appellant on account of the absence of his counsel, while replying to the arguments for the respondents, for the first time urged that the issue should be expunged from the record and that an ordinary decree based upon the mortgage bond should be given without any determination of the title of the defendant based upon the hiba set up by him. It is impossible to concede to the contention of the learned vakil at this stage and to ignore the hiba set up by defendant 2. According to the plaintiff he inherited a portion of the mortgaged property from his mother Ekbalanissa and had necessarily to be made a party to the suit. He however claimed to have acquired the property by virtue of a deed of gift executed by Ekbalanissa in

1908, and it was for him in the first instance while filing his written statement to take up the position of an heir of Ekbalanissa or to stand upon the deed of gift set up by him. Having chosen the latter position, it was incumbent on the Court to decide that position in order to give effect to the mortgage decree that was to be passed in the case, so that the purchasers in execution sale might not be in doubt or difficulty as to the title to the property in suit. I am quite alive to the principle that in an ordinary mortgage suit, title paramount to and independent of the mortgagor is not a necessary issue and should, as far as possible, be excluded from the trial of a mortgage suit, but that is not an absolute principle which should apply to the circumstances of each case. Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit. This was the view taken in the case of *Hare Krishna Bhowmik* v. *Robert Watson & Co.* (1). The facts of that case apply to those of the present case. I therefore agree with the learned Chief Justice that the issue raised by the defendant 2 was properly decided in the Court below and should as well be decided by us in this appeal.

The defendant set up a title derived from a deed of gift executed by Ekbalanissa. There can hardly be any question that it was for him to prove that the deed was validly executed and was intended to transfer the property to him. The evidence on the point has been summarised by the learned Chief Justice and I need hardly repeat it. Suffice it to say that it has not at all been proved in this case that the document was read over and explained to Ekbalanissa, or that she executed it knowing fully the effect of the transfer of all the property then held by her, in favour of her son defendant 2. A faint attempt was made to prove it from the evidence of Syed Muhammad Nawab, witness 3, the scribe of the deed. This man belongs to the Registration Department and his profession is that of a scribe. He admits in his evidence that Ekbalanissa did not appear before him, nor did she hold any conversation with him. He therefore is not competent to prove that the document was explained to Ekbalanissa. Nawab Wazir Bahadur, witness 1, examined by commission on behalf of the defendant, a relation of Ekbalanissa, was the proper person to prove the reading over of the document and the explanation of it to Ekbalanissa. He does not say a word about it. Ahsan Raza, another witness to the deed who is referred to as having been present when the document was read over and explained to the Mussamat was not asked a single word about it.

Afrosanissa the mother-in-law of Ekbalanissa, the only competent person who could prove the circumstances connected with the execution of the deed, has not been examined at all. It has therefore not at all been proved in this case that the document was properly executed by Ekbalanissa after fully understanding its nature and effect. In the deed of gift the grandmother Afrosanissa is said to be the guardian for the purposes of the deed. The mother Ekbalanissa knew full well that under the Mahommadan Law she had no right to be the guardian of the property of her minor son, and it is with this knowledge of the law that it has been mentioned in the deed that Afrosanissa was the guardian of the minor for the purposes of that deed. Afrosanissa did not at all deal with the property on behalf of the minor. Ekbalanissa continued to be in possession on her own account. There is no reason to disbelieve the evidence on the point given by the plaintiffs' witnesses, one of whom is the Tahsildar who made the collections in respect of the property in dispute. It is futile to contend that the mother managed the property on behalf of the minor. To my mind her interest was antagonistic to that of the minor. It became so undoubtedly in the year 1909, a year after the execution of the deed of gift when she married for the second time.

Her children by the second marriage are the defendants 3 and 4. Under the Mahomedan law the mothers's right to the custody of an infant is forfeited by her marrying a stranger. In 1909, therefore after her second marriage Ekbalanissa could not possibly be said to have been dealing with the property in the interests of her minor son, defendant 2. The mortgage bond itself executed by her along with her mother and sister goes to shew that she mortgaged the property not intending to act on behalf of her minor son, but in her own right as hold

(1) [1904] 8 C. W. N. 365.

ing possession of the property as heir of Ausag Ali Khan. This was only ten nonths after the execution of the deed of gift. Throughout her conduct has been that of asserting the right in her independent of or antagonistic to her being guardian of her son, defendant 2, as stated by the deed of gift. There can therefore be no doubt as to the absence of intention on her part to transfer the property by virtue of the deed of gift, which as has been shown so thoroughly by the learned Chief Justice was executed in secrecy shortly after the death of her husband at a place where she had no relations to advise her and in circumstances where she could not possibly know the consequences of divesting herself of all interest in the property.

We have been through this record for a week and reading it carefully the only impression which has been left upon my mind, and I believe upon the mind of the learned Chief Justice, is that the document was not an operative document and that it was executed on the advice of Afrosannissa, for some purpose best known to her and not disclosed at the trial. Some inkling of that purpose might be had from the evidence of defence witness 1, Ahsan Raza, that

"the document was executed because Ekbalanissa thought she was only a woman and her son only a minor and fearing lest some one else might take possession of the property she executed the hibanama."

I have no hesitation therefore in agreeing with the view of the learned Chief Justice in this matter. It is unnecessary to enter into any detail as to the contention of the learned counsel on behalf of the appellant regarding the proof of the mortgage bond in suit. The bond was executed not only by Ekbalanissa but by her mother and her sister. The document was properly read over and explained to her, and the evidence of Murad Baksh read with the evidence of the scribe can leave no manner of doubt that the execution and attestation of the document was carried out according to the formalities prescribed by the terms ol of the Transfer of Property Act. I agree therefore that the mortgage bond was duly executed and was for a consideration of Rs. 3,000 due as rent from the property of the mortgagors. I agree that the appeal should be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 364

CHAPMAN AND ATKINSON, JJ.

Inderdeo Narain Singh—Petitioner—Appellant.

v.

Gouri Shanker—Opposite Party—Respondent.

Appeals Nos. 288 and 289 of 1917, Civil Revn. No. 320 of 1917, Decided on 3rd January 1918, from original orders of Sub-Judge, Second Court, Patna, D/- 6th October 1917.

Civil P. C. (1908), O. 40, R. 1. S. 115—Mortgage decree — Execution — Receiver appointed—Objection by person not party to suit that he was entitled to possession of property as against receiver rejected—Objector has no right of appeal to High Court—Order was however set aside in revision.

A receiver was appointed in execution of a mortgage decree. The petitioner who was not a party to the suit objected to the receiver taking possession of the property on the ground that his father had taken a lease of the property and that he was entitled to retain possesssion, because although the lease was subsequent to the mortgage. yet he had paid off debts and other charges prior to the decree in the suit under which the sale had been held, and that he was entitled to retain possession of the property as holder of prior charges. The objection was overruled on the ground that the lease had no existence in the eye of the law having been made during the pendency of the mortgage suit. The objector appealed to the High Court and also filed an application for revision:

Held: that the objector, not having been a party to the suit, had no right of appeal to the High Court. [P 365 C 1]

Held also: in revision however that the lower Court's order overruling the objection, must be set aside, (a) because the objector not being a party to the execution proceedings was not bound by the order appointing the receiver and the lower Court had therefore no jurisdiction to overrule his objection unless it was satisfied that the claim was not made bona fide or was made really on behalf of one of the parties to the case; and (b) because the lower Court had not dealt at all with the claim that the objector was entitled to a prior charge. [P 365 C 2]

Pugh and *G. D. Singh*—for Appellant.

Kulwant Sahay and *Purnendu Narayan Sinha*—for Respondent.

Chapman, J.—On 4th February 1905 one Rai Bahadur Harihar Prasad Singh obtained a mortgage-decree against Mathura Prasad Singh. In September 1917 the mortgage property was put up to sale and was purchased by one Gouri Shankar. An application was made to have the sale set aside upon the ground of irregularity. The application was made by one Bindeshwari who had purchased the property from one Lokenath who had himself purchased it at a sale in execu-

tion of a mortgage decree obtained by him. On 19th November 1917, Gouri Shankar applied for the appointment of a receiver. No objection being made by the other side, a receiver was appointed upon that date. On 25th November 1917 before the receiver had taken possession of the property and in fact in the course of his journey to take possession, he was met by an objection made on behalf of one Inderdeo Narain Singh who objected to the receiver taking possession of the property. Inderdeo Narain's objection was to the effect that his father had taken a lease of this property on 23rd December 1907 and that he was entitled to retain possession, because although the lease was subsequent to the date of Harihar Prasad's mortgage, yet he had paid off debts and other charges prior to the decree in the suit under which the sale had been held, and that he had retained possession of the property as holder of prior charges.

It appears that at about this time the Court was closed and upon the re-opening of the Court on 3rd December, the receiver reported this objection to the learned Subordinate Judge. The learned Subordinate Judge summarily dismissed the objection upon that date. An application was then made by Inderdeo Narayan to have his objection re-heard. The Subordinate Judge re-heard the objection and again overruled it upon the ground that the ijara had no existence in the eye of the law, .having been made during the pendency of the mortgage suit. Inderdeo Narayan now appeals to this Court. He has filed two appeals one against the first order summarily overruling his objection on 3rd December and the other appeal being against the subsequent order overruling it on 6th December. There is also an application in revision. A preliminary objection has been made that no appeal lies. This objection must be given effect to. Inderdeo Narayan was not a party to the suit and therefore he has no right of appeal to this Court. The appeals are therefore dismissed. Inderdeo Narayan has however also made an application in revision, and it is that application which we now proceed to consider.

The above recital of the facts makes it clear that Inderdeo Narayan was in no sense a party to the proceedings in which the receiver has been appointed. The appointment of the receiver was by implication an order to the parties in the case to deliver possession to the receiver and to permit the receiver to comply with the orders of the Court; but it was not by implication or otherwise any order to a person who is not a party to the suit and it was not an order to Inderdeo Narayan either to deliver possession to the receiver or prohibiting him from interfering with what the receiver was required to do by the Court. The only ground upon which the Court could have overruled the objection made by Inderdeo Narayan, appears to be that Inderdeo was in fact acting on behalf of one of the parties to the suit and did not put in bona fide claim of right. The learned Subordinate Judge has not proceeded upon any ground of that kind: he has in fact determined the question of right in the case, namely, whether Inderdeo Narayan could make any claim in fact under his ijara or not. The Subordinate Judge has omitted to deal with the real point in the case which is the claim by Inderdeo that he was entitled to a prior charge by reason of the fact that he had discharged the prior mortgage and also by reason of the fact that he had discharged a rent decree. I am of opinion that we should interfere upon both grounds, the first ground being that the Subordinate Judge had no jurisdiction to overrule the objection unless he was satisfied that the claim was not made bona fide or was made really on behalf of one of the parties to the case, the other ground being that the learned Subordinate Judge has not dealt at all with the claim that Inderdeo was entitled to a prior charge.

I am therefore of opinion that his order overruling the objection and directing the receiver to take prompt action, must be set aside, and that Inderdeo Narayan in his application for revision is entitled to succeed. In the course of the argument in this Court, Inderdeo's counsel drew our attention to the fact that his client had been put in possession under S. 171, Ben. Ten. Act. Under that section, he is entitled to remain in possession until his debt is discharged on behalf of the opposite party. It has been contended that if this claim had been made before the Subordinate Judge the opposite party would have been able to show that by reason of his long p o

session under that section, the debts had been discharged and that he had no present right to remain in possession. If such a claim was made whether the Subordinate Judge would have had jurisdiction to entertain it· is not necessary now to determine, but we are of opinion that the omission of Inderdeo Narayan to put forward a claim of that kind to the Subordinate Judge, is a point which the Court would consider in assessing costs. It is probable that if his claim under S. 171 had been placed before the Subordinate Judge that the order would have been different. We accordingly direct the parties to abide their own costs. The order of the Subordinate Judge is set aside. We are informed that the application to set aside the sale will be entertained on Saturday. We accordingly direct the Registrar to take steps to send the record down without delay.

Atkinson, J.—I agree.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 366

JWALA PRASAD AND IMAM, JJ.

Secy. of State—Defendant—Appellant.

v.

Hiranand Ojha and *others*—Plaintiffs—Respondents.

First Appeal No. 12 of 1916, Decided on 26th July 1918, from decision of Sub-Judge, Palamau.

Contract—Construction— Plaintiff allowing defendant to execute and work out on his land irrigation scheme of considerable benefit, at considerable expense—Agreement created license—Easements Act, S. 52.

Where by an oral agreement the plaintiff allowed the defendant to execute and work out on the plaintiff's land an irrigation scheme of considerable permanent benefit to a very large number of villages at a considerable amount of expense :

Held : that the agreement created a license which could not be revoked at the instance of the plaintiff. [P 369 C 1]

Fakhruddin—for Appellant.

Naresh Chandra Sinha—for Respondents.

Judgment.— The facts and circumstances from which this appeal arises are as follows : The plaintiffs-respondents and the pro forma defendants are owners of a village called Man-Ahar, in which is situated a reservcir bearing the same name. The plaintiffs-respondents have an eight-annas share in this village. It appears that there are some estates in the neighbourhood of this village that are owned by Government.

An irrigation scheme known as Sadabha scheme was mooted in the year 1905. The project was to bring a channel from the Sadabha stream to the Government villages and such other villages as wished to participate in the benefits of the scheme. It appears that a number of villages through which the proposed channel was to come were admitted into the scheme and on 26th February 1908 a memorandum of agreement was drawn up fixing the rights and liabilities of all those that wished to join. The memorandum is marked as Ex. A in the case, The plaintiffs respondents, among others interested in the scheme, it is alleged, signed this agreement. It was agreed amongst the parties that lands lying or situate in the respective villages or shares of villages required for the purposes of the said scheme would be given free of cost. It was also agreed upon that the Deputy Commissioner of Palamau representing the Government estates was to distribute the water that was to be brought from the Sadabha river among all who were admitted to the benefits of the scheme in such a way as would meet all the requirements for irrigating the fields, and that he should not obstruct in any way the flow of water through the main channel of the said scheme, provided no waste was committed in the use of the water, nor it was agreed upon the Deputy Commissjoner or others who signed the agreement should have the right to obstruct the flow of the water in any of the subsidiary channels of the scheme with a view to divert water into any reservoir or reservoirs but that each of them should be at liberty to prevent all excess flow of water into any reservoir, provided that by so doing he did not in any way unduly interfere with the proper supply of water to any person entitled to be supplied.

After parties had so agreed the work of construction was taken up and it appears that the channel made from the Sadabha river was taken down through the plaintiffs-respondents' village Man-Ahar skirting the eastern side of their reservoir called Man-Ahar to the villages to the south of it including the Government estates. The agreement included a stipulation for the proprietors of the villages concerned to pay towards the construction of the scheme in the same proportion to the total cost of construction

as the road-cess payable by each of these villages was to the road-cess of all the villages admitted to the benefits of this scheme. It was further stipulated that the maintenance of the scheme and its preservation were to be carried on by further contribution upon the same basis. On the completion of the work it transpired that a portion of the channel (coloured " red " in Ex. C, the map on the paper-book) was found to be of such a level that the water brought from the Sadabha river could not freely flow down to the south. This necessitated a slight diversion of the channel and the diversion in question was effected as is shown in the map, Ex. C, by cutting a channel from the main channel into the reservoir known as Man-Ahar at its north-eastern corner and taking out another channel from its south-eastern corner further south again to the main channel. This arrangement resulted in converting the reservoir, Man-Ahar, into an important and integral part of the scheme as the water brought down in the channel from the Sadabha fell into this reservoir at the north-eastern corner and flowed down again from the south-eastern corner falling into the main channel lower down. The inclusion of this reservoir as a part of the old scheme was effected at a cost of Rs. 688-7-6, which was met by the funds raised for the purposes of the carrying out of the scheme. The embankments of the Man-Ahar reservoir were for this reason raised and strengthened.

The plaintiffs' case is that the construction of the channel on the land belonging to them and the inclusion of Man-Ahar reservoir into the scheme by cutting the two new channels, raising and strengthening the embankments were acts done by the Deputy Commissioner of Palamau without their knowledge or consent. It is also alleged by them that the construction of the channel has stopped the supply of surface water grom the north-east into their reservoir and that they were also prevented by the Deputy Commissioner from taking water from their Man-Ahar reservoir to other reservoirs owned by them for the purposes of irrigating their fields and that thereby they have suffered loss of crops. The relief claimed is the declaration that defendand 1, Secretary of State for India in Council, has no right to the use of the water of the reservoir called Man-Ahar and for an order directing him to remove all structures made by him on plaintiffs' land and the award of damages for loss of crops due to his having prevented the plaintiffs from irrigating their fields from the water of Man-Ahar.

The defendant denies generally the allegations of the plaintiffs and rests his suit principally on the ground of estoppel, alleging that the Sadabha scheme with the subsequent inclusion of Man-Ahar was carried out with the knowledge and consent of the plaintiffs. He also denies that there has been any loss of crops suffered by them. The learned Subordinate Judge who tried the case gave his decision as follows :

"The suit be decreed to the effect that on payment of Rs. 636 into Court in favour of defendant 1 within four months from this day the plaintiffs shall have free and uncontrolled use of the Ahar called Man-Ahar and its water as against defendant 1 from 1st October 1915 and that defendant 1 shall have no right to the use of the same from 1st October 1915. On failure to deposit the amount within the period fixed the plaintiffs shall have no right to prevent defendant 1 from the use of the said Ahar and its water.

" No damages allowed, parties are to bear their own costs."

We have to consider whether this order passed by the learned Subordinate Judge can be sustained. Before we deal with the points of law raised by the learned Government Pleader we wish to express our entire concurrence with the finding of the lower Court regarding the knowledge and consent of the plaintiffs and with reference to the carrying out of the original Sadabha scheme and the subsequent inclusion of Man Ahar in it. The evidence on the record on this point is overwhelming. Ex. A of the Commissioner appointed to take the evidence of Mr. Hignell, who was Deputy Commissioner of Palamau in 1908, is a note, dated 4th April of that year, written by the witness. This document read with the evidence of Mr. Hignell leaves no room for doubt that the plaintiffs were willing parties to the completion of the Sadabha irrigation scheme by the inclusion of their reservoir Man Ahar. It is also abundantly proved that the plaintiff Hiranand Ojha gave his consent to the raising and strengthening of the embankments of the Ahar for the purposes of

the scheme. Ex. F is a note, dated 15th March 1908, submitted by the District Engineer to the Deputy Commissioner of Palamau.

This note shows that the entire work was completed with the exception of a few subsidiary channels at a cost of Rs. 18,126 10-6. Ex. B is a petition of the plaintiff Hiranand Ojha dated 10th November 1909. This was in reply to a notice served on him to pay up the proportionate cost of construction in respect of some villages admitted to the benefit of the Sadabha scheme. A perusal of this petition is sufficient to show that he had willingly joined the supporters of the scheme and had actually accepted the liability to pay cost of construction in proportion to such share or shares of villages as were in his direct possession and were benefited by the scheme. Ex. K is a copy of a judgment in Money Appeal No. 13 of 1913 given by the Judicial Commissioner of Ranchi on 4th January 1914. It appears that the plaintiff Hiranand Ojha failed to contribute his share of the cost of the Sadabha irrigation scheme and a suit had to be instituted against him by the Secretary of State for the realization of the amount due from him. The suit was decreed and the finding of the Judicial Commissioner in that case was that Hiranand Ojha had fully participated in the benefits of the scheme and was accordingly liable for his share of expenses incurred in giving effect to that scheme.

It is unnecessary to labour with this part of the case and it would be sufficient to say that we have no hesitation in holding that the Sadabha scheme, as originally agreed to and the subsequent inclusion of the reservoir Man-Ahar in it had been carried out with the full knowledge and consent of the plaintiffs. The learned Subordinate Judge having found against the plaintiffs on the question of their knowledge and consent arrived at his decision from the point of view as to whether an oral agreement or contract between the plaintiffs and the Deputy Commissioner in respect of an immovable property worth more than Rs. 100 could be given any effect to. It is true that in the absence of a registered instrument making a gift of the land on which the Sadabha scheme was executed according to the memo of agreement, there remains nothing but an oral contract. This view of the learned Subordinate Judge is not seriously challenged, as the contention of the learned Government Pleader is that even if the provisions of the Contract Act and the Transfer of Property Act have no application to the suit, it deserved to be dismissed on other grounds. The learned vakil presses upon our consideration that if the agreement between the plaintiffs and the Deputy Commissioner of Palamau did not amount to a gift of the land in village Man-Ahar over which the scheme was carried out, under any circumstances it was a grant which fulfilled all the legal conditions of a license. "License" has been defined as

> "a grant by one person to another or to a definite number of other persons of a right to do or continue to do in or upon the immovable property of the grantor something which would, in the absence of such right, be unlawful and such right not amounting to an easement or an interest in the property."

This definition is contained in S. 52 Easements Act (Act 5 of 1882). This Act does not apply to this Province, but the definition is borrowed from the English law and there can be no question that in the absence of an enactment of the Indian legislature we must be guided by the principles of the English law. A license may be created by parole [vide, *Hewlins* v. *Shippam* (1), *Fentiman* v. *Smith* (2)]. We have therefore no hesitation in holding that the facts provided in this case establish the grant of a license by the plaintiffs to the defendant represented by the Deputy Commissioner of Palamau. The next question for consideration is whether a license is revocable. S. 60 of the Act referred to above provides for its revocation by the grantor unless (a) the license is coupled with a transfer of property and such transfer is enforced, and (b) unless the licensee acting upon the license has executed a work of permanent character and incurred expenses in the execution. In the present case we are not concerned with any question of transfer of property, and there can be no doubt that the defen lant through the Deputy Commissioner of Palamau acting upon the license has executed the Sadabha irrigation scheme which is of a permanent character and has iucurred expenses in the execution.

In the present case however what we have to consider is whether on the facts

(1) [1826] 5 B & C 221.
(2) [1803] 4 East. 107.

and circumstances of the case the license granted by the plaintiffs to the defendant should be revoked. If the case were governed by the Easements Act, it would, under S. 60 of that Act, be irrevocable, but that Act does not apply to the Province of Bihar and Orissa. We have therefore to come to a decision on considerations of what is reasonable and just [*Plimmer* v. *Wellington Corporation* (3)]. The decision, therefore does not rest on regard for the strict legal rights of the parties so much as on the supervening equities of the case. There can be no question on the evidence that the Sadabha irrigation scheme is a work of considerable permanent benefit to a very large number of villages and that a considerable amount of money has been spent upon its construction. There can also be no doubt that on the consent given by the plaintiffs and reliance having been placed upon the same a scheme of this magnitude was carried out, of which the reservoir known as Man Ahar has been an integral part and on which a very large sum of money has been spent. These are grave considerations in the case.

It is also evident that if the prayer of the plaintiffs is granted, whatever new method may be adopted to re-construct the scheme on a fresh basis, the loss in money and convenience would accrue not only to the defendant but to a large number of proprietors of villages other than Man Ahar that are at present receiving benefit from the existing scheme. The revocation of the license is a matter of discretion with the Court and it can only be exercised on a balance of the consideration of the equities of the case. On a careful consideration of the facts and circumstances of this case we have no hesitation in holding that the equities are on the side of treating the license as irrevocable. It does not also appear to us on the evidence that the plaintiffs resent the bringing of the Sadabha water into Man Ahar reservoir but what is disliked by them is its control by the Deputy Commissioner of Palamau. If the plaintiffs claimed to take this water into other reservoirs of their own without any reference to the Deputy Commissioner they seem to have wholly ill-conceived their remedy in instituting the present suit. The result is that the decree of the lower Court is vacated and the plaintiffs' suit stands dismissed with costs throughout.

V.S./R K. *Appeal decreed.*

(3) [1834] 9 A. C. 699.

1918 P/47 & 48

A. I. R. 1918 Patna 369

DAWSON MILLER, C.J. AND MULLICK, J.

Gananath Satpathy and *others*—Appellants.

v.

Harihar Pandhi and *others* — Respondents.

Letters Patent Appeal No. 101 of 1917, Decided on 31st July 1918, against judgment of Ros, J., D/-28th March 1917.

(a) Specific Relief Act (1877), S. 42—Transferee of portion of occupancy holding if dispossessed can sue and recover possession—But he has no status to sue for declaration that alleged tenant is not such and that rent decree obtained against him is fraudulent—Landlord and Tenant.

A landlord cannot interfere with the possession of a transferee of a part of a non-transferable occupancy holding, and if he does so, the transferee is entitled to recover possession from him by suit. Until however he is actually dispossessed, he is not entitled to a declaration that a tenant alleged by the landlord to be his tenant is not his tenant and that a decree obtained by the landlord against his alleged tenant is fraudulent. Having no legal title or interest which the landlord is concerned to deny, the transferee cannot invoke the operation of S. 42, in his favour. [P 371 C 1]

(b) Cosharer—Recognition by one cosharer protects transfer of portion or whole occupancy holding from ejectment—But no title is acquired against whole of proprietary body—Other cosharer can sue for rent original tenant without impleading transferee.

If some out of a number of cosharers recognise the transfer either of a part or the whole of a non-transferable occupancy holding, the remaining cosharers are not entitled to eject the transferee. By obtaining recognition from a cosharer landlord however the transferee does not acquire any right or valid title in the holding itself as against the entire body of landlords. Notwithstanding such recognition the remaining cosharers can sue the original tenant for the entire rent without impleading the transferee. [P 372 C 1]

(c) Landlord and Tenant—Transfer—Consent—Consenting cosharer can repudiate his consent to transfer of occupancy and join to sue original tenant along with other cosharers for entire rent.

If the consenting landlords choose to repudiate their consent and to join the non-consenting landlords in suing the original tenant for the entire rent on the footing that the consent given by them does not operate to create a division of the tenancy, it is open to them to do so. [P 372 C 1]

Susil Madhav Mullick — for Appellants.

Achalendra Nath Das — for Respdts.

Mullick, J.—This appeal arises out of a suit which was instituted by the four plaintiffs against defendants 1 to 8, the landlords, defendant 9, Kusun Behara the recorded tenant of the holding in dispute, and against defendant 11, Jasoda Dei, the daughter-in-law of the aforesaid Kusun Behara. The dispute relates to a holding of about 4½ acres, out of which in or about the year 1898 Kusun Behara mortgaged an area of 1 man to the plaintiffs. On 27th January 1899 Kusun Behara conveyed with the consent of the landlords an area of 1 man out of the holding to the plaintiffs. On 28th January 1899 Kusun Behara transferred the remainder of the holding to his daughter-in-law Jasoda Dei. In 1910 the plaintiffs sued Kusun Behara upon the mortgage of 1898 and obtained a sale certificate on 31st August 1910, and delivery of possession on 11th April 1911. The case of the plaintiffs is that they thereby became possessors not only of the 1 man which was transferred in 1899 and in respect of which their title was recognized by the joint landlords, but also of the additional area of 1 man which was conveyed to them by the mortgage of 1898. In 1911 however the joint landlords sued Jasoda Dei the transferee for the rent of the holding as constituted after deduction of the 1 man in respect of which they had recognized the transfer to the plaintiffs. A decree was obtained but plaintiffs having deposited the decretal amount the decree was not enforced by sale. The defendants again sued Jasoda in 1912 for the rent of the holding and a decree having been obtained, 15th July 1913, was fixed for the sale of the holding. The plaintiffs, apprehending that their title to the area purchased in execution of their mortgage decree would be jeopardised, brought the present suit on 6th June 1913, claiming the following declarations:

"(1) That it may be decided that we the plaintiffs have got the right of purchase in auction in the land in claim and that it may be decided that defendants 9 and 10 have no right or concern threein; (2) that it may be proved that the suit, the decree, the execution of the decree in respect of the said land of defendants 1 to 8, are illegal, invalid and inoperative; (3) that our right of purchase in auction in the said land may be declared and our possession therein may be confirmed, or if it be decided that we ought to get possession, we may be given possession; (4) that till the final decision of the suit the injunction may be given to defendants 1 to 8 for staying the auction sale of the land in claim."

It will be convenient to notice here that Kusun Behera died during the pendency of the suit and his sons Hari Behera and Bera Behera have been substituted in his place. The Munsif dismissed the whole suit. There was an appeal to the Subordinate Judge, who decreed it. There was next a second appeal to this Court, which was heard by Roe, J., sitting alone, with the result that the decree of the learned Subordinate Judge was set aside and in substitution therefor the following declarations were given to the plaintiffs:

"(1) That it be declared that the transfer of Kusun Behera to Jasoda Dei was fraudulent, without consideration and invalid as against the plaintiffs; (2) that by his purchase of the rights of Kusun Behera the plaintiff has good title as against defendants 9 and 10 to the lands purchased in execution of his decree: (3) that it be declared that the landlords' suit against Jasoda Dei was fraudulently instituted with the intention of ousting the plaintiff from the land: (4) that no execution of any decree obtained against Jasoda Dei will affect the rights of the plaintiff and Kusun Behera's representatives."

Against this decree the landlords, defendants 1 to 8, prefer the present Letters patent Appeal. With regard to the declarations made by the learned Judge of this Court affecting the rights of the plaintiffs as against their transferor Kusun Behera and his representatives, it is conceded by the learned vakil for the appellants that there can be no objection. No relief is claimed in this appeal as regards the first two declarations given by the learned Judge. We will not therefore consider that part of the decree of the learned Judge. The contest really centres round the third and fourth declarations which affect the landlords, and it is contended that as against them the plaintiffs acquired no title by their auction-purchase in execution of their mortgage decree and they are not entitled to any declaration which in any way recognises their title as transferees in respect of a part of the holding. The effect of the declarations made by the learned Judge of this Court is indirectly to compel the landlords to recognise the transfer, and it is contended that S. 42, Specific Relief Act, cannot be invoked for this purpose. It is clear that the Orissa Tenancy Act, which came into operation in 1913, does not determine the rights of the parties, but there is some doubt whether the Bengal Tenancy Act or Act 10 of 1859 is applicable. But

there can be no doubt that whichever Act applies, no transfer of a part of a non-transferable occupancy holding is valid against the landlords without their consent in writing. The position therefore is that unless it can be shown that the entire body of landlords recognized the mortgage sale in favour of the plaintiffs, they cannot be said to have any title against the landlords in respect of this land. The first question therefore is, whether, although they have no title against the landlords, they are entitled to an injunction prohibiting the landlords from executing a decree obtained by them against a tenant alleged by them to be the lawful tenant of the land.

The second question also follows from this, viz., whether the plaintiffs are entitled to attack a decree obtained by the landlords against the alleged tenant on the ground that that tenant is not the legal tenant and on the ground that the decree is fraudulent. In my opinion the answer to both questions must be in the negative. It is true that the landlords cannot interfere with the possession of the transferee of a part of a non transferable occupancy holding and that if they do so, the transferee is entitled to recover possession from them by suit. That right to recover possession arises, not by reason of any title in the holding as against the landlords, but from the tenant's undisputed right to transfer a part of his holding. Here the landlords have not yet dispossessed the plaintiffs and it is not known whether they will do so. When that time comes it will be open to the plaintiffs to adopt such remedies as the law gives them, but before that time comes the plaintiffs are not entitled to a declaration that a tenant alleged by the landlords to be their tenant is not in fact their tenant and that a decree obtained by the landlords against their alleged tenant is fraudulent. Having no legal title or interest which the landlords are concerned to deny, the plaintiffs cannot invoke the operation of S. 42, Specific Relief Act, in this suit.

It is urged however that the suit is justified by the decision of their Lordships in the case of *Dayamayi* v. *Ananda Mohan Roy Chowdhuri* (1). Having carefully considered the decision of their Lordships in that case, it does not seem to us that there is any justification for the contention that because a landlord cannot eject the transferee and because if he does eject him he is liable to restore possession, the transferee has a right to obtain a declaration prohibiting the landlord from proceeding with an action against his recorded tenant. The transferees here cannot be permitted to attack on the ground of want of consideration or fraud the conveyance made by Kusun Behera in favour of Jasoda Dei. If the holding should be sold they may possibly be competent to attack the sale but at this stage they have no right of suit. Reliance is next placed upon a decision by a learned Judge of this Court sitting alone in Second Appeal No. 796 of 1915, where certain observations were made which may support the view that a transferee in the position of the plaintiffs is competent to obtain the declarations which they are seeking here. But on referring to the record of that case it would seem that the contest was between a transferee who had purchased a part of a non-transferable holding in execution of a mortgage sale and a cosharer landlord who had obtained a decree for rent against the recorded tenant. If the decree in that case had the effect of an ordinary money decree, possibly the mortgagee purchaser might be entitled to the declaration which he sought. But if the learned Judge intended to lay down the general proposition that a transferee of a portion of a non-transferable occupancy holding is entitled to attack the validity of decrees obtained by the landlord against his recognised tenant, then it seems to me that that view of the law is not supported by the Full Bench ruling in *Dayamayi's* case (1) on which the learned Judge relied. So far therefore as the above two decisions are concerend, they do not seem to support the contention of the respondents before us.

The learned vakil for the respondents then urges that they are not trespassers, that thay have certain rights as to possession against the transferor, the recorded tenant, and that they have also a right of re-entry in the event of dispossession against the landlords. These rights do not however in my opinion render it competent for them to attack transactions and proceedings between the landlords and the recognised tenant to which they are not parties. Finally it is contended by the

(1) A. I. R. 1915 Cal. 242=27 I. C. 61=42 Cal. 172(F.B.)

learned vakil for the respondents that in this case the transfer to the plaintiffs had been recognised by defendants 3, 5 and 6, who represent the greater part of the interest of the joint landlords. Now though it has been found that on the back of the sale certificate issued to the plaintiffs on 31st August 1910, defendants 3, 5 and 6 recorded their consent on 28th January 1912, it is certainly a somewhat suspicious circumstance that this consent was given only two days before the first decree for rent was obtained by the joint landlords against Jasoda. However that may be the learned Subordinate Judge having come to the definite finding that defendants 3, 5 and 6 have recognized the transfer in respect of the mortgaged lands, his finding in this respect cannot be challenged. The question is whether that recognition confers a right upon the plaintiffs to attack the rent-decree which those defendants together with their cosharers have obtained from their alleged tenant. In my opinion it does not. It is true that if some out of a number of cosharers recognise the transfer either of a part or the whole of a non-transferable occupancy holding, the remaining cosharers are not entitled to eject the transferee; and the case of *Hossein Mahomed* v. *Fakir Mahomed* (2) merely affirms the proposition that they can sue for joint possession with the transferee.

That case certainly does not support the contention that by obtaining recognition from a cosharer landlord the transferee acquires any rights or valid title in the holding itself as against the entire body of landlord. I think that notwithstanding such recognition the remaining cosharers could sue the original tenant for the entire rent without impleading the transferee. In the present case therefore the recognition of the transfer by defendants 3, 5 and 6 does not in any way operate to defeat the rent decree which has been obtained by the entire body of landlords. If as appears to be the case defendants 3, 5 and 6 chose to repudiate their consent and to join the non-consenting landlords in suing the original tenant for the entire rent on the footing that the consent given by them does not operate to create a division of the tenancy, it was open to them to do so. Therefore whether the Bengal Tenancy Act or Act 10 of 1859 applies, the division of the holding in this case was not operative for want of the necessary consent and the suit for rent brought by the joint landlords was a properly constituted action. It may be that the transferees in this case will be entitled to sue defendants 3, 5 and 6 for damages for fraud, but that is a different matter and does not affect the present suit. The result therefore is that the appeal is decreed and the suit is dismissed against defendants 1 to 8 with costs in all Courts. The remaining defendants are not appealing and the decree as against them will stand. The effect of our decree therefore is that as against defendants 1 to 8 the declarations made by the learned Judge of this Court will be inoperative. It is to be noted that in the memorandum of appeal filed against the judgment of Roe, J., the name of Chandi Debia, the widow of Sham Sunder, defendant 6, does not appear on the record either as appellant or respondent but that of her husband appears in the category of respondents. Her failure to join her cosharers in the Letters Patent appeal cannot however debar the appellants from obtaining the relief which they seek.

Dawson-Miller ,C. J.—I agree.

V.S./R.K. *Appeal allowed.*

(2) [1909] 4 I. C. 740.

A. I. R. 1918 Patna 372

CHAMIER, C. J. AND SHARFUDDIN, J.

Lachi Rai—Petitioner.

v.

Raghubir Dube—Opposite Party.

Civil Revn. No. 7 of 1917, Decided on 27th March 1917.

(a) Civil P.C. (1908), O. 23, R. 1—Reasons for allowing withdrawal must be given.

A Court allowing a suit to be withdrawn with leave to bring a fresh suit must give reasons in its order for allowing the withdrawal. [P 373 C 1]

(b) Provincial Small Cause Courts Act (9 of 1877), S. 25—Whether suit withdrawn is decided within S, 25 (*Quaere*)

Quaere.—Whether a suit which is allowed to be withdrawn is "decided" within the meaning of S. 25, Small Cause Courts Act. [P 373 C 1]

(c) Government of India Act, S. 107—Order of withdrawal is liable to be set aside in revision.

Where the order of a Small Cause Court allowing a suit to be withdrawn gave no reasons for allowing the withdrawal, the High Court set aside the order in the exercise of its powers under S. 107, Government of India Act. [P 373 C 1]

S. Sultan Ahmad—for Petitioner.

Rajendra Prasad—for Opposite Party.

Judgment.—This is an application by the defendant in a suit which was instituted in a Court of Small Causes for revision of an order of the Court allowing the plaintiff to withdraw the case and institute a fresh case. On the merits the order cannot possibly be supported. The question is whether we have power to interfere with it. According to some authorities this case was not "decided" by the Court within the meaning of S. 25, Provincial Small Causes Courts Act, 1887. According to other authorities the case was "decided" by the Court, inasmuch as it was disposed of by the order now in question. We do not think that it is necessary to determine the question whether the case was "decided" by the Court of Small Causes, because under the circumstances we are of opinion that we ought to set aside the order under S. 107, Government of India Act. The Judge of the Small Cause Court made no attempt to comply with the law on the subject of the withdrawal of suits. He gives no reason in his order for allowing the withdrawal, and the petition before him contained no reasons for allowing the withdrawal. Under the circumstances he certainly ought not to have allowed the withdrawal of the case, and it is quite clear that the defendant has been seriously prejudiced by the order which has been passed. As in our opinion the Judge of the Court below had no power to allow the case to be withdrawn without any reason being even suggested, we set aside his order and direct that the case be restored to the pending file and disposed of according to law.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 373

ROE AND JWALA PRASAD, JJ.

Mangni Lal Marwari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 473 of 1917, Decided on 9th January 1918, from order of Magistrate, First Class, Hazaribagh.

Criminal P. C. (1898), S. 556 — Duty of Judge — Importing once's knowledge is irregularity.

Where a Judge is the sole judge of the law and fact in a case tried before himself, he cannot give evidence before himself or import matters in his judgment not stated on oath before the Court in the presence of the accused. If he does so, he makes himself a witness in the case and renders himself incompetent to try it.

[P 374 C 1]

P. R. Das and *S. N. Bose* — for Petitioner.

Assistant Government Advocate — for the Crown.

Jwala Prasad, J.—The petitioner in this case has been convicted by the Sub-Deputy Magistrate of Chattra exercising Second Class powers under S. 352, I.P.C., and sentenced to pay a fine of Rs. 50. The conviction and sentence have been upheld in appeal by the First Class Magistrate of Hazaribagh.

The trying Magistrate imported into the judgment his knowledge gained by making inquiries out of Court without giving notice to the parties, as a result of which he says that he was perfectly "satisfied with the truth of the complainant's story in the main." He also disbelieved the defence witness, Mahangu Mian, who swore in the Court that "he did not see any assault." The Magistrate says:

"I chanced to meet this witness outside the Court before his evidence was gone into and on making inquiries relating to the occurrence he told me that owing to market day there were too many customers at his shop and he did not care to see what was going on at the complainant's shop, etc."

The appellate Court has condemned this procedure adopted by the Magistrate, but has upheld the conviction because it considered that the evidence of the defence witness, Mahangu Mian, was not worthy of credence irrespective of the irrelevant inquiry from the witness made by the Sub-Deputy Magistrate. The appellate Court however does not refer to the general inquiry made by the Magistrate as to the truth of the complainant's story outside the Court and without notice to the parties. There is no record of this general inquiry. He was also not competent to hold any inquiry into the case out of Court and to judge of the value of the evidence given in Court, except what was placed as legal evidence on the record. He became a witness out of Court and also to the facts that came to his knowledge at the extra-judicial inquiry. Under S. 556, Criminal P. C., he became personally interested in the result of the case however small that interest may be.

In the case of *Queen-Empress* v. *Manikam* (1) on a review of all the authorities on the point, it was held that where a Judge is the sole judge of law

(1) [1896] 19 Mad. 263.

and fact in a case tried before himself, he cannot give evidence before himself or import matters in his judgment not stated on oath before the Court in the presence of the accused and that by so doing he made himself a witness in the case and had therefore rendered himself incompetent to try it. In that case, as in this, the appellate Court upheld the conviction on the ground that there was sufficient evidence on the record irrespective of the irrelevant matter introduced by the Magistrate. The conviction was set aside by the High Court in revision. The procedure of importing into a case his own knowledge of particular facts by a Judge was condemned in *Hurpershad* v. *Sheo Dyal* (2). This was a civil case, but the principle applies with greater force to a criminal trial. The same view has since then been taken in *Girish Chunder Ghose* v. *Queen-Empress* (3) and in *Hari Kishore Mitra* v. *Abdul Baki Miah* (4). In the notable case of *Serjeant* v. *Dale* (5) it was observed that:

"a Magistrate by making himself a witness has a legal interest in the decision of the case which disqualifies him from trying it; no matter how small that interest may be."

The Magistrate could not give an impartial consideration to the evidence on the record on account of the prejudice that may have existed in his mind after having held an inquiry out of Court. He had seen the witnesses, and the petitioner is entitled to have an impartial opinion of the evidence given by the witnesses, by the trying Court. The trial is vitiated by the inquiry held by the Magistrate. The appellate Court had not the advantage of seeing the witnesses and was in no better position than what we are in when hearing the case in revision. The petitioner is therefore prejudiced by the material irregularity in the trial of the case committed by the Magistrate. I would therefore set aside the conviction and direct that the petitioner be re-tried by another Magistrate.

Roe, J.—I am not prepared to say that the appellate Court in this case was bound to refer the matter or re-trial but there is much to be said for the view that it would have been wiser to have done so. It is to be noted that in the case of *Hurpershad* v. *Sheo Dayal* (2), in which at p. 70 were contained the observations of their Lordships of the Judicial Committee on which most of the judgments in regard to Magistrates having knowledge of matters connected with the occurrence are based, their Lordships did not refer the matter for re-trial by another Court but decided the case upon its merits on that part of the record actually admissible in evidence. In my view the matter falls rather within S. 167, Evidence Act than S. 556, Criminal P. C., as now amended. However as my learned brother is of opinion that the justice of the case requires a new trial. I concur in the order proposed.

V.S./R.K. *Retrial ordered.*

(2) [1875-76] 3 I. A. 259=26 W. R. 55=3 Sar. 611 (P.C.).
(3) [1893] 20 Cal. 857.
(4) [1894] 21 Cal. 920.
(5) [1877] 2 Q. B. D. 558 = 46 L. J. Q. B. 781

A. I. R. 1918 Patna 374

JWALA PRASAD AND COUTTS, JJ.

Suba Raut—Plaintiff—Appellant.

v.

Mt. Manla Rautain and *another*—Defendants—Respondents.

Appeal No. 526 of 1917, Decided on 25th July 1918, from appellate decree of Dist. Judge, Muzaffarpore.

Hindu Law — Partition — Step-mother — Share of, is equal to son.

Under the Mitakshara Law in a partition between sons, the step-mother is entitled to a share equal to that of a son. [P 375 C 2]

Shivanandan Rai and *Jalgobind Singh*—for Appellant.

Chandra Sekhar Banerji—for Respondents.

Jwala Prasad, J.—The plaintiff is the appellant in this case. He brought a suit for partition of the family properties. The family consisted of the plaintiff, his step-brother, defendant 1, and his step-mother, defendant 2. At first only defendant 1, the brother of the plaintiff, was made a party, and therefore the plaintiff claimed a half-share in the family properties. Subsequently defendant 2, the step-mother, was added, apparently because she also has an interest in the properties and a right to a share on partition. Defendant 2 did not appear in the first Court. Defendant 1 filed a written statement, but did not appear at the date of the hearing of the suit. The Court accordingly passed an ex parte decree in favour of the plaintiff declaring his share to be half in the properties in suit. Defendant 2, the step-mother, finding that no share was allotted to her appealed to the District Judge.

The District Judge, by his judgment of 14th February 1917, allowed her equal share with the sons, that is, a one-third share in the family properties. Against this decision the plaintiff has appealed to this Court.

It is contended on his behalf that the step-mother has no right to a specific share in the family properties on partition, but only has a right to be maintained out of them. This contention is wholly untenable. The Mitakshara in Ch. I, S. 7, verse 1, relating to partition of properties clearly says that the wife shall be entitled to participation equally with the sons even when a partition takes place during the lifetime of the father. In S. 8 of the same chapter there is an indication in the mitakshara that all the wives should take equal shares, and therefore when a partition takes place after the death of the father among the sons, the mothers and the step-mothers would be entitled to equal shares with the sons. This is based upon verse 1 in Yajnavalkya 23-A which says "let the mother take equal shares with the sons." The word "mother" there includes step-mother. No doubt the Dayabhaga differs from the mitakshara on this point; the mothers only take a share in the properties along with their own sons and not with the sons of different mothers, vide Dayabhaga, Ch. 3, S. 1, verses 12 and 13. Upon this text of the Dayabhaga their Lordships of the Privy Council in the case of *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (1) held that the mothers' share with their own sons and not with the sons of different mothers. That decision therefore cannot be authority for the present case which is governed by the Mitakshara law. Under the Mitakshara law the authorities in Calcutta and Allahabad appear to have concurred in holding that the mothers have equal shares with the sons, vide the case of *Sumrun Thakoor* v. *Chunder Mun Misser* (2) and *Dular Koeri* v. *Dawarkanath Misser* (3).

The decision in the case of *Damoodur Misser* v. *Senabutty Misrain* (4) is exactly in point, inasmuch as it related to the Mithila School to which the parties in the present case belong. Relying upon the texts of the Mitakshara quoted above and upon Vyvada Chintamoni of Vachaspati Misser which is followed in the Mithila School, their Lordships held that "both mothers and step-mothers are equal sharers with the sons." Viramitrodaya, which is a commentary on the mitakshara and is accepted to be an authority in the Benares School concurrently with the mitakshara, has laid down on p. 80 (Golab Ch. Sarkar's translations) that all the wives of the father, whether sonless or having sons are entitled to equal shares with the sons, even in partition after the father's demise. Recently in the Allahabad Court in the case of *Har Narain* v. *Bishambhar Nath* (5) relying upon the above authorities it was held that in a partition between two sons the step-mother is entitled to a third share. In this case also the partition is sought between two brothers along with the step-mother. We therefore think that the learned District Judge was right in holding that the step-mother was entitled equally with the sons to a third share in the properties. The contention of the learned Vakil on behalf of the appellant is therefore overruled.

It is then contended that the learned District Judge was wrong in giving any decree in favour of the stepmother inasmuch as she did not contest the claim of the plaintiff in the first Court. In the first place, this was a question of law and certainly. the fact that the step-mother did not appear or contest the claim of the plaintiff in the first Court would not prevent her from impugning the legality of the decree before the District Judge. In the second place, it appears to me that the first Court was bound to give a decree only to the extent of one-third in favour of the plaintiff upon the plaint itself. The plaint was amended and the name of defendant 2, the step-mother, was subsequently added. Upon the plaint therefore it was clear that the family consisted of two sons and the step-mother. In declaring the share of the plaintiff in the properties sought to be partitioned the Court was bound to give the plaintiff only a one-third share in the family properties, inasmuch as he could not be entitled to more than that upon the plaint itself. The plaintiff did not aver in the plaint that defendant 2 had given up her share in the properties and that he was there-

(1) [1889] 16 Cal. 758=16 I. A. 115 (P.C.).
(2) [1882] 8 Cal. 17.
(3) [1905] 32 Cal. 234.
(4) [1882] 8 Cal. 537.
(5) [1915] 38 All. 83=31 I. C. 907.

fore entitled only to a half-share. Defendant 2, the step-mother was therefore not bound to contest the plaintiff's claim; she naturally would have thought that her interest would be protected by the Court while making a decree even ex parte. The result is that this appeal is dismissed with costs.

Coutts, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 376

CHAPMAN AND ATKINSON, JJ.

Jugeshar Rai and *others*—Petitioners.

v.

Railal Bahadur and *others*—Opposite Parties.

Civil Revn. No. 113 of 1917, Decided on 22nd March 1918, from order of Dist. Judge, Mozuffarpore.

Civil P. C. (1908), Ss.2 (2) and O. 9, R. 8—Order of dismissal in presence of one of several plaintiffs amounts to decree.

On a date fixed for the hearing of a case one of the plaintiffs appeared and made an application for adjournment. The Court rejected the application and on the same day passed the following order: "No further step is taken. The case is dismissed with costs."

Held: that as one of the plaintiffs was present the order of dismissal amounted to a decree and was not one of dismissal for default, and an appeal lay against it to the District Judge and from the latter's order a second appeal lay to the High Court. [P 376 C 2]

Nirsu Narain Singh—for Petitioners.

Kulwant Sahay, Rai Guru Saran Prasad and *Murari Prasad*—for Opposite Parties.

Judgment.—This is an applicatien in revision in respect of an order made by the Munsif of Hajipur dismissing a suit. The suit was brought by a tenant for the recovery of possession of the land from his landlord. It was filed on 15th June 1915. Some defect appears to have arisen in the matter of obtaining a proper service of the summons. The written statement was not filed till 14th April 1916. Issues were framed on 18th April 1916 and an order was recorded in the order sheet adjourning the case to 6th May 1916. The case was however in fact taken up on 5th and not 6th May 1916. On that date one of the plaintiffs was present and an application for adjournment was presented for the purpose of filing a list of witnesses and documentary evidence. The Munsif thereupon passed an order in the following terms:

"The case is one year old nearly. Plaintiffs' petition for time is very harassing. Therefore it is rejected."

On the same date the learned Munsif made the following order: "No further step is taken. The case is dismissed with costs." From this order an appeal was taken by the plaintiff to the District Judge and the learned Judge held that no appeal lay to him and accordingly dismissed the appeal making, however no order as to costs. Against the order of the learned District Judge we have been moved in revision. We are of opinion that the learned District Judge fell into an error in holding that no appeal lay to him. One at least of the plaintiffs was present when the case was taken up for hearing, therefore it cannot be held to be a dismissal for default. The learned District Judge should have taken up the appeal and determined whether the application for adjournment was properly refused or not. On behalf of the opposite party it has been pointed out that if we hold that an appeal lay to the District Judge it must be on the ground that the order of the Munsif was a decree within the meaning of the definition of a decree given in the Civil Procedure Code, and that accordingly the only relief open to the petitioners is by way of second appeal and not by way of revision. This contention appears to us to be correct and we direct that this application in revision be treated as a second appeal. No question of court-fee arises inasmuch as the applicant has paid more court-fee than he would be required to pay in the case of a second appeal. There is however one matter which we must notice in the order which we shall make. It appears to us from the fact that the application for adjournment was filed upon the 5th May that the plaintiffs knew that that was the date fixed for the hearing of their case and we do not believe the statement to the effect that they were not aware that that was the date fixed for the disposal of their case. In these circumstances the order which we shall make is this: We set aside the order of the learned District Judge dismissing the appeal and we direct that upon his being satisfied that the appellant has paid to the respondent the costs incurred by the respondent he do readmit the appeal and hear and dispose of it on merits. The learned District

Judge is further directed to allow a reasonable time for the payment of the costs by the appellant to the respondent and upon his being satisfied that these costs have been paid within that time he will admit the appeal. If the costs are not paid within such time as the learned District Judge thinks reasonable he will dismiss the appeal. Let the record of this case be sent down at once.

V.S./R.K. *Record sent down.*

A. I. R. 1918 Patna 377 (1)

DAWSON-MILLER, C. J. AND MULLICK, J.

Mahabir Prasad Singh —Plaintiff—Appellant.

v.

Anup Narain Singh— Defendant — Respondent.

Privy Council Appeal No. 5 of 1918, Decided on 21st March 1918.

(a) Civil P. C. (1908), S. 110—Suit for possession and mesne profits —Mesne profits are to be included in valuation.

In determining the value of a suit for possession of land and mesne profits for the purposes of S. 110, Civil P. C. it is usual to add to the actual value of the land the amount of mesne profits up to the date of the decree of the appellate Court. [P 377 C 2]

(b) Precedents—Patna High Court.

In matters of settled practice it is the rule of the Patna High Court to follow the Calcutta High Court. [P 377 C 2]

Krishna Sahai and *Sivesar Dayal*—for Appellant.

Ganesh Dutt Singh and *Sivanandan Rai*—for Respondent.

Judgment.— This is an application for leave to appeal to His Majesty in Council and the only question which arises is one as to the value the decree appealed from being a decree of reversal. It appears that in the plaint the value is stated to be Rs. 9,100 That of course was the plaintiff's valuation. The defendant has put in an affidavit which shows that upon an annual income of Rs. 765, which is the income of this property taking it at 20 years purchase, the value would be Rs. 15,300. That obviously is not the right method of calculation because we ought to take the net income and that would appear after deducting the Government revenue and other outgoings to be something over Rs. 400. By the same process of calculation the sum would not in that case amount to over Rs. 10,000. But it is said that it has been the practice in the Calcutta High Court to add to the actual value of the land in such cases where mesne profits are claimed the amount of mesne profits up to the date of the decree of the appellate Court. A number of cases have been decided by the High Court of Calcutta in which this practice has been followed and if that is done in the present case the value will clearly be over Rs. 10,000. It is quite true that the High Court of Madras has adopted a different rule, but as this Court exercises jurisdiction over a province which until recently was under the jurisdiction of the High Court of Calcutta in matters of settled practice it has been our rule to follow the Calcutta High Court. We see no reason in the present case to depart from the rule of the Calcutta High Court. We therefore think that a certificate should be granted in this case to the effect that the case complies with the provisions of S. 110, Civil P. C. The costs of this application will be costs in the cause.

V.S./R.K. *Application granted.*

A. I. R. 1918 Patna 377 (2)

IMAM, J.

Sheo Charan Dhobi and *others*—Defendants—Appellants.

v.

Bansi Singh and *another*—Plaintiffs—Respondents.

Second Appeals Nos. 178 to 182 of 1917, Decided on 17th January 1918, from decision of Addl. Dist. Judge, Gaya, D/- 16th November 1917.

Civil P. C. (1908), S. 11—Suit for rent as usufructuary mortgagee—Plaintiff's title as mortgagee put in issue and decided against him—Subsequent suit for rent is res judicata —S. 60 Ben. Ten Act, has no application—Bengal Tenancy Act (1885), S. 60.

Plaintiff sued defendant for rent of certain lands as usufructuary mortgagee thereof. The defendants pleaded that the plaintiff was not entitled to sue for rent inasmuch as his name had not been registered as mortgagee. The question of his title as mortgagee was also put in issue and was decided against him. He subsequently brought another suit for rent for the same period after registration of his name :

Held : (1) that the subsequent suit was barred by res judicata; (2) that S. 60, Ben. Ten. Act, had no application to the case, inasmuch as the defendants denied the mortgage in favour of the plaintiff altogether. [P 379 C 2; P 380 C 1]

Nandkaloya and *Kailaspati*—for Appellants.

Kulwant Sahay and *Sivanandan Rai* —for Respondents.

Judgment.—In this case the plaintiff Bansi Singh sued Mohan Mahton and

others for the recovery for rent of the years 1319, 1320 and 1321 basing his claim as usufructuary mortgagee of a share in Mouza Barwa Khurd. He made Acchutanand, a malik in the mouza, as one the defendants alleging him to be his mortgagor. The case went on to trial and the evidence on behalf of the plaintiff was recorded and finished, when Acchutanand put in an application praying to be entered as a plaintiff in the case and by an order passed on 26th April 1916, the learned Munsif directed Acchutanand's name to be entered as such. The case before the Munsif turned on the consideration as to whether the doctrine of res judicata applied to the present suit. It appears that there was an earlier suit instituted by Bansi Singh as against the tenants defendants in this case for rent of 1319 and 1320 on the very same ground of his having been a usufructuary mortgagee of a share of Acchutanand. In that suit it appears from Ex. 8, the judgment in that case, the claim was resisted by the defendants principally on two grounds, firstly, they challenged the right of Bansi Singh to recover rent on the ground that if he was a mortgagee he could not successfully sue for rent unless his claim was registered under the Land Registration Act. In the alternative they also pleaded payment. The introductory part of the judgment Ex. 8, would go to show that in the pleadings of that case the question of the title of Bansi Singh as mortgagee of Acchutanand was not raised. The issues framed in that case show that one of them was in these words: "Is the plaintiff entitled to receive rent from the defendants?" It is evident that the language in which this issue was framed was wide enough to cover not only the locus standi of the plaintiff with reference to the registration of his name, but also his title as mortgagee of Acchutanand.

It has been urged before me on behalf of the respondents that the language of this issue, though framed in general terms could not have been intended to cover the issue affecting the title of the plaintiff as the mortgagee of Acchutanand. On the face of the pleadings, as set out in the introductory part of the judgment one would be disposed to take that view but a glance at that part of the judgment which deals with this issue shows that the Court did not confine itself to the consideration of only that part of the plaintiffs' right to realize rent which referred to the matter of the registration of his name, on the contrary it appears from his judgment that the learned Munsif who tried that case went exhaustively into an examination of the title of the plaintiff resting on the allegation that he was a mortgagee of Acchutanand. After considering the various points relating to this matter of the alleged title of the plaintiff, the learned Munsif in that case concluded his observations on this particular issue in these words:

> "The thicca therefore confers no right on the plaintiff (defendant 2 in this case) and he cannot in any capacity realize rent from tenants."

On a proper appreciation of this part of the judgment of the learned Munsif it is obvious that he did go into the question of the title of the plaintiff as mortgagee to sue the defendants and that he gave his decision on that point adverse to the plaintiff. I am however invited to consider this part of the judgment of the learned Munsif as a decision on a point which was not before him as the question of the title of the plaintiff as mortgagee was never raised in the pleadings. In other words, I am invited to hold that unless and until in the pleadings the issue is raised any decision given must be regarded as a decision that did not arise in the case. There would seem to be some force in this argument were it not that O. 14, R. 3, Civil P. C, clearly lays down that the Court may frame the issues from allegations made on oath by the parties or by any persons on their behalf or made by the pleaders of such parties. I have endeavoured to find in this case whether the issue regarding the title of the plaintiff as mortgagee of Acchutanand was before the Court and whether the plaintiff had an opportunity to contest the defendants' denial of his title, as it appears it was denied in the judgment of the learned Munsif. With a view to this it was necessary to find from the judgment of the learned Munsif as to whether the consideration of this question of title was sprung upon the plaintiff, when the judgment was given. I find that this was not so, inasmuch as it is clearly laid down in the judgment of the learned Munsif that in the argument before him the plaintiff had full nctice of the contention and that he had

resisted the contention of the defendants on this point to the best of his ability. I have not the pleadings of that case before me, but taking the introductory part of the judgment to represent what the pleadings were it would appear that this part of the issue was framed, if not on the pleadings, at any rate on allegations of the two parties, namely the plaintiff and the tenants-defendants in the case.

In the circumstances I must hold that the issue on this point framed by the Munsif was an issue which covered the consideration of the question of the title of the plaintiff as mortgagee of Acchutanand. I also hold that the plaintiff was fully cognizant of the meaning of that issue. I also hold that in the argument on his behalf before the learned Munsif the point was gone into and that he contested the point to the best of his ability, and I also hold that after this contest the learned Munsif came to a clear decision adverse to the plaintiff. These being the facts the question that arises now for consideration is as to whether the judgment in the present case given by the learned Subordinate Judge reversing the order of the Munsif of Aurangabad can be sustained.

The Munsif in this case held that the judgment in the previous case was res judicata and barred the claim set up by the plaintiff Bansi Singh. In doing so I notice that the Munsif did not overlook the fact that the principal ground on which the former suit was resisted was the ground of nonregistration of Bansi Singh's name. Having that point before his eyes the learned Munsif has carefully examined the question as to how far the decision of this particular issue in the former case would be a bar. In this connection it is also noticeable that the judgment given by the Munsif in the previous case was accepted by Bansi Singh sub silentio. If he realized after the judgment was given that the Munsif had in that case gone out of the scope of the case and delivered a judgment on a point which did not arise, it is expected that Bansi Singh should have taken some steps to remove such disability as might have been placed upon him by that judgment. Bansi Singh did not do so. The question then is whether with reference to Bansi Singh and thetenants-defendants the doctrine of res judicata must be held to apply to this case. The learned Subordinate Judge in his judgment reversing the judgment of the Munsif in the present case says:

"Now the law is that a finding can operate as res judicata only if it was directly and substantially in issue", was alleged by one party, and denied by another and was raised and decided." "Now the question of validity or invalidity of the thika lease was never alleged or denied by any party in the previous suit; it was never directly or even indirectly, or substantially in issue and it was raised by none, and the plaintiff had no opportunity of adducing evidence on the point or of meeting it."

For the reasons given above I am unable to agree with the view taken by the learned Subordinate Judge. As I have said before this issue was raised or else it could not have been a contested one as is apparent from the judgment of the learned Munsif, and I am unable to agree with the learned Subordinate Judge regarding the decision of the Munsif in the previous case on the question of title as mortgagee as a mere obiter dictum. I therefore hold that on this point Bansi Singh's case is concluded by the doctrine of res judicata.

The learned vakils appearing on behalf of Bansi Singh and Acchutanand have pressed before me the consideration that should it be held that the question of Bansi Singh's title is concluded by res judicata, then I should in that case hold in favour of plaintiff 2 Acchutanand. He admittedly was no party to the first suit. I am unable to accept this suggestion, for I look upon Acchutanand in this case as a person who does not appear to have been a bona fide plaintiff in the suit. It was not, as I have said before, till after Bansi Singh's case had closed and Acchutanand occupied the position of a defendant that he applied to be made a plaintiff in the case. It seems to me that the contest really has been between Bansi Singh on the one side and the tenants-defendants on the other. I am therefore unable to accept this suggsstion. I have also been asked to consider the question of the rent of 1321. It is urged that if the previous judgment is a bar by the doctrine of res judicata to the relief claimed by Bansi Singh, then that should be limited to the rent of 1319 to 1320 only and that I should allow Bansi Singh relief in respect of the rent of 1321. I do not agree with this view for the reason that the question of res judicata, as I have said before, is not limited

to the consideration of Bansi Singh's title to receive rent for 1319 to 1320; rather it goes to the very root of his claim inasmuch as his title as mortgagee of Acchutanand has been rejected by the Munsif in the previous case.

The next point that has been placed before me on behalf of Bansi Singh is that it is not open to the tenants-defendants in this case to plead in defence to the claim set up by Bansi Singh that not he but somebody else is entitled to receive rent. This is advanced on the ground that Bansi Singh has been registered under the Land Registration Act of 1876 and I am asked to hold that S. 60, Ben. Ten. Act, is an absolute bar to any plea set up by the tenants-defendants denying the right of Bansi Singh to realize rent because of the plea that rent is due to a third person. I do not sympathise with this suggestion, inasmuch as I am unable to think that S. 60, Ben. Ten. Act, was intended to be of the effect which the learned vakil on behalf of Bansi Singh invites me to give to it. A reading of that section clearly points out to me that it relates to cases of those who are proprietors, managers or mortgagees of an estate. In the present case the defendants deny the position of Bansi Singh as a mortgagee. Admittedly he is not a manager or a proprietor; if his position as a mortgagee had been admitted I could understand the application of S. 60, Ben. Ten. Act, but that has been denied and that very title in the previous case has been held to be not in Bansi Singh. In the circumstances S. 60, Ben. Ten. Act, has no application to the present case. The decree given in this case by the learned Subordinate Judge must therefore be vacated and the order passed by the Munsif dismissing the suit be confirmed. The appeals are allowed with costs.

V.S./R.K. *Appeals allowed.*

A. I. R. 1918 Patna 380

MULLICK AND THORNHILL, JJ.

Mahamaya Prasad Sinha and *others* —Objectors—Appellants.

v.

Sukhdai Koer—Petitioner — Respondent.

Misc. Civil Appeal No. 155 of 1917, Decided on 17th May 1918, from decision of Sub-Judge, Darbhanga.

(a) Decree—Form of — Decree should be self-contained—Decree without embodying terms of document filed with record is not bad.

Decrees should be drawn up by the Judges in such a way as to make them self-contained and capable of execution without reference to any other document. Where however a decree is made in terms of a document filed with the record without embodying the terms of the document in the decree, it is not necessarily bad. [P 381 C 2]

(b) Decree—Execution—Maintenance decree based on award—Award creating charge on property—Decree is capable of execution personally.

A decree for maintenance was made by the Court in terms of an award. The award created a charge upon immovable property for the payment of the maintenance. The decree-holder sought to execute the decree without seeking to bring the property charged to sale:

Held: that in view of the fact that the charge had not been created before the decree and that the charged propery was not sought to be sold, the decree was capable of execution personally against the judgment-debtors. [P 383 C 1]

Murari Prasad—for Appellants.

Jagannath Prasad—for Respondents.

Thornhill, J.—The petitioner-respondent is the widow of Babu Gobind Prasad Singh who predeceased his father, Rai Ganga Prasad Singh Bahadur, who was the father of the six brothers judgment-debtors and appellants. After the death of the father, certain disputes arose and an arrangement for the maintenance of the respondent was made under the arbitration of two Muzaffarpur pleaders. The material portion of their award dated 8th November 1910 is as follows:

"1. Mt. Sukhdai Koer is the widow of Babu Gobind Prasad Singh, who predeceased his father Rai Babu Ganga Prasad Singh Bahadur of Darbhanga in the estate of joint hold with his father and parties No. 1 to 6, and is entitled to get maintenance allowance from the family property, and we hereby award that she do get maintenance allowance at the rate of Rs. 300 per month from parties Nos. 1 to 6, i. e. Rs. 50 per month from each of the parties Nos. 1 to 6 separately from 1st Assin 1318 F. S., and for the easy realization thereof we award that instead of getting the said maintenance allowance in cash from the parties, she will have a charge for the maintenance allowance on the properties datailed in the schedule annexed to this award, and will be in possession, and appropriate the whole income of the said properties in lieu of her said maintenance allowance from the 1st Assin 1318 F. S. The Government demands of the said properties will have to be paid by the parties Nos. 1 to 6. In the Land Registration and Public Registers in respect of the said properties the names of the parties No. 1 to 6 will stand as proprietors and the party No. 7 may get her name registered in respect thereof as maintenance-holder in possession. The party No. 7 shall

not have any right to sell or otherwise alienate or charge with debt the said property. She will have the right to enjoy the usufruct thereof, for her lifetime only. After her death, the said properties will revert to the parties Nos. 1 to 6, or their heirs or representatives. We further award that if the party No. 7, for any fault, or action, of all or any one or more of the parties Nos. 1 to 6, or their heirs or representatives or for any other reasons, be dispossessed from the whole or any portion of the said property, the said Musammat will be entitled to realize the said maintenance allowance from the other properties of parties Nos. 1 to 6, to the extent of the diminution of her maintenance allowance, on account of her dispossession. We also award that parties Nos. 1 to 6 do pay Rs. 2,000 to the party No 7 for arrears of maintenance up to 30 Bhadon 1317 F. S."

An application for confirmation of the award and for passing a decree in terms thereof was made under Sch. 2, Para. 20, Civil P. C., in suit No. 258 of 1910, before the Subordinate Judge of Darbhanga in which the present respondent was the plaintiff and the appellants defendants. On 24th November 1910, the brothers filed a petition stating they had no objection to the award, when the following order was passed:

"Let the award be filed and let a decree be drawn up in accordance with the award."

It would appear that in pursuance of that order a decree was drawn up, of which the material portion is as follows:

"Claim for confirmation of the arbitrators' judgment passed by Babu Shib Chandra Chatterjee and Babu Gayanandro Mohan Dutta, pleaders of Muzaffarpore, the arbitrators appointed by both the parties, with regard to the maintenance allowance of the applicant, dated 18th September 1910, under S. 14, Cl. 8, Civil P. C. The suit coming on this the 24th day of November 1910 for final disposal before Babu Charu Chandra Mukherji, sub-Judge, in the presence of Babu Hem Chandra Ghatak, pleader for the opposite party, it is ordered and decreed that the decision of the arbitrators be kept with the record and a decree be prepared in accordance with that decision of the arbitrators and that the opposite party should, as per judgment of the arbitrators, pay Rs. 2,000 to the applicant. Given under my hand and the seal of this Court, this 24th November 1910."

The above decree was signed by the Subordinate Judge on 2nd December 1910, on which date the order-sheet contained the following: "Decree prepared, sealed and signed." The maintenance having fallen into arrears the respondent, on 5th September 1916, as plaintiff of the said Suit No. 258 of 1910, filed her petition seeking execution of the said decree. On 5th December 1916 the Subordinate Judge of Darbhanga disposed of certain objections by the appellants on 15th June 1917, decided certain questions relating to payments and deductions claimed by the appellants. The appellants now appeal against both these orders. In the first place, it is argued that the decree is incapable of execution as the decree orders the filing of the award but does not decree in terms of the award. Looking at the order of 24th November 1910, there can be no doubt that the judgment was pronounced according to the award. Para. 21 (2), Sch. 2, Civil P. C., states as follows:

"Upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

The document above referred to purports to be that decree. It is badly worded no doubt. It is headed "decree" and in my opinion the only reasonable interpretation that can be put upon it is that the decree is in terms of the award. The case of *Ummi Fazl* v. *Rahim-un-nissa* (1) is easily distinguishable as there was in that case no mention whatsoever of the award in the decree and it was impossible to say that the decree was not in excess of the award. In *Joytara Dassee* v. *Mahomed Mobarack* (2) the Court was of opinion that decrees should be drawn up by the Judge in such a way as to make them self-contained and capable of execution without referring to any other document. No doubt this is right and convenient but nowhere is it laid down that where a decree is made in terms of a document filed with the record without embodying the terms of the document in the decree, the decree is necessarily bad. In our opinion the decree in the present case is capable of execution.

It is next alleged on behalf of the appellants that after the said award the mouzahs allotted by the arbitrators to provide the source for the maintenance were under the management of the appellants from 1st Aswin 1318 to Baisak 1319 that from Jeyt 1319 to 10th of Kartick 1322 they were under the management of the appellant B. Lachmi Prasad and after that date from 11th Kartick 1322 Fasli under the management of Babu Sarosati Prasad Singh another of the appellants. It is therefore said that in respect of any shortage in the payment of the maintenance the respon-

(1) [1891] 13 All. 366.
(2) [1882] 8 Cal. 975.

dent must look to the various managing parties for any shortage which may have occurred during their respective managements and cannot recover jointly from the appellants. In answer to this and also in relation to the question of possession it is necessary to see what happened immediately after the award was filed. In pursuance of the award the respondent's name was registered in the Collectorate Register as maintenance-holder. Payments were made to her on account of her "allowance" and such payments purported to be made by one Mahomed Raza who signed himself as the manager of the joint estate. This would appear to me to be sufficient evidence of constructive possession by the respondent and it is no doubt to this that the learned Subordinate Judge refers when he says in his judgment that the arbitrators put her into possession. It is denied by the respondent that she ever appointed Babu Lachmi Paasad Singh or Babu Sarasoti Prasad to manage the mouzahs. She states that she does not know how long they acted or how they came in and suggests that the management may have been given to them by the ijmali estate. It would appear that she never did anything apart from sending to the brothers to ask for money. Two notices dated 6th July 1914 and 4th September 1914 written by the respondent's pleaders have been referred to in support of the proposit ion that she ratified the appointment of Babu Lachmi Prasad.

It does not appear she ever authorized her pleader to make any such admission even if the words can be interpreted as such. Considering that she was a purdanashin lady evidence of any such alleged admission must be received with the greatest caution. There is no evidence as to how he came to be appointed and we can only assume that he was acting on behalf of the joint estate. Similar remarks apply to the management of Babu Sarasoti Prasad Singh. It would appear from Ex. 1, dated 10th February 1916, that Babu Sarasoti Prasad Singh distinctly refused to give up possession of the mouzahs to the management of the respondent and this we think was in interference with the constructive possession of the respondent obtained after the award. The award distinctly provides that in case of dispossession by any one or more of the appellants the properties of the appellants are to be liable to the extent of the diminution of her maintenance allowance on account of her dispossession. We therefore think that a joint execution is maintainable. This question however does not appear to be very material inasmuch as the remedy is always open to any appellant to seek contribution if he had paid more than his share. A further point has been raised on the question of limitations but can hardly be said to have been pressed. The allegation is that the decree having been obtained in 1910 and not having been executed within three years must consequently be barred. There appears to be no substance in this as the management was in the hands of the appellants themselves and admittedly payments were made from time to time.

A ground has also been taken by way of objection which was not taken before the Subordinate Judge nor is it mentioned as one of the grounds for this appeal. It is to the effect that under the award which has been decreed by the Court a charge has been created on the mouzahs therein referred to and the fact of a charge having been created supersedes the remedy by execution and that the respondent's remedy is by suit to enforce the charge. *Matangini Dassee* v. *Chooneymoney Dassee* (3) and *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (4) have been referred to. The charge if it be one would appear to be an ancillary remedy and the point on which those cases were decided does not arise as the respondent does not seek: [vide her petition for execution] execution of the decree by attachment and sale of the mouzahs. In *Brajasunder Deb* v. *Sarat Kumari* (5) it was decided there need not be a suit for sale where a decree was obtained to the effect that the plaintiff do get maintenance at a certain rate and that the allowance decreed will be a charge on certain properties named and that the properties might be brought to sale in execution of the decree. It was pointed out by Chapman, J., that the effect of Rr. 14 and 15, O. 34, Civil P. C. of 1908, read with S. 100, T. P. Act, 1882 is that where immovable property has been made security for the

(3) [1895] 22 Cal. 903.
(4) [1895] 22 Cal. 859.
(5) [1917] 38 I. C. 791.

payment of money and the beneficiary has obtained a decree for the payment of the money so secured he shall not be entitled to bring the property to sale otherwise than by instituting a suit for sale in enforcement of the security. Nevertheless the immovable property must have been made security for the payment of the money before the decree was obtained otherwise the provisions do not apply. On these two grounds (1) that it is not sought to bring the mouzahs to sale and (2) that the charge was not created before the decree was obtained we think the appellants' contention is not maintainable.

The only other question to be considered is the finding of the Subordinate Judge as to what payments were made for which credit should be given. A considerable number of alleged receipts have been rejected on the ground that they were forgeries. None of the appellants though available have ventured to give evidence. An account book has been produced also in support of the alleged payments which has the appearance of having been written up not in the ordinary course of business but at one and the same time. The learned Subordinate Judge has stated in his judgment the reasons why he deemed the evidence produced on behalf of the appellants untrustworthy. The onus of proving payments was on the appellants and we can see no reason for interfering with the judgment of the learned Subordinate Judge. This appeal is therefore dismissed with costs.

Mullick, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 383 (1)

CHAMIER, C. J.

Lalji Sahu—Appellant.

v.

Baijnath Goenka—Respondent.

Misc. Judicial Case No. 38 of 1917, Decided on 1st May 1917.

Civil P. C. (5 of 1908), O. 45, R. 15—Original case decided in Bihar—Appeal in Calcutta—Order in Council against appellate order has to be executed in Calcutta.

An applciation for the execution of an Order-in-Council passed on appeal from a decree of the Calcutta High Court in a case originally decided by a Court in Bihar must be made to the Calcutta High Court, and not to the Patna High Court.

[P 383 C 2]

Judgment.—This is an application under O. 45, R. 15 by a person who desires to obtain execution of an order of His Majesty-in-Council, dated 3rd February 1915. That Order-in-Council was passed on appeal from a decree passed by the High Court of Judicature at Fort William in Bengal on 18th May 1907. The question whether with reference to the language of O. 45, R. 15, this Court has jurisdiction to entertain this applicatiou is one of considerable importance, inasmuch as there are several cases now pending before the Privy Council that were originally decided by Courts in Bihar and Orissa. It appears to me to be desirable to obtain once for all a final decision on the question. We are informed that last year an application, in a somewhat similar case, was sent to Calcutta to be presented to the Calcutta High Court, but we have no information as to whether the application was actually presented and, if presented, what order was passed. Let the application and the papers attached to it be sent to the High Court at Calcutta in order that they may be laid before the learned Chief Justice of the Calcutta High Court under Cl. 39 of the Letters Patent constituting this Court. The Registrar of this Court will ask the Registrar of the Calcutta High Court for a copy of any order that may be passed in this case by the Chief Justice of the Calcutta High Court.

Chamier, C. J.—Read the order of Sir L. Sanderson.* Let the application and connected papers be returned to the applicant.

V.S./R. K. *Application returned.*

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* Sanderson, C. J.—Having regard to the language of O. 45, R. 15 (1), I think that the application referred to in the note in the column opposite must be made to the High Court of Judicature at Fort William in Bengal.

A. I. R. 1918 Patna 383 (2)

ROE AND JWALA PRASAD, JJ.

Haldhar Singh—Petitioner.

v.

Bulaki Singh—Opposite Party.

Criminal Revn. No. 480 of 1917, Decided on 9th January 1918, from order of Magistrate, Patna.

Criminal P. C. (1898), Ss. 145 and 439—Proceedings under S. 145—Matter referred to arbitration—Award accepted by both parties—It is not open to parties to object to award.

Where after drawing up proceedings under S. 145, the matter is with the consent of the parties referred to arbitration and the award is filed and accepted by both parties it is not open

to either of them to object to the award in revision.

Seshir Kumar Mitter—for Petitioner.

Nirsu Narain Sinha—for Opposite Party.

Judgment.—The facts of this case are that on proceedings under S. 145, having been drawn up and parties having appeared in Court it was agreed that the matter should be referred to arbitration. On the submission of the award by the arbitrators, both sides accepted it and an order was made in accordance with the award which was in favour of the first party. The second party now comes to this Court on the basis of the decisions in the cases of *Hamidul Haq* v. *Ataet Hossain* (1) and *Hari Prasad Tiwari* v. *Sewak Das* (2). We may say at once that we are in entire agreement with the principles of those two decisions; but it is to be noted that in both these cases the parties were not disposed to accept the award when it arrived before the Magistrate. It was therefore if we may say so correct to say that the Magistrate was still required in spite of the award to proceed in accordance with law as prescribed in S. 145, Cl. (4). In the case before us the second party acquiesced in the award. It is recorded upon the award itself, "filed by the parties. Second party accepts the decision of the arbitrators." No evidence was offered by the second party. The Magistrate therefore proceeded in accordance with S. 145, Cl. (4). In the absence of any written statement he perused the statement made by the arbitrators which had been handed to him by the parties jointly; he heard the parties and the only reason why he did not receive evidence may be said to be that there was no evidence to receive. Having heard the second party declare that he accepted the decision of the arbitrators, it was hardly open to him to go outside that statement and to insist upon the production of evidence which the second party had no desire to produce. We are therefore of opinion that there was nothing in the proceedings of the Court below to justify our interference.

The application is rejected.

V.S./R.K. *Application rejected.*

(1) [1917] 2 P. L. J. 86=37 I. C. 513.

(2) [1917] 40 I. C. 333.

A. I. R. 1918 Patna 384

MULLICK AND ATKINSON, JJ.

Raj Bans Sahai—Judgment-debtor—Appellant.

v.

Surju Lal and *others*—Decree-holders—Respondents.

Misc. Appeal No. 51 of 1917, Decided 15th November 1917, from decision of Sub-Judge, Gaya, D/- 1st March 1917.

Civil P. C. (1908), O. 41, R. 5—Stay of execution—Security furnished—Appeal dismissed — Giving security does take away decree-holder's right to execute decree against judgment-debtor in any way allowed by law.

Where pending an appeal from a decree execution proceedings were stayed on the judgment-debtor giving security for the payment of the sum due upon the decree including interest and costs, and the appeal was subsequently dismissed:

***Held*: that the fact that a security bond was given in no way detracted from or diminished the right of the decree-holder to enforce his decree as against the judgment-debtor in any way he thought fit in accordance with law.**

The fact that security is given does not take away any legal right which a decree-holder otherwise has. [P 385 C 1]

Ganesh Dutt Singh and *Sivanandan Rai*—for Appellant.

Kulwant Sahay and *Shiveswar Dyal*—for Respondent.

Judgment.—This appeal arises out of an order of the Subordinate Judge of Gaya dated 1st March 1917. The appeal arises an exceptional point of legal interest. The facts shortly stated are that the respondents obtained a money decree against the appellant on 21st September 1911 for a sum of Rs. 7,693-10-0. From that decree the present appellant appealed to this Court and coupled with his petition of appeal he applied that the execution of the original decree might be stayed pending the determination of the appeal. This Court was pleased to make an order staying the execution proceedings on condition that the appellant gave security for the full sum due upon the decree including interest and costs. The appeal was subsequently heard in this Court and the learned Judges who heard it were satisfied that the decree awarded by the Subordinate Judge was excessive to the extent of Rs. 1,500 and accordingly directed that the decree should be amended in accordance with the judgment of this Court and that was done. The defendant gave a security bond in pursuance of the direction of this Court directing the stay of execution proceedings.

When the respondent came to execute the original decree the judgment-debtor contended that the respondent was not entitled to execute the original decree as against the person of the judgment-debtor or as against the property of the judgment-debtor other than the property specified in the security bond. No authority whatsoever has been cited in support of this proposition. The fact that a security bond was given in no way detracts from or diminishes the right of the respondents-decree-holders to enforce their decree as against the judgment-debtor in any way they may think fit in accordance with law. The fact that security is given does not take away any legal right which a decree-holder otherwise has. Clearly therefore the learned Subordinate Judge was right in this case in dismissing the appellant's application. We are not concerned with any matter arising out of the arrest of the judgment-debtor because though he was arrested he was subsequently discharged. We are only concerned with the contention put forward by Mr. Ganesh Dutt Singh on behalf of the appellant that the decree-holder was bound to seek his remedy against the property covered by the security bond and not against the person of the judgment debtor. We cannot yield to any such contention and we therefore dismiss this appeal with costs in the lower Court and in this Court measured at five gold mohurs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 385

DAWSON-MILLER, C. J. AND MULLICK, J.

Mohamad Hanif—Appellant.

v.

Moorat Mahton and *another* — Respondents.

Letters Patent Appeal No. 13 of 1916, Decided on 29th January 1918, from decision of Roe, J., D/- 22nd March 1916.

Deed—Construction—Zarpeshgi ijara held to constitute mortgage.

No general rule can be laid down as to the effect of a zarpeshgi transaction. Every case must depend upon its own facts.

Plaintiff executed a zarpeshgi ijara in favour of defendant which stipulated that in the event of the plaintiff's failure to repay the zarpeshgi money the defendant would be entitled to retain the land till repayment. It further stipulated that out of the annual consolidated jama of the property transferred to the possession of the defendant estimated at Rs. 112-8-0, the defendant was entitled to retain a certain sum on account of interest, revenue cesses and irrigation charges and that the balance should be paid to the plaintiff :

Held : that the intention of the parties was to create the relationship of mortgagor and mortgagee and that the amount advanced to the plaintiff could not be viewed as an advance of the rent fixed upon the land. [P 386 C 1, 2]

Muhamad Ishfaq—for Appellant.

Kulwant Sahai—for Respondents.

Judgment.—The suit out of which this appeal arises was instituted on 22nd September 1910. The plaintiff is the proprietor of Mouza Chak Amanulla and on 14th March 1896 he executed a document which is called a zarpeshgi ijara, in favour of defendant 1 and Jitan Mahton, husband of defendant 1. The interest of Jitan Mahton has been transferred to defendant 3. The zarpeshgi ijara stipulated among other things that an annual sum of Rs. 35-10-8 was payable to the plaintiff by the defendants or their predecessors and the present suit is brought for the years 1311 to F. S. 1317 in respect of this sum of Rs. 35-10-8 with interest. The trial Court and the Court of first appeal found that the defendants' contention that the plaintiff was not competent to recover more than the amount due for three years was not sustainable. The defendants also contended that in July 1896, that is about three months after the zarpeshgi ijara, the plaintiff borrowed by three simple bonds a total sum of Rs. 300 from defendant 1 and Jitan Mahton and that it was stipulated in these bonds that the interest payable thereon, namely a sum of Rs. 18 per year, should be credited towards the payment of the money due to the plaintiff upon the zarpeshgi ijara. It is necessary to observe that the period of the zarpeshgi ijara and of the three bonds was five years. The zarpeshgi ijara also stipulated that in the event of failure to pay the sum of Rs. 700 which was the loan taken by the plaintiff on that transaction, the defendants should be competent to retain the land till the repayment of the zarpeshgi money. It also stipulated that the annual consolidated jama of the property transferred to the possession of the defendants by the zarpeshgi ijara was estimated at Rs. 112-8-0, and that out of this amount the sum of Rs. 42 should be retained by the defendants as interest upon the zarpeshgi money, that a sum of Rs. 23-2-8

should be paid on account of revenue road and dak cess, and a sum of Rs. 11 9-8 on account of irrigation charges leaving a balance of Rs. 35-10 8 payable on account of haq ajri to the plaintiff. On appeal to this Court Roe, J., held that the relationship created by the zarpeshgi ijara was not one of mortgagor and mortgagee but of landlord and tenant, and that under the Bengal Tenancy Act the plaintiff was not entitled to recover more than three years' rent. The plaintiff had a cross-appeal before the learned Judge as to the deduction of the yearly interest of Rs. 18. He contended that the defendants were not entitled to make any deduction for the years in suit, but the learned Judge of this Court was against the plaintiff on this point with the result that he gave the plaintiff a decree for three years only for the principal sum of Rs. 17-10-8 per year.

This matter now comes before us in Letters Patent appeal and the first question that has been argued is what is the relationship created by the zarpeshgi ijara. Now it is impossible to lay down any general rule as to the effect of a zarpeshgi transaction. Every case must depend upon its own facts, and in this particular case we must determine upon a construction of the document whether or not we can accept the contention of the defendants that a relationship of landlord and tenant subject to the provisions of the Bengal Tenancy Act was created. On a careful examination of the terms of the document it seems to be clear that the intention of the parties was to create the relationship of mortgagor and mortgagee and that this is not a case in which the amount advanced to the owner of the land is to be viewed as an advance of the rent fixed upon the land. In *Nidha Sah* v. *Murli Dhar* (1) their Lordships had before them the case of a plaintiff, who in consideration of advances which had been made to him by the defendant executed what purported to be a mortgage of certain villages with possession to the defendant for 14 years, the deed providing that on

"the expiration of the term the mortgagor shall come into possession of the mortgaged villages without settlement of account, that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate which after the expiration of the term of the mortgage-deed shall be returned to the mortgagor without his paying the mortgage money secured under this document."

In regard to this document their Lordships observed as follows:

"The instrument though it is called a mortgage and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances."

That case is a very different case from that before us here. Here there is a distinct provision for interest upon the sum advanced and we see no difference between the nature of this document and that which was before their Lordships of the Privy Council in the *Bengal Indigo Co.* v. *Raghoubur Dass* (2) and where their Lordships observed that the real question was whether the main object of the instrument was to provide security for the loan. The same principle was followed in *Ram Khelawan Roy* v. *Sambhoo Roy* (3). In that case a sum of one rupee per year was reserved as rent to be paid to the debtor and the creditor was to remain in possession until the payment of the zarpeshgi money. Their Lordships held that the proper intention to be inferred from the document was that the land was hypothecated for a term of years as security for the payment of the loan. Upon a consideration of all the facts in this case and the document itself it is impossible to say that the contention of the plaintiff is not correct and that the intention of the parties was not to create the relationship of mortgagor and mortgagee but that of simple landlord and tenant. The document being a registered instrument the amount payable to the plaintiff will be governed by Art. 116, Lim. Act, the period of which is 6 years from the date on which the cause of action accrued and not 3 years as provided in the schedule attached to the Bengal Tenancy Act.

The next question is whether the defendants are entitled to credit the sum of Rs. 18 per year for the years in suit. Now the Courts below have proceeded on the assumption that the stipulation in the three bonds of 1896 was that the de-

(1) [1903] 25 All. 115=30 I. A. 54 (P. C.).

(2) [1897] 24 Cal. 272=23 I. A. 158 (P. C.).

(3) [1898] 2 C. W. N. 758.

fendants were entitled to pay themselves the sum of Rs. 18 per year so long as the zarpeshgi ijara remained in force. The bonds themselves do not appear to make any such stipulation and if anything is to be inferred from the conduct of the parties all that appears to be established is that up to the year 1901 the plaintiff gave a receipt to the defendants acknowledging payment of Rs. 17-10-8 per year and allowing the defendants credit for the sum of Rs. 18. The learned vakil for the plaintiff-appellant before us has admitted in the course of the argument that he continued to allow the defendants to make this deduction up to the year 1903. This being so the defendants would be under the operation of S. 20, Sub-Cl. (1), Lim. Act entitled to sue upon their bonds for three yaars after the last payment of Rs. 18, and if they were entitled to sue it follows that they would also be entitled to credit themselves with the sum of Rs. 18 by way of interest up to that period. Therefore the defendants are entitled to credit for the sum of Rs. 18 and interest thereupon up to the end of the year 1906. That means that for the year 1311 the defendants will be entitled to Rs. 18 and interest which amounts roughly to Rs. 6-4-0, for 1312 they will be entitled to the same sum and interest amounting to Rs. 5-3-8 and for 1313 they will be entitled to the same sum with interest which amounts to Rs. 4-3-0. The total of these sums will have to be deducted from the total claim of Rs. 293-10-2 and for the balance the plaintiff will be entitled to a decree with interest at 6 per cent from the date of the institution of the suit till the date of realisation. The result therefore is that the appeal will be decreed in this modified manner and the plaintiff will be entitled to his costs in all Courts below calculated proportionately to his success. The defendants will be entitled to their proportionate costs. We make no declaration here as to what proportion of the principal sums is to be paid by defendant 3 and also as to what proportion of the costs is to be paid by or realised by him.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 387

CHAPMAN AND ATKINSON, JJ.

Khoka Marwari—Appellant.

v.

Ramchandra Marwari and *others*—Respondents.

Misc. Appeal No. 220 of 1917, Decided on 5th February 1918, from decision of Sub-Judge, Bhagulpore.

Civil P. C. (1908), O. 38, Rr. 1 to 6—Attachment before judgment—General allegation against defendant is not sufficient.

When a party seeks to obtain an order of attachment before judgment, he must by definite evidence satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole of his property with a view to defeating his creditors. It is not sufficient to make only general allegations. [P 388 C 2]

Hasan Imam and *Naresh Chandra Sinha*—for Appellant.

Pugh and *Bankim Chandra Mitter*—for Respondents.

Chapman, J.—In this case the suit was instituted on 11th April 1917, and on 14th April the Court heard an application for an attachment of the defendant's property before judgment. Notice was issued, or purported to issue, on the defendant, and on 21st April 1917, the date fixed for the disposal of the application, an order was made in the absence of the defendant for the attachment of the defendant's property before judgment. On 30th April, the defendant filed an objection to the attachment before judgment, in which he denied the allegations made by the plaintiffs and objected to the attachment upon the ground that he had no notice of it. After some adjournments the matter was disposed of on 14th August; and the attachment before judgment was vacated by the Court on two grounds, ground 1 being that the defendant had no notice of the proceeding for attachment; and ground 2 being that at the time that the order for attachment was made there was no evidence before the Court, either by affidavit or otherwise, that the defendant was about to dispose of or remove any part of the property within the meaning of O. 38, R. 5. An appeal has been filed before this Court against the order setting aside the attachment before judgment and directing that the attached properties be at once released. It is urged on behalf of the respondents that no appeal lies. It is conceded that an appeal could only lie under O. 47, R. 7,

sub-R. 1, Cl. (a); that is to say, an appeal would lie to this Court on the ground that the application for review could not be entertained by the Subordinate Judge inasmuch as he was not the Subordinate Judge who made the order for attachment, unless the application for review was based on the ground of discovery of new and important evidence or on the ground of clerical or arithmetical mistake.

It is conceded however by the appellant that the order of the Subordinate Judge must be upheld inasmuch as, upon his finding that the previous order for attachment was without notice to the defendant, and upon his finding that the notice had been suppressed, it was the obvious duty of the learned Subordinate Judge to vacate the order made by his predecessor. It is immaterial therefore whether an appeal lies in this case or not. In any case the order of the learned Subordinate Judge must stand, inasmuch as it was the proper order to make having regard to his finding that the notice had not been served upon the defendant and that the process of the Court had been suppressed. The only question for our consideration is whether there should be a direction by this Court that the Subordinate Judge should entertain the application for attachment before judgment. He has not in fact entertained it. He has merely held that his predecessor was wrong on the materials then before him in issuing an order of attachment before judgment. It appears however that since the passing of that order of attachment, there has been some evidence on the record, however scanty it might be, to support the application for attachment before judgment; and I think that the proper procedure for the learned Subordinate Judge was, after vacating the order of his predecessor, to proceed to dispose of the application for attachment before judgment on the evidence before him. Therefore I think it desirable to direct that the application for attachment before judgment should be disposed of in the proper way. I do not wish to suggest that there are upon the record materials which any Court should hold as sufficient to support the application for attachment before judgment; but I am of opinion that the application should be disposed of in the proper way. The appeal before us has failed on the grounds taken in the memorandum of appeal and is dismissed with costs.

Atkinson, J.—I concur. I only wish to add one word with regard to what I believe to be important, having regard the construction to be put upon O. 38, Rr. 1 to 6. In my opinion when a party seeks to obtain an order of attachment before judgment, he must by definite evidence, satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property with a view to defeating his creditors. It is not sufficient as in this case to make general allegations. The petitioners in this case have done no more than state generally that they have

"ascertained that in order to avoid and delay realization of money that would be decreed in favour of the plaintiffs the defendants are about to dispose of the property mentioned in the schedule annexed."

A general statement of this sort without any evidence to support it is in my opinion, wholly insufficient to prove any intention on the part of the defendant to dispose of any part of his property with a view to defeat his creditors; or to warrant the Court in making an order of attachment before judgment. I however agree with my learned brother that the application for attachment before judgment should be disposed of in the regular way upon the evidence now on the record. This will not of course debar the plaintiffs from adducing such additional evidence relative to the state of things existing at the date of the application for attachment as the learned Subordinate Judge may think admissible.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 388

CHAPMAN AND JWALA PRASAD, JJ.

Radha Prasad Sinha—Defendant—Appellant.

v.

Dinanath Missir—Plaintiff—Respondent.

Second Appeal No. 2549 of 1913, Decided on 17th April 1917, against decision of Dist. Judge, Purneah, D/- 20th May 1917.

(a) Custom—Presumption— Existence for long time raises presumption that it is reasonable.

It is only in exceptional cases that it is possible to say that a custom is unreasonable, because the fact that it has prevailed for a very long

time raises a strong presumption that it is reasonable. [P 389 C 1]

(b) Custom—Market — Dues — Custom to collect market dues is neither unreasonable nor contrary to public policy.

A custom under which proprietors in India are encouraged to establish markets originates for the convenience of the people. [P 389 C 1]

A custom entitling a zamindar to collect certain dues from merchants or traders resorting to a market and doing business there is neither unreasonable nor opposed to public policy. [P 389 C 2]

Purnendu Narayan Sinha and *Sivanandan Rai*—for Appellant.

Murari Prasad—for Respondent.

Judgment.—The appellants were defendants in the Court below. In the year 1317, they took a lease of the right to collect the customary dues from merchants and traders in two places named in the lease, in one case in respect of Furh Bazar in the village of Saifgunj and in the other case in respect of the Station Bazar in village Mirchai. Out of the Rs. 1,600 due for the first year the defendants paid Rs. 1,033. Out of the Rs. 1,200 payable in respect of the first three-quarters ef the second year they paid Rs. 201. The suit out of which this appeal arises was for the balance of some Rs. 16,971-12-0 (sic) due under the contract. The suit was decreed in part in both the Courts below. In appeal to this Court the first point that has been contended is that this arrangement is contrary to public policy. The lease however purports to be a lease for the right to collect what are called customary dues and I find no indication in the suit that the existence of the custom was disputed. There was no dispute that it had been in existence from at least 1865. It would be difficult to say that a custom that prevailed for so long was contrary to public policy. It is only in exceptional cases that it is possible to say that a custom is unreasonable, because the fact that it has prevailed for a very long time raises a strong presumption that it is reasonable, and after all the custom under which proprietors in India are encouraged to establish markets originates for the convenience of the poople, If they were not entitled to realize some sort of dues not realizable from the holders of ordinary houses or lands, we would not find zamindars establishing markets for the convenience of the people. That is an established custom and in the absence of public bodies all over the country for establishing markets, there is no reason why the custom should not continue.

It is contended that in this particular instance the custom is bad because there are suggestions both in the lease and in the judgment of the first Court that these dues are realisable from sales which take place in what are called verandahs of private houses. I cannot myself see the distinction between a professional seller operating in his verandah and a seller in a shop. If it has been the custom for so many years in these two particular villages to realise commission upon the sales, I can see nothing inconsistent with the public interest. It is next contended that all rights of this kind were abolished by the notification of 1790 by which certain *sir* collections were done away with. This suggestion is based only upon the fact that in the judgment of the District Judge the property is referred to by the name of Sairat. It has not been shown to us that by the notification of 1790 or any other notification the right to collect dues of this kind was abolished. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A . R. 1918 Patna 389

CHAPMAN AND ROE, JJ.

Manmath Nath Roy—Appellant.

v.

Ameer Khan—Respondent.

Appeal No. 52 of 1917, Decided on 16th April 1918, from appellate decree of Dist. Judge, Cuttack, D/- 14th May 1917.

Contract—Land—Third party having beneficiary interest in its purpose may take benefit of contract.

In contracts relating to land a third party may take the benefit of the contract if it has a beneficiary interest in its purpose. [P 390 C 1]

Plaintiff-landlord contracted with Government to maintain the rights of all tenure-holders entered in the Record-of-Rights prepared prior to the giving of a kabuliyat by the plaintiff. He nevertheless brought a suit for a declaration that one of the tenure-holders covered by the Record-of-Rights had obtained a fraudulent entry therein and had no such rights as there entered:

Held: that the plaintiff was not entitled to maintain the suit. [P 390 C 2]

J. N. Bose and *S. C. Bose*—for Appellant.

Baikuntha Nath Dutta—for Respondent.

Roe, J.—The question in issue in this appeal is one of some importance and

has been the subject of an abortive reference to a Full Bench of the Calcutta High Court. The facts are briefly that the appellants have contracted with Government to maintain the rights of all tenure holders entered in the Record-of-Rights prepared prior to the giving of a kabuliyat by the appellants. They nevertheless bring this action for a declaration that one of the tenure-holders covered by this Record-of-Rights has obtained a fraudulent entry therein and has no such rights as those recorded. The learned Judge has decided as a question of law that having regard to the terms of this kabuliyat the appellant cannot maintain this action. On this ground the appellant appeals to this Court and quotes in the first instance the reference to the Full Bench of the Calcutta High Court made by Coxe, J., and Imam, J., *Manmatha Nath Mitter* v. *Rai Kishore Mahanti* (1). The case relied on in support of the contention of the respondents are those of *Gour Chandra Saha* v. *Mani Mohan Sen* (2) and *Jahandar Baksh Mallick* v. *Ram Lal Hazra* (3). But in relying upon the latter case, it seems to me the learned vakil has lost sight of the distinction which Mookerjee, J., drew between *Gour Chandra's* case (2) and the cases of *Tapanidhi Raghunath Puri* v. *Pitambar Gajendra Mahapati* (4) and *Chandramoni Mohanti* v. *Manmatha Nath Mitter* (5). The reference to the Full Bench seems to be based chiefly upon the decision in *Tweddle* v. *Atkinson* (6) and the decision of the Judicial Committee in *Jamna Das* v. *Ram Autar Pande* (7). That the rule in these cases is not of universal application is clear from the decision in *Rogers* v. *Hosegood* (8), which is clear authority for the proposition that in contracts relating to land a third party may take the benefit of the contract if they have a beneficiary interest in its purpose. In *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begum* (9) the principle of *Tweddle* v. *Atkinson* (6) was held to be inapplicable to a case in which, though the respondent was no party to the original agreement, she was clearly entitled to proceed in equity to enforce her claim. The cases of *Gour Chandra Saha* v. *Mani Mohan Sen* (2) and *Jahadar Baksh Mallick* v. *Ram Lal Hazra* (3), as Mookerjee, J., explains, were based on the principle that the tenants themselves had waived the conditions imposed upon the landlord by the Government and could not now resile from their waiver. There has in the case before us been no waiver of the conditions imposed by the Government. I am of opinion that these conditions prevail and that advantage may be taken of them by the tenant and that the cases before us are not maintainable until the condition has been removed by waiver on the part of the tenants on the estate or by the Government who were parties to the original contract. The appeal should therefore be dismissed with costs.

Chapman, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(1) [1913] 17 C. L. J. 70 (Notes).
(2) [1905] 32 Cal. 463.
(3) [1910] 37 Cal. 449=5 I. C. 565.
(4) [1907] 5 C. L. J. 67.
(5) [1910] 5 I. C. 301.
(6) [1861] 30 L. J. Q. B. 265.
(7) [1912] 34 All. 63=13 I. C. 304=39 I. A. 7 (P.C.).
(8) [1900] 2 Ch. 388.
(9) [1910] 32 All. 410=7 I. C. 237=37 I. A. 152 (P.C.).

A. I. R. 1918 Patna 390

ROE AND ALI IMAM, JJ.

Jhotu Lal Ghose—Petitioner.

v.

Ganouri Sahu—Opposite Party.

Civil Revn. No. 261 of 1917, Decided on 22nd March 1918, against an order of the Dist. Judge., Bhagalpur, D/-25th August 1917.

Civil P. C. (1908), S. 115—Erroneous decision on question of limitation—Revision does not lie.

The question whether or not a petition for the restoration of a suit is barred by limitation is a question specifically within the province of the Court to decide and an error, whether of law or of fact, made by the Court in deciding this question is not an error in the exercise of jurisdiction which would entitle the aggrieved party to move the High Court in revision. [P 390 C 2]

Lalit Mohan Ghose—for Petitioner.

Gour Chandra Pal—for Opposite Party.

Ali Imam, J.—It has been pointed out to us that the Munsif, in holding as he did that the petition for restoration was not barred by limitation, had in fact fallen into an error, and that the facts would disclose that the petition was so barred; but we do not regard this contention as of any substance inasmuch as even if it be conceded that the Munsif had fallen into an error, be it of law or of fact, this is not an error in the exercise of juris-

diction under S. 115 of the Code. This petition is rejected with costs.

Roe, J.—I agree. There is no substance in the suggestion that the Munsif had no jurisdiction because the case was barred by limitation. The question whether or not it was barred by limitation was a question specifically within the province of the Court to decide.

V.S./R.K. *Application rejected.*

A. I. R. 1918 Patna 391

MULLICK AND ATKINSON, JJ.

Gadadhar Ramanuj Das—Appellant.

v.

Ghana Shyam Das—Respondent.

Second Appeal No. 4 of 1917, Decided on 20th December 1917, from decision of Dist. Judge, Cuttack, D/- 12th December 1916.

Hindu Law—Debt—Father—Decree against—Sale of ancestral property—Sons cannot object except only on ground that debt was immoral.

A Hindu son is bound by a sale of his share in joint ancestral property held in execution of a decree obtained against his father, even where it is not shown that the debt was incurred by the father for legal necessity. The only exception is where the debt was an immoral one. [P 392 C 1]

In a suit for accounts the defendant obtained an ex-parte decree against the plaintiffs' father who was his agent and in execution of that decree brought to sale the joint property of the plaintiffs and their father and purchased it himself.

Held: that the sale was binding on the plaintiffs, inasmuch as the liability of their father was an ordinary civil liability and there was nothing to show that it was immoral.

[P 392 C 2]

M. S. Das and *B. N. Sinha*—for Appellant.

S. C. Bose—for Respondent.

Judgment.—The facts of this case are as follows: Defendant 2 is the father of plaintiffs 1, 2 and 3 and was the agent of defendant 1. A suit for accounts under the Orissa Tenancy Act was brought by defendant 1 against defendant 2, in which defendant 2 failed to put in an appearance. The suit was decreed for a sum of Rs. 5,000. The decree holder, defendant 1, thereupon took out execution for this sum against the father, and sold the property in suit and purchased it himself. The plaintiffs now come forward in the present suit with a claim that what was sold was only the right, title and interest of their father and that their share in the ancestral property which is governed by the Mitakshara law was not affected by the sale. The learned District Judge has allowed their claim so far as the ancestral properties are concerned, and hence this second appeal by defendant 1. Now the law as regards the liability of the sons of a Mitakshara father in respect of a sale held in execution of a decree for their father's debt has been summarised in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) by their Lordships of the Privy Council as follows:

"First, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they shew that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, secondly, that the purchasers at an execution sale, being strangers to the suit, if they had no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

These two propositions were considered by Sir John Stanley in *Chandradeo Singh* v. *Mata Prasad* (2) and the learned Chief Justice observes as follows:

"The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family and with no other cases, and the words antecedent debt seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons."

Their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (3) approved of this statement of the law as correct, and emphasized the distinction between a suit for recovery by the sons of their share of the ancestral property sold in execution of a decree for their father's debt and a suit upon a mortgage executed by the father charging the joint property and in which the plaintiff endeavours to obtain a personal decree against the sons by reason of the pious obligation attaching upon them to pay their father's debts. Their Lordships held that so long as the father was liv-

(1) [1880] 5 Cal. 148=6 I. A. 88 (P.C.).
(2) [1909] 31 All. 176=1 I. C. 478.
(3) A. I. R. 1917 P. C. 61=39 I. C. 280=44 I. A. 126=39 All. 437 (P.C.).

ing, the effort to affect the sons' share in the property on the ground of pious obligation to pay off their father's debt in respect of a personal debt of the father, and not in respect of a debt incurred in the interest of the family, must fail. But their Lordships nowhere ruled that the liability which empowers a creditor to enforce the payment of a personal debt of a father, and to sell the entire estate of the family for the realization of the said debt, did not exist and that it was absolutely necessary that the sons should be made parties to the suit or to the execution proceedings. To like effect is the judgment of their Lordships in *Sripat Singh Dugar* v. *Prodyot Kumar* (4), where their Lordships say that in cases of this kind the substance and not merely the technicalities must be looked at and it must be ascertained what it was that the parties intended to sell and the Court did in fact sell. It is a question of mixed law and fact and there is no provision of law to support the proposition which the learned vakil for the respondent has urged, namely that in no case can you sell the share of the sons for a debt incurred by the father and that the sale in the present case passed only the right, title and interest of the father himself.

Now, what is the position here? Here the decree-holder, defendant 1, brought to sale not the interest of defendant 2 alone, but that of the sons also and this is the interest which the Court sold at the execution sale. This is clear from the fact that the present plaintiffs were claimants at the execution proceeding, but were unsuccessful. There can be no doubt whatsoever that what the Court did in fact sell was not only the interest of the father, but that of the sons also. Regarded from this point of view the argument that the debt was not one for legal necessity is not relevant. The question of legal necessity does not affect this case. If there was legal necessity the sons would be obviously bound; but the law is that even if there was no legal necessity the sons would be bound by a sale of their property held in execution of a decree against the father. The only exception is if the plaintiffs succeed in proving that the debt was an immoral debt. This is the only point in the case, and the authorities which have been discussed in *Chakouri Mahton* v. *Ganga Proshad* (5) disclose much divergence of opinion regarding it. Mookerjee, J., in that case obeerved that this divergence may possibly be reconciled if we recognize the distinction between a criminal offence and a breach of civil duty.

Was the act of defendant 2 in the present case in relation to his master such that it constituted a criminal offence? Admittedly no prosecution was instituted. The suit was one for accounts in which he failed to deliver accounts and by reason of his failure a decree was made for a certain sum. The decree itself is consistent with the view that defendant 2 did not himself misappropriate any of the money and that he was made liable for sums which owing to his negligence or laches remained uncollected from the tenants. It is impossible from the facts of this case to say that the circumstances disclose a criminal misappropriation on his part or that there was any dishonesty which could constitute an immoral act within the meaning of the Hindu law. Every civil debt does not necessarily involve a moral stigma, and in the present case in my opinion the plaintiffs have failed to show that the debt was immoral in law, from liability in respect of which they are exempted. Therefore the learned Judge's decree allowing the plaintiffs' claim in respect of the property in schedule Ka was wrong and must be set aside. The appeal therefore succeeds and is decreed with costs.

V.S./R.K. *Appeal allowed.*

(4) A. I. R. 1916 P. C. 220=39 I. C. 252=44 I. A. 1=44 Cal. 524 (P.C.).

(5) [1911] 39 Cal. 862=12 I. C. 609.

A. I. R. 1918 Patna 392

CHAPMAN AND ATKINSON, JJ.

Tata Iron and Steel Co., Ltd.— Plaintiffs—Appellants.

v.

Raghunath Mahto—Defendant— Respondent.

Appeal No. 627 of 1917, Decided on 9th January 1918 from appellate decree of Deputy Commissioner, Singhbhum.

(a) Chota Nagpur Tenancy Act (1908), S. 4—Holder of prodhani pattah is in position of quasi service tenure-holder.

The holder of a prodhani pattah is not in the position either of a non-occupancy raiyat or of an occupancy raiyat. He is in the position of a quasi service tenure-holder, that is, he is a tenure-holder of a kind but not one within the definition of the Chota Nagpur Tenancy Act.

[P 394 C 2]

(b) Chota Nagpur Tenancy Act (1908) — Court under Act is not entitled to eject tenure-holder.

There is no provision in the Chota Nagpur Tenancy Act to justify a Court, constituted to hear suits under that Act, to eject a tenure holder. [P 394 C 2]

(c) Chota Nagpur Tenancy Act (1908), S. 139 (6)—S. 139 (6) gives Deputy Commissioner jurisdiction to deal with disputes as between parties claiming office of prodhan.

Section 139 (6), Chota Nagpur Tenancy Act gives jurisdiction to the Deputy Commissioner to deal with disputes as between parties claiming the office of prodhan coupled with possession of land attached to such office in a civil proceeding between parties other than landlord and tenant, which would otherwise be apparently outside the scope of the Act. [P 395 C 1]

(d) Chota Nagpur Tenancy Act (1908), S. 139 (6) and (8)— Suit to eject prodhan does not fall under sub-S. 6 nor is it covered by sub-S. (8).

A suit to eject a prodhan does not fall within the provisions of this sub-section nor is it covered by sub-S. (8), S. 139. The Deputy Commissioner has therefore no jurisdiction under the Chota Nagpur Tenancy Act to hear such a suit. [P 395 C 1]

(e) Jurisdiction—Absence of— Conduct of parties cannot validate proceedings.

In cases where there is an inherent absence of jurisdiction no subsequent action or conduct of the parties can validate the proceedings. [P 395 C 2]

Pugh, *Mritunjoy Lal* and *Sivanarain Bose*—for Appellants.

Shisher Kumar Mitter —for Respondent.

Atkinson, J.—The plaintiffs in this suit, namely, the Tata Iron and Steel Co., Ld., seek to eject the defendant from certain lands held by him under a Prodhani Pattah lease dated 1882. The interest of the lessor in that lease has now by divers mesne assignments become vested inthe Tata Iron and Steel Co., and of that there is no question at all. The lease that was made to the defendant as Prodhan was made by the Deputy Commissioner of Singhbhum while the owner of the estate was a disqualified proprietor. The lease covered an area of 64 bighas odd of cultivated lands in the village of Beldih for a period of 15 years, subject to an annual rent of Rs. 25-9-9. The lease was subject to certain conditions, namely, that the Prodhan was to maintain the sal jungles for the benefit of the lessor, and also that he was to pay his rent according to the stipulations contained in the lease, kist by kist, and that he was to collect no rent from the bastu lands in excess of the rent stated in the doul jamabandi, and that if in the discharge of his duties as Prodhan he was proved unfit, then the lessor for the time being would be entitled to eject him from the lands and also from his office as Prodhan. Irrespective of the lands comprised in the lease, the defendant has also a right to certain other lands and in respect of which he is a raiyat; but Mr. Pugh disclaims on behalf of the plaintiff any intention to eject the defendant from such raiyat lands. The plaintiffs' claim is conversant only with the ejectment of the defendant from the lands covered by the lease of 1882; and for which he pays a reserved rent, subject to the due discharge of his duties as Prodhan.

The case was originally instituted by the plaintiffs in the Court of the Subordinate Judge of Singhbhum; and in that Court the defendant raised the contention that the learned Subordinate Judge had no jurisdiction inasmuch as the claim was governed by the provisions of the Chota Nagpur Tenancy Act of 1908; and that therefore the only Court that had jurisdiction to hear and dispose of that suit was the Deputy Commissioner of Singhbhum. The learned Subordinate Judge held that by reason of the existence of the relationship of landlord and tenant between the parties, this suit was cognizable only by the Court of the Deputy Commissioner of Singhbhum. The plaintiffs accepted that contention, without demur, and accordingly instituted the present suit on 28th February 1916 in the Court of the Deputy Commissioner, relying on the contention that the cause of action sued upon was one governed by the provisions of the Chota Nagpur Tenancy Act, and as such cognizable by the Deputy Commissioner. Before the Deputy Collector to whom the case was properly assigned for disposal, the defendant took up a novel position and urged that the Deputy Collector had no jurisdiction to hear the case; having raised before the Subordinate Judge formerly the contention that he (the Subordinate Judge) had no jurisdiction but that the Deputy Collector only had jurisdiction. It would be interesting to inquire if the Deputy Collector had no jurisdiction, and the civil Courts had no jurisdiction, then what Court had jurisdiction to try the case and grant the relief claimed in this suit? The question as to jurisdiction does not seem to have been pressed before the learned Assistant

Judicial Commissioner in appeal. The Deputy Collector however proceeded to try the case, holding that there was jurisdiction inasmuch as the plaintiffs were seeking to eject a tenant, and that the facts as proved before him warranted the plaintiffs' right to eject the defendant; and he accordingly granted a decree to the plaintiffs. The learned Deputy Collector found on the question of fact submitted to him that there had been breaches by the Prodhan of the conditions of the lease which justified his eviction; and on the issues of fact raised by the parties before him, the Deputy Collector decided in favour of the plaintiffs. No question as to limitation was raised before the Deputy Collector. On appeal whether any, and if so which, party raised the question of limitation does not appear; but the learned Judge decided that the plaintiffs' suit was barred under the provisions of S. 231, Chota Nagpur Tenancy Act, inasmuch as the specific breaches relied upon by the plaintiffs to warrant the eviction of the defendant under the terms of the lease were breaches which occurred more than a year prior to the institution of the suit. We are not called upon now, having regard to the view we take, to consider the propriety of that decision; but we take leave to say that inasmuch as the question of limitation was not taken expressly in the pleadings or before the Deputy Collector at the trial, the learned Judicial Commissioner, if he intended to hold that the suit was barred by limitation, might very properly have given the plaintiffs an opportunity to establish by proof that the specific breaches of the lease alleged to have taken place were within one year before the institution of this suit.

The main discussion before us now has been whether or not the Deputy Collector in point of law had jurisdiction to try this case. It is necessary, first, in determining this legal consideration that we should ascertain what is the nature of the relationship which exists between the plaintiffs on the one hand and the defendant on the other. Is he a tenant, if so, what class of tenant is he? Is he an occupancy raiyat or a non-occupancy raiyat? If the defendant fulfils neither of these qualifications, then is he a tenure holder.? I asked Mr. Pugh what class of tenant the defendant was and Mr. Pugh candidly confessed, "I do not know what class of tenant is he." I think myself, having regard to the definition of tenant provided by S. 4, Chota Nagpur Tenancy Act, that the defendant was not in the position of either a non occupancy raiyat qua the lands held as Prodhan under the lease. The furthest that it could be pushed would be to contend that the defendant was a tenure-holder holding lands under the plaintiffs. Mr. Pugh contends that with regard to the 64 bighas odd of cultivated lands which were covered by the lease of 1882 the defendant is a tenure-holder. But the plaintiff's claim in this suit is not merely to recover these 64 bighas of land but also to eject the defendant from his office as Prodhan and to have it declared that the defendant has ceased to exercise the right of Prodhan, so far as his rights are concerned outside the mere collection of rents of the lands occupied by tenants. We think the defendant occupies the position of a quasi service tenure-holder, that he is a tenure holder of a kind; but certainly not one within the definition of the Chota Nagpur Tenacy Act. If the defendant is a tenure-holder, and not a raiyat, then there is no power vested in the Deputy Commissioner to eject him under the provisions of the Chota Nagpur Tenancy Act. The Chota Nagpur Tenancy Act gives express power to deal with the eviction of occupancy raiyats and non-occupancy raiyats. But there is no provision, so far as we can find, to justify a Court, constituted to hear suits under that Act, to eject a tenure-holder. S. 63 says that

> " no tenant shall be ejected from his tenancy or any portion thereof except in execution of a decree, or in execution of an order of the Deputy Commissioner, passed under this Act."

Section 22 also bears upon this consideration relative to the position of occupancy and non-occupancy raiyats under the Act. But the Deputy Collector acquires a special jurisdiction only in suits specified in S. 139, Chota Nagpur Tenancy Act. The suits set out in the sub-clauses of that section are suits which he alone has jurisdiction to try and which no other Court has any jurisdiction to try. It is contended before us that this suit, if maintainable, would be maintainable under the provisions of S. 139, sub-Cl. (6). But we are clearly of opinion that sub-Cl. (6),

S. 139 has no application to the facts of this particular case although that section does provide that:

"suits by or against headmen of villages for declaration of title in, or for possession of their office or agricultural lands"

may be maintained in the Court of the Deputy Commissioner irrespective of the fact whether the relationship of landlord and tenant exists. This enactment involves nothing more than a provision which empowers the Deputy Commissioner's Court to hear suits between the prodhan on the one hand and rival claimants on the other with regard to the right to hold the office coupled with the possession of the agricultural lands attached thereto, and it provides that such a suit is maintainable although it is a suit between parties between whom the relationship of landlord and tenant does not exist. And thus this section in our view gives jurisdiction to the Deputy Commissioner to deal with disputes as between parties claiming the office of prodhan coupled with possession of land attached to such office in a civil proceeding between parties other than landlord and tenant, which would otherwise be apparently outside the scope of the Act. The present suit is clearly not within the express provisions of sub-Cl. (6). The only other sub-clause in respect of which this suit could be maintained would be Cl. (8), S. 139, and that clause runs as follows:

"All suits and applications in respect of which jurisdiction is conferred by this Act on the Deputy Commissioner."

Is the present suit one in respect of which jurisdiction is conferred by this Act? Yielding to Mr. Pugh's argument that there is no kind of tenancy existing between the plaintiff on the one hand and the defendant on the other, except some kind of tenancy in the nature of a tenure holder's interest, then as there is no jurisdiction conferred on the Deputy Commissioner by the Chota Nagpur Tenancy Act to eject a tenure-holder, this suit cannot be maintained under the provisions of sub-Cl. (8), S. 139. In our view it is manifestly clear that there was an utter absence of jurisdiction in the Deputy Collector to try this suit. Mr. Pugh contends on the other hand that by some principle of equitable estoppel the defendant having forced the plaintiffs to obtain such relief in the Deputy Commissioner's Court, that we should recognise the decision of that Court. It is quite impossible to accept this argument, having regard to the authorities which lay down clearly that in cases where there is an inherent absence of jurisdiction no subsequent action or conduct will validate the institution of a proceeding instituted without jurisdiction. Accordingly we must reluctantly hold, that in this particular case, the Deputy Collector had in law no jurisdiction to dispose of this suit and consequently this appeal must be dismissed.

This decision, of course, involves the dismissal of the present suit instituted by the plaintiffs. As at present advised, we are inclined to think that the fact that the suit has been dismissed for the reasons stated will not operate as a bar to any fresh suit which may be instituted by the plaintiffs in a Court having competent jurisdiction to try and decide it on the issues raised between the parties. But having regard to the attitude adopted by the defendant, it is equitable and just that he should not receive costs in any Court. Accordingly the plaintiffs' suit must be dismissed without costs in the Deputy Collector's Court, without costs in the Judicial Commissioner's Court, and without costs in this Court.

Chapman, J.—I agree.

V.S./R.K. *Suit dismissed.*

A. I. R. 1918 Patna 395

ROE AND IMAM, JJ.

Dhaninder Das—Appellant.

v.

Harihar Prasad Singh—Respondent.

Appeal No. 46 of 1917, Decided on 21st December 1917, from original order of Sub-Judge, Shahabad, D/- 6th February 1917.

(a) Civil P. C. (1908). S. 47 and O. 21, R. 96—Proceedings for delivery of possession are not execution proceedings and no appeal lies.

Proceedings for delivery of possession are not proceedings in connexion with the execution of a decree, and therefore no appeal lies against an order passed in such proceedings [P 396 C 1]

(b) Civil P. C. (1908), O. 21, R. 96 and O. 47, R. 1—Order for delivery for possession can be reviewed if subsequently found to be beyond time.

Where through no fault of the judgment-debtor, the fact that an application for delivery of possession is barred by time is kept from the knowledge of the Court, and an order is passed directing delivery of possession, the Court has, on the fact being brought to its notice, jurisdiction

to review its previous order and to bring it in accordance with law, and the High Court has no power to interfere in revision with the order passed on review. [P 396 C 1]

Rajendra Prasad—for Appellant.

Mirtunjay Lal—forRespondent.

Roe, J.—The facts of this case are briefly that on 8th January 1917 the learned Subordinate Judge of Shahabad made an order for delivery of possession of property purchased in execution of a decree. On 26th January 1917 the judgment-debtor applied to have that order set aside on the ground that the application for delivery of possession was on the face of it barred by limitation. The matter was taken up on 6th February 1917, and the learned Subordinate Judge, finding that the order for delivery was barred by limitation, ordered it to be cancelled. His order runs: "Objection is allowed and the delivery of possession is cancelled."

An appeal has been laid to this Court. But that appeal is obviously incompetent for it is now settled law for this province that proceedings for delivery of possession are not proceedings in connexion with the execution of a decree. We are asked however under S. 115 to set aside the learned Subordinate Judge's order on the ground that it is made without jurisdiction. It is to be noted that the whole of the proceedings, both as conceived by the judgment-debtor and by the learned Subordinate Judge, were taken under S. 47, Civil P. C., a section which had nothing whatever to do with the matter: but it is urged before us that the Court had jurisdiction under O. 47 to review its own order. For the applicant reliance is placed on *Sasibhushan Mookerjee* v. *Radhanath Bose* (1). It was never suggested in that case that the Munsif had no power to review his own order erroneously made delivering possession. All that was said was that he had no power to review an order of his predecessor. It is clear from the decision in *Hadjee Abdoollah Reasut Hossein* v. *Hadjee Abdoollah* (2) that this is a type of case in which a Court should review its own order. Through no fault of the judgment-debtor the important fact was kept from the knowledge of the learned Subordinate Judge that this application was time-barred. On the fact being brought to his notice by the judgment-debtor, the learned Subordinate Judge was, in our opinion, right in correcting his order and making it in accordance with law. We therefore decline to interfere. The appeal is dismissed with costs in accordance with the scale laid down. We make no order as to costs upon the application for revision.

Imam, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(1) A. I. R. 1915 Cal. 137=25 I. C. 267.

(2 [1876-77] 2 Cal. 131=3 I. A. 221 (P.C.).

A. I. R. 1918 Patna 396

MULLICK AND ATKINSON, JJ.

Krupasindhu Roy—Appellant.

v.

Balbhadra Das—Respondent.

Appeal No. 8 of 1917, Decided on 7th December 1917 from Original Order of Sub-Judge, Cuttack, D/- 7th March 1917.

(a) Civil P. C. (5 of 1908), Ss. 144, 141 and O. 2. R. 2—Application for restitution is neither suit nor execution—Rules applicable to execution apply—S. 141 and O. 2, R. 2 does not apply.

An application for restitution under S. 144 is neither a suit nor an execution proceeding; it is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. S. 141 does not apply to an application for restitution, and such an application is not therefore subject to the provisions of O. 2, R. 2. [P 397 C 2, P 398 C 1]

(b) Limitation Act (9 of 1908), Art. 181—Application for restitution must be made within three years but mesne profits for all period that other party was in possession of can be claimed.

Article 181 prescribes that the period of limitation for making an application for restitution shall be three years from the date when the right to apply accrued. But the Article does not in any way control the period during which mesne profits shall be allowed to accumulate, and whatever the number of years during which the opposite party has been in possession, the applicant is entitled to be compensated in respect of the whole of that period, provided he applies within three years of the date on which the right to relief accrues. [P 398 C 1,2]

On 22nd March 1909 plaintiffs got a decree for recovery of possession of some immovable property. In pursuance of that decree they took possession on 24th September 1910. The defendant appealed against that decree to the High Court and succeeded in getting it reversed on 4th June 1913. The defendant then took possession of the property on 4th December 1913. On 2nd June 1916 the defendant applied, under S. 144, Civil P. C., for restitution of mesne profits in respect of the property for the period during which the plaintiffs were in possession, namely from 24th September 1910 till 4th December 1913:

Held (1) that the defendant was not debarred from claiming mesne profits by reason of the provisions of O. 2, R. 2. (2) that the right to apply having accrued to the defendant on the date of the High Court's judgment viz., 4th June

1913, the application was within time and the defendant was therefore entitled to mesne profits for the whole of the period from 4th September 1910 to 4th December 1913. [P 398 C 2]

Subodh Chandra Chatterjee—for Appellant.

Sarat Chandra Mukherjee and *J. N. Bose*—for Respondent.

Mullick, J.—On 22nd March 1909, plaintiffs got a decree for recovery of possession of some immovable property. In pursuance of that decree they took possession on 24th September 1910. The defendant appealed against that decree to the High Court and succeeded in getting it reversed on 4th June 1913. The defendant then took possession of the property on 4th December 1913. On 2nd June 1916 the defendant applied under S. 144, Civil P. C, for restitution of mesne profits in respect of the property for the period during which the plaintiffs were in possession, namely from 24th September 1910 till 4th December 1913. The learned Subordinate Judge has held that inasmuch as the defendant in applying for restitution of the property did not apply for restitution of mesne profits, he is now debarred from claiming mesne hrofits by reason of the provisions of O. 2, R. 2, Civil P. C. His view is that when the defendant took possession on 4th December 1913, he should have insisted upon his right to restitution of mesne profits also and having declined to claim that relief at that time he is, according to the principles of constructive res judicata, no longer competent to claim it by a subsequent proceeding under S. 144. The learned Subordinate Judge has accordingly dismissed the defendant's application and against that order, which is a decree under the definition of decree contained in S.2, Civil P. C., the defendant prefers the present appeal before us.

In our opinion the learned Subordinate Judge's order cannot be maintained. It is conceded by the learned vakil who appears on behalf of plaintiffs before us, that a proceeding, under S. 144, Civil P. C., is not a proceeding in execution. This must clearly be so, because the relief which the defendant claims in the present proceedings is not a relief founded upon any decree giving him such relief. It is a relief which used to be granted previous to 1859 under the inherent powers of the Court and which in the subsequent Civil Procedure Codes has been recognized by express statutory provision. The Code of 1882 prescribes it in S. 583 and the present Code of 1908 reproduces substantially the provisions of that section in S. 144. The proceeding in which the relief is claimed is neither a suit nor an execution proceeding; it is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. In this connexion it is to be noticed that S. 583 of the Code of 1882 contains words expressly prescribing that the Court in proceeding to grant relief under that section is to proceed according to the rules prescribed for the execution of decrees in suits. That Code nowhere stated that the proceeding was an execution proceeding, nor does the present Code prescribe anything to this effect. Although the words above referred to have been omitted from S. 144, of the present Code, the law in this respect is still substantially the same. Therefore the question arises whether S. 141 of the present Code requires that all the provisions of the Civil Procedure Code and therefore also of O. 2, R. 2, should be applied to the miscellaneous proceeding before us. In my opinion the answer is in the negative. It has been held in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (1), following a decision of their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir-ullah* (2), that S. 141 is not applicable to an execution proceeding. And if it is not applicable to an execution proceeding, I fail to see why it should be made applicable to a proceeding which is only of the nature of an execution proceeding.

The learned vakil for the respondents has strenuously contended that though the proceeding is miscellaneous it is in the nature of an original suit. In my opinion this argument fails, for a suit must always be based on a cause of action. Here the defendant petitioner has no cause of action on which he can claim relief from the plaintiffs. If it is urged that the cause of action is a trespass, then the reply is that the plaintiffs were put in possession by a decree of Court and were not trespassers. Nor does the decree of the

(1) A. I. R. 1914 Cal. 126=19 I. C. 683=41 Cal. 1.
(2) [1895] 17 All. 106=22 I. A. 44 (P. C.).

appellate Court per se constitute a cause of action. In my opinion the defendant had no cause of action on which he could have based a suit against the plaintiffs, even if the law had not expressly forbidden him to proceed by suit. His only remedy was to apply to the Court to proceed against the plaintiffs in exercise of its special powers. Therefore the rule applicable to several reliefs arising out of the same cause of action cannot be applied here. Finally even if we were to accede to the learned vakil's argument that this proceeding is a suit, in my opinion the claim for mesne profits cannot be said to arise from the same cause of action as a claim for recovery of possession and therefore O. 2, R. 2 is no bar.

We are fortified in the view we take by *Somasundaram Pillai* v. *Chokkalinga Pillai* (3). In that case their Lordships of the Madras High Court, following a previous decision of their own, expressly held that O. 2, R. 2, of the present Civil P. C., does not cover restitution applications. Therefore the result is that the learned Subordinate Judge's order holding that the defendant's application was barred by reason of O. 2, R 2, must be set aside. The learned vakil for the respondents has taken another ground before us, namely limitation. The learned Subordinate Judge has not gone into this point, but as it has been taken by the learned vakil and argued, we will proceed to give our decision on it, which will be binding on the parties. The learned vakil contends that the article applicable to this case is Art. 181, Lim. Act of 1908, Sch. 1, and that as the defendant made his application for restitution on 2nd June 1916, he can only obtain as mesne profits that amount which became due within three years from that date. In that case the defendant would be entitled only to mesne profits from 3rd June 1913 to 4th December 1913. Now Art. 181, which is admittedly the article applicable to the present proceeding, prescribes that the period of limitation for making an application for restitution shall be three years from the date when the right to apply accrued. Here the right to apply accrued on the date of the High Court judgment namely 4th June 1913, and the application for restitution, having been made on 2nd June 1916. was within three years of that date and therefore was witin time.

But Art. 181 does not in any way control the period during which the mesne profits shall be allowed to accumulate and whatever the number of years during which the plaintiffs were in possession the defendant was entitled to be compensated in respect of the whole of that period provided he applied within three years of the date on which the right to relief accrued. Here the defendant will be entitled to such mesne profits as the Subordinate Judge may find to be due for the period from 4th September 1910 to 4th December 1913. The result is that the case will go back to the learned Subordinate Judge in order that it may be decided according to law. The appeal is allowed with costs.

Atkinson, J.—I agree.

V.S./R.K. *Appeal allowed.*

(1917) 40 Mad. 780=38 I. C. 506.

A. I. R. 1918 Patna 398
Full Bench

CHAMIER, C. J., CHAPMAN, MULLICK, ROE AND JWALA PRASAD, JJ.

Janki Singh—Defendant—Appellant.

v.

Jagannath Das—Plaintiff — Respondent.

Letters Patent Appeal No. 8 of 1916, Decided on 24th July 1917, against judgment of Atkinson, Judge, in Second Appeal No. 1297 of 1915, D/- 7th February 1917.

(a) Bengal Tenancy Act (1885), Sch 3, Art. 1 —Act applies to proprietor's private land —Suit for ejectment of non-occupancy tenant of private land on expiry of lease is governed by Art. 1 (a).

Per *Curiam*; (*Chapman* and *Jwala Prasad JJ.*, dissenting). The Ben. Ten. Act applies to a proprietor's private land, and a suit by a landlord to eject a non-occupancy raiyat of his private land on the ground of the expiration of his lease is governed by Art. 1 (a), Sch. 3 of the Act. Case law discussed. [P 400 C 2]

Per *Chapman, J.*—Art. 1 (a), Sch. 3 does not apply to tenants in zirat land. [P 403 C 1]

Per *Jwala Prasad J.*—The Ben Ten. Act does not purport to be a complete and exhaustive Code even in respect of the law of landlord and tenant. A person holding raiyati land under a lease for a term of years is not a raiyat and will not be governed by the Ben. Ten. Act but by the general law. He does not become a non-occupancy raiyat after the expiry of the lease and is a trespasser only. Therefore Art. 1 (a), Sch. 3 does not apply to persons holding under a lease the proprietor's private lands. [P 411 C 2]

(b) Bengal Tenancy Act (1885), Sch. 3, Art. 1 (a) and S. 116—Zirat land—Operation of Art 1 (a) is not excluded by S. 116.

Per *Chamier*, *C. J.*—The operation of Art. (1) (a), Sch. 3 is not excluded by S. 116 of the Act in the case of zirat land [P 400 C 1]

(c) Bengal Tenancy Act (1885), S. 116—Act does not prevent creation of raiyati interest by Zemindar in his private land—

Per *Chamier*, *C. J.*—S. 116 prevents the application of Ch 6 to raiyats of a proprietor's private land in two cases only, namely where such land is held under a lease for a term of years and where it is held under a lease from year to year. Except in these two cases Ch. 6 of the Act was intended to apply to raiyats of a proprietor's private land, and such raiyats may be non-occupancy raiyats within the meaning of the Act. [P 400 C 2]

Per *Mullick*, *J.*—There is nothing in the Ben. Ten. Act to support the view that it is not open to a zemindar to create raiyati interests in his private lands. On the contrary S. 116 of the Act clearly contemplates the acquisition of occupancy rights in such land under certain circumstances, and if of occupancy rights then why not of non-occupancy rights also. [P 403 C 2]

(d) Bengal Tenancy Act (1885), Ss. 4 and 5—Ss. 4 and 5 must be applied with reasonable elasticity—Zirat land is not raiyati land.

Per *Chapman*, *J.*— The classification of tenants in S. 4 and 5 was not intended to be scientific or precise, and in order to render the Act intelligible these sections must be applied with a reasonable amount of elasticity. [P 402 C 1]

Zirat land is not raiyati land although the zemindar may lose his rights in it by treating it as if it was raiyati. But if he lets it for a term or from year to year, it remains his own and the tenant of it is not a raiyat. [P 402 C 2]

Per *Mullick*, *J.*—The words of the heading should not be allowed to affect the construction of a section. [P 405 C 1]

(e) Landlord and Tenant — Tenancy right —Tenant in zirat is not raiyat according to custom.

A Court is required to have regard to custom in determining whether a person is a raiyat or not. No custom is more certain than that a tenant in zirat is not a raiyat. [P 402 C 2]

(f) Interpretation of Statutes—Headings—Headings of sections may be used for determining intention of Act.

Per *Jwala Prasad*, *J.*—The headings prefixed to sections or sets of sections may be used for the purpose of interpreting the meaning, scope and intention of statutes. [P 408 C 2]

(g) Interpretation of Statutes—Preamble—Preamble is key to intent of Act.

The recital or preamble of an Act is a key for opening the meaning and intent of the Act. [P 408 C 2]

(h) Interpretation of Statutes —Intention of legislature—Probable intention should be looked at only when words are of doubtful meaning.

Per *Roe*, *J.*—It is only when words are of doubtful meaning that the Courts should look to probable intention. [P 407 C 1]

Ali Imam and *Siva Narayan Bose*—for Appellant.

Kulwant Sahay and *Mohammad Tahir*—for Respondent.

Chamier, C. J.—This appeal arises out of a suit brought by the respondent Jagannath Das for possession of 6 bighas 8 cottahs 18 dhurs of lands, which were held by the appellant and another under a lease for a term of nine years which expired on 31st, May 1912. It was found by the Court of first appeal and it is now admitted that the land in question is zirat, that is, the proprietor's private land within the meaning of Ch. 11, Ben. Ten. Act. The suit was brought on 5th December 1912, a little more than six months after the expiration of the term of the lease. The only question which we have to decide in this appeal is whether the suit is barred by limitation. The Munsif and Subordinate Judge held that the suit had been brought within time and their view was accepted by a learned Judge of this Court. Art. 1 (a), Sch. 3 to the Ben. Ten. Act, provides that a suit to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease shall be brought within six months from the expiration of the term. The appellant contends that the suit is governed by this provision and is therefore barred by limitation. The plaintiff-respondent contends that the appellant was not a non-occupancy raiyat at all within the meaning of the Ben. Ten. Act, and secondly, that even if he was a non-occupancy raiyat, Art 1 (a), Sch. 3 does not apply to the present case.

I am unable to hold that the appellant was not a non-occupancy raiyat of the land in question. He was admittedly a tenant within the meaning of S. 3, Sub-S. (3), Ben. Ten. Act. S. 4 of the Act provides that there shall be for the purposes of the Act certain classes of tenants, namely tenure-holders, raiyats and under-raiyats, and the following classes of raiyats, namely raiyats holding at fixed rates, occupancy raiyats and non-occupancy raiyats. The appellant was certainly not a raiyat holding at a fixed rate or an occupancy raiyat. Prima facie he was a non-occupancy raiyat. I am aware that it has been held in some cases that S. 4, Ben. Ten. Act, is not exhaustive, but it appears to me that there can be no doubt that the appellant was a non-occupancy raiyat. There are provisions in the Bengal Tenancy Act outside Ch. 6 which refer to "non-occupancy raiyats" and which appear to apply to raiyats of

zirat land. Ch. 6 deals exclusivly with non-occupancy raiyats. The framers of the Act evidently intended that Ch. 6 should be applied to raiyats holding zirat land, but as it was part of the policy of the Act to enable a landlord to prevent raiyats from acquiring rights against him in his zirat land, they provided by S. 116 of the Act that nothing in Ch. 6 shall apply to a proprietor's private land known in Bengal as khamar, nij, and nijjot and in Bihar as zirat, nij, sir, or kamat, where any such land is held under a lease for a term of years or under a lease from year to year. Previous to 1907 there was in Ch. 6 of the Act a S. 45, which provided that notice should be served upon a non-occupancy raiyat whom the landlord wished to eject and that a suit for ejectment should be instituted within six months after the expiry of the term for which the non-occupancy tenant held the land. S. 116, of the Act excluded the operation of S. 45 in the case of a proprietor's private land with the result that the period of limitation prescribed by S. 45 did not apply to a suit like the one now before us. By Bengal Act 1 of 1907, S. 45 was repealed and the second part of it that is to say, the part relating to limitation, was replaced by Art. 1 (a), Sch. 3. The result of the amendment appears to be that the operation of Art. 1 (a), Sch. 3 is not excluded by S. 116 in the case of zirat land. This view was taken by Mookerjee and Beachcroft, JJ., in *Ganpat Mahton* v. *Rishal Singh* (1) and by Newbould, J., in *Dwarkanath Chowdhury* v. *Tafazar Rahman Sarkar* (2). In the last mentioned case Newbould, J., said:

"By taking the provisions of S. 45 out of Ch. 6 and putting them into the schedule, the legislature, whether intentionally or not has compelled the landlord to bring a suit for ejectment of a tenant of khas khamar land on the termination of his lease within six months."

The decision of Newbould, J., was reversed on appeal under the Letters Patent by Woodroffe and Chaudhuri, JJ. The judgment of the Court was delivered by Woodroffe, J., who said:

"Reliance also is placed on the amendment of the heading under Ch. 11, Ben. Ten. Act. In that heading there has been inserted 'non-accrual of occupancy and non-occupancy rights.' I think we may look at this heading for the purpose of interpreting the sections mentioned above; and on this it is contended on behalf of the appellants that the defendants holding khamar lands are not included in the term 'non-occupancy raiyat' within the schedule. I think that this argument has force and I hold that the suit is accordingly not barred."

I take it that the learned Judge intended to hold that a raiyat of a proprietor's private land could not be a non-occupancy raiyat within the meaning of Ch. 6 or Sch. 3 of the Act. I am unable to accept this view, for S. 116 of the Act prevents the application of Ch. 6 to raiyats of a proprietor's private land in two cases only, namely, where such land is held under a lease for a term of years and where it is held under a lease from year to year. In my opinion it is reasonably clear that except in those two cases Ch. 6 of the Act was intended to apply to raiyats of a proprietor's private land, and that such raiyats may be non-occupancy raiyats within the meaning of the Act. It was contended however that even if a raiyat of a proprietor's private land is a non-occupancy raiyat, Art. 1 (a) does not apply to such a suit as the one now before us. It was urged that the only provision in the Act entitling a landlord to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease is contained in S. 44 of the Act; that Art. 1 (a) applies only to a suit brought under S. 44 (c); and that as the present suit cannot have been brought under S. 44 (c), Art. 1 (a) does not apply at all. It must be conceded that the present suit was not brought under S. 44 (c) of the Act, but no provision of this kind was required to enable a landlord to bring a suit to eject his tenant on the expiration of the term for which the tenant held his land. Those provisions of the Act which apply to non-occupancy tenants appear to apply to raiyats holding a proprietor's private land except where the application of those provisions is excluded by the Act, as for instance by S. 116.

The Bengal Tenancy Act applies to a proprietor's private land, and it appears to me that a suit by a landlord to eject a non-occupancy raiyat of a proprietor's private land on the ground of the expiration of the term of his lease is governed by Art. 1 (a), Sch. 3, Ben. Ten. Act. In this connexion I would refer to Art. 3, Sch. 3, which provides a special period of limitation for a suit to recover possession of land claimed by the plaintiff as a raiyat or under-raiyat. There is no spe-

(1) [1916] 33 I. C. 978.
(2) [1917] 44 Cal. 267=39 I. C. 64.

cial provision in the Act expressly authorizing a raiyat, who has been wrongly ejected by his landlord to bring a suit to recover possession of the land. But no such provision was required to enable a tenant to bring a suit to recover possession. It has never been suggested that Art. 3, Sch. 3, is a dead letter merely because there is no express provision in the Act authorizing a tenant to sue for recovery of possession of land from which he has been wrongly ejected by his landlord.

Similarly I am unable to hold that Art. 1 (a) does not apply to the present suit merely because there is no express provision in the Act authorising a landlord to sue to eject a non-occupancy raiyat of his private land on the expiration of the term of a lease. I think it is doubtful whether the legislature intended by the amendments made in 1907 to compel a landlord to sue for ejectment of a tenant of his private land within six months of the termination of the lease held by the tenant, and it may be that the result of holding that a raiyat of zirat land is or may be a non-occupancy raiyat will be that landlords will be placed in a less favourable position than the framers of the Act intended, but we must take the Act as we find it; and on a consideration of the Act as it now stands it appears to me that the only possible conclusion is that Art 1 (a), Sch. 3, applies to such a suit as the one now before us. I would therefore allow this appeal, set aside the decisions of the Courts below, and dismiss the suit with costs in all Courts.

Chapman, J.—Prior to the Rent Act of 1859 raiyats were divided into two classes, khudkasht and paikasht, corresponding roughly to the present classes of of occupancy and non-occupancy raiyats. Neither class included tenants of the zemindar's zirat or demesne: Phillips' Land Tenures, p. 289, and *Thakooranae Dossee* v. *Bisheshur Mookerjee* (3). The Act of 1852 did not abolish the names khudkasht and paikasht: see Bengal Act 8, of 1865. The Act of 1859 defined for the first time the manner in which a right of occupancy could be acquired and the vernacular terms gradually fell into disuse. The Ben. Ten. Act. 1885 with which we are now concerned provided the new term "non-occupancy raiyat" as a convenient symbol for the remainder of the raiyats for whom it was desired for the first time then to create rights. In my opinion a tenant in zirat is prima facie not a raiyat: (1) because he has never been so regarded; and (2) because he neither has rights of occupancy nor has been vested with the new non-occupancy rights. The classification of tenants in S. 4, Ben. Ten. Act, is "for the purpose of the Act." The purpose referred to is apparent from the headings of Chs. 3 to 7 which immediately follow.

The purpose for which the classification is made is to introduce the definition of the rights of the various classes of tenants and that purpose is exhausted when the definition of these rights is completed in Chs. 3 to 7. Ch. 11 is headed "Non-accrual of occupancy and non-occupancy rights," and deals therefore with the circumstances in which such rights shall not accrue. A consideration of the provisions of the Act would make it clear that no purpose of the Act is served by placing a temporary cultivator who is not to have the rights of a non-occupancy raiyat under any of the classes mentioned in S. 4. If however it is thought desirable to classify tenants in zirat, they may be called tenure-holders as was done by the Calcutta High Court in Second Appeal No. 2626 of 1904 in the case of a cultivator holding fakirana land and in *Bandhu Acharja* v. *Nathni Bahar Singh* (4) in the case of a cultivating tankidar. For "the purpose" of saying that non-occupancy rights shall not accrue in the case of a tenancy in zirat, S. 116 merely says that Ch. 6 shall not apply and some difficulty no doubt arises from the fact that there are one or two scattered provisions on the subject of non occupancy raiyats which are not in Ch. 6. I do now however attach importance to this in the present connection, having regard to the heading of Ch. 11, "non accrual of non-occupancy rights" which indicates "the purpose" of the chapter. The heading of Ch. 6 and the S. 1, S. 41, indicates that Ch. 6 was designed to be exhaustive on the subject of non-occupancy raiyats. I hold by reference to the heading of Ch. 11 that by saying in S. 116 that Ch. 6 does not apply, it was meant that the tenant should not be regarded as a non occupancy raiyat. A heading may be used with

(3) B. L. R. Sup. Vol. 202=3 W. R. Act 10 Rulings 29.

(4) [1908] 7 C. L. J. 460.

considerable freedom to extend the meaning of a section which follows it.

The significance of the words "non-accrual of non-occupancy rights" is enhanced when it is remembered that these words were added to the heading in Ch. 11 at the time that Art 1 (a) was added to the Schedule. The object of the simultaneous change in the heading must have been to make it clear that the referance to non-occupancy raiyats in Art. 1 (a) was not meant to include the tenants dealt with in Ch. 11. It should be noted in this connexion that the classification in Ss. 4 and 5 was not intended to be scientific or precise.

For instance, the classification does not include the case of a cosharer holding land subject to payment to his co-proprietor under S. 22. There are several other kinds of tenants not easily placed under any of the classes. If the classification be treated as a series of precise definitions, the Act will be misinterpreted. As an exanple I may refer to the case of *Bhut Nath Naskar* v. *Surendra Nath Dutt* [*Bhutnath Naskar* v. *Manmotho Nath Mitra*] (5), in which by the application of precision the result was obtained by one of the Judges that a raiyati at fixed rates is not a protected interest, a conclusion which I am entirely unable to accept. It is obvious that in order to render the Act intelligible Ss. 4 and 5 must be applied with a reasonable amount of elasticity and this is apparent from the use of the word "primarily" and the reference to custom in S. 5. To apply Art. 1 (a) to the tenants referred to in S. 116 would clearly tend to defeat the obvious purpose of Ch. 11, which is to afford some substantial protection to the proprietors of zirat. That this purpose will be defeated will be evident if the result of applying Art. 1 (a) to S. 116 is considered. Under the law as it stood before the amendment of 1907 which introduced Art. 1 (a), the main protection conferred by S. 115 in respect of zirat was that on the expiry of an oral or written lease the tenant in zirat could ipso facto be ejected at any time up to twelve years after the expiry of the lease. If the effect of Art. 1 (a) is to reduce the limitation from twelve years to six months, there remains little, if any, special protection for the proprietor of zirat. The only distinctions remaining between a tenant in zirat and a tenant in land not zirat will be the following: (1) to enable the proprietor of zirat to eject on the expiry of a lease—the lease need not be written or registered; (2) an agreement to enhance will not require registration; but, on the other hand, (3) a tenant in zirat will not be liable to ejectment for failure to pay rent unless this remedy is provided for in his lease; and (4) will not be liable to ejectment for refusal to agree to enhancement. I cannot believe that the elaborate provisions of Ch. 11 would have been framed if the only privilege it was intended to confer on the proprietor of zirat was the use of unregistered documents.

The view I have taken is also consonant with what has always been held in regard to zirat [Regn. 8 of 1793]. True zirat belongs to the zemindar [S. 6, Act 10 of 1859] as distinguished from the rest of his estate, his rights in which are subject to the rights of his raiyats [see Regn. 7 of 1799, S. 15, and *Thakooranae Dosse* v. *Bisheshur Mookherjee* (3)]. Zirat land is not raiyat land although the zamindar may lose his rights in it by treating it as if it was raiyati. But if he lets it for a term or from year to year, it remains his own and the tenant of it is not a raiyat. The custom under which a tenant of zirat is not a raiyat is a custom recognised in the Act of 1859. It was again recognised in the Act of 1885 by the expedient of placing all raiyati rights in two chapters and then saying that those chapters shall not apply to zirat. It was recognised in the statement of the objects and reasons of the Act of 1885 and in the account of that Act given in the Bengal Administration Report, 1892-93 [see p. 93]. It is recognised in Mr. Finucane's Tenancy Act published in 1904. The custom is recognised also by a series of decisions both of the Sardar Diwani Adalat and of the High Court, a series which includes *The Great Rent Case of* 1865 [*Thakooranae Dossee* v. *Bisheshur Mookerjee* (3)] and continues till the decision of the present question by Woodroffe and Chaudhuri, JJ., in 1916 [*Dwarka nath Chowdhury* v. *Tafazar Rahaman Sarkar* (2)]. The series of precedents is unbroken save for the obiter dictum of Mookerjee, J., in 1914 [*Ganpat Mahton* v. *Rishal Singh* (1)], a dictum which it

(5) [1909] 2 I. C. 675.

is impossible to reconcile with his considered judgment in *Jonab Ali* v. *Rakibuddin Mallick* (6) in 1905, where he held that a tenant in zirat is neither an occupancy nor a non occupancy raiyat. Again it is impossible to apply Art. 1 (a) as it stands to tenants in zirat in a satisfactory manner. There is no difficulty in applying the article to a non-occupancy raiyat who enjoys the rights provided for in Ch. 6. Six months after the expiry of his registered lease, though he cannot be ejected upon the ground of the expiry of the lease, he can be ejected upon other grounds provided for in S. 44, for instance, upon the ground that he has failed to pay arrears of rent. The application of Art. 1 (a) in the case of a tenant of zirat would be by no means so simple. The following views are possible as to his status after the expiry of six months from the end of his lease if Art. 1 (a) applies to him:

First, there is the view that Ch. 6, then becomes applicable to him. I am unable to concur with this view [*Bhugwan Bhagut* v. *Jug Mohun Roy* (7)]. There is in the alternative the view that he then becomes entirely immune from ejectment, a view which would defeat the express provision in S. 116 that he shall not have a right of occupancy. There is another possible view that he is liable to ejectment upon any grounds provided for in his lease, and there is a fourth possible view that he is a tenant from year to year upon the terms of his lease and that the right to eject continues to recur at the end of every year, and to expire at the end of six months from the end of every year. I am confident that if the legislature had intended Art. 1 (a) to apply to a tenant in zirat they would not have left the matter in this nebulous condition. I would therefore hold that Art. 1 (a) does not apply to the present case and dismiss the appeal. This judgment is merely an amplification of the judgment of Woodroffe, J., in *Dwarkanath Chowdhury* v. *Tafazar Rahaman Sarkar* (2) with which Chaudhury, J., concurred.

Mullick, J.—I agree with the view taken by the learned Chief Justice. I think the first point for consideration is whether the Bengal Tenancy Act, applies at all to the proprietor's private lands. I am quite satisfied that the answer to this is in the affirmative. Under the permanent settlement regulation [Regn. 8, of 1793, Ss. 37 and 39] no land was recognized as a proprietor's private land which was not such on 12th August 1765, the date of the assumption of the diwani, and there is no law recognizing the creation of such lands since that date. Although the distinction between these lands and the raiyati lands of the country was at the time of the settlement a well-established one and although there may be some doubt whether these lands as well as chakran lands [S. 41 of the Regulation] were taken into account for assessing the revenue of the zamindari, yet it is quite clear that both these classes of land were annexed to the malguzari lands and were made responsible for the revenue [see S. 37 to 41.] What reason is there for holding that it is not open to a zamindar to create raiyati interest in his private lands? There is nothing in Act 8 of 1885 to support such a view, on the contrary S. 116 of the Act clearly contemplates the acquisition of occupancy rights under certain circumstances and if of occupancy rights, then why not of non-occupancy rights also?

It is urged that S. 4, Ben. Ten. Act, is not exhaustive and that a raiyat of zirat lands belongs to a class by himself, who is not covered by the classification into raiyats at fixed rates, occupancy-raiyats and non-occupancy-raiyats. Now, although there are authorities which say that the definition of a raiyat is not exhaustive, there is to my knowledge no authority which says that the classification is not exhaustive All that the authorities say is that S. 4 rather describes than defines a raiyat and that it is not exhaustive only to the extent that a cultivator who may prima facie answer the qualifications of a raiyat may really turn out to be a tenure-holder. The scheme of the Act is to determine the relations between cultivator and landlord in every inch of agricultural land, and for that purpose it divides the former into classes set out in S. 4 and declines to recognize any rights or liabilities in relation to the landlord except those enjoyed by or imposed upon those classes. For this reason the Act omits settled raiyats from the classification although by S. 20 it defines such a raiyat.

(6) [1905] 1 C L. J. 303.
(7) [1873] 20 W. R. 308.

The Act intends that as a settled raiyat must be either an occupancy or non-occupancy raiyat, or a raiyat at fixed rates, it is unnecessary to make a separate class for him. A cultivator may be a settled raiyat on zirat lands, but as such he has no rights.

Reliance has been plaeed upon *Sheo Nandan Roy* v. *Ajodh Roy* (8) and on *Jonab Ali* v. *Rakibuddin Mallik* (6) for the purpose of showing that there can be no occupancy or non-occupancy raiyats in zirat or chakran lands. Now although at p. 542 of the first of these cases there is an observation to the effect that occupancy or non-occupancy rights cannot be acquired in zirat lands, that expression of opinion was clearly obiter and not necessary to the decision of the case. Indeed as an absolute proposition of law it is incorrect. The point which their Lordships were concerned to decide was that no tenant brought upon the land by a thikadar holding under the proprietor under a lease for a term of years can acquire rights of occupancy, for the reason that the thikadar could not create any interest greater than his own ; and in coming to this conclusion their Lcrdships declined to extend the doctrine of *Binad Lal Pakrashi* v. *Kalu Pramanik* (9) to zirat lands and held that a tenant inducted by such a thikadar could not claim raiyati rights in zirat lands, the primary character of which was that the proprietor should be in khas possession. In the other case too a like view was expressed by Harington, Bodilly and Mookerjee, JJ., in regard to chowkidari chakran lands. It is obvious that the learned Judges never intended to lay down the rule that non-occupancy rights cannot be acquired in zirat lands ; for in *Ganpat Mahton* v. *Rishal Singh* (1) one of these same learned Judges, namely, Mookerjea, J., expressed the clear opinion that a non-occupancy raiyati interest could be acquired in zirat lands and was subject to the operation of Art. 1 (a), Sch. 3, Ben. Ten. Act.

There is therefore in my opinion no ground for the contention that the nature of the land will bar the operation of S. 4, Ben. Ten. Act. This view is also supported by the history of the legislation on the subject. The classification of raiyats into raiyats at fixed rates, occupancy raiyats and non-occupancy raiyats was made for the first time by Act 10 of 1859, but S. 6 of that Act provided that the rule that a raiyat who has cultivated land for a period of 12 years has a right of occupancy in the land so long as he pays the rent payable on account of the same does not apply to khamar, nij jot or *sir* lands belonging to the proprietor when let by him on a lease for a term of years or from year to year. The Act nowhere stated that a raiyat cultivating a proprietor's private land was not a non-occupancy raiyat, and in this respect the Amending Act of 1869 [Act 8 (B. C.) of 1869] does not appear to have made any substantial alteration. Such a raiyat was apparently liable to ejectment any time within 12 years on expiry of his lease. He was also liable to have his rent enhanced upon service of notice. So in *Janoo Mundur* v. *Brijo Singh* (10) it was held that a landlord, seeking to obtain an enhanced rate of rent on account of nij-jot land held by a tenant without a right of occupancy had no right to obtain a judicial enhancement upon the footing of a notice under Act 8 (B. C.) of 1869. His right according to S. 8 was to make his own terms with his tenant, or to turn him out of occupation.

Considerable diversity of opinion however began to arise on the point whether the raiyat was entitled to ask for an adjudication of fair and equitable rent, and one of the purposes of enacting Act 8 of 1885 was to put the status of non-occupancy raiyats on a more satisfactory basis in this and other matters. To this end the two principal changes introduced were (1) that a non-occupancy raiyat could be ejected at the will of his landlord only if he was admitted into occupation under a registered lease and then only after service of six months' notice to quit, and upon suit being brought within six months after the expiration of the lease and (2) that a non occupancy raiyat who objected to pay an enhanced rent could have his rent fixed by the Court ; if he refused to pay he could be ejected. The position of raiyats in zirat lands was not materially altered, for we find that the provisions of the old Act were practically reproduced in S 116, which was enacted in the following terms :

"Nothing in Ch. 5 shall confer a right of occupancy in, and nothing in Ch. 6 shall apply to, a

(8) [1899] 26 Cal. 546.
(9) [1893] 20 Cal. 708 (F.B.).

(10) [1874] 22 W. R. 548.

proprietor's private lands known in Bengal as khamar, *nij* or *nij-jot* and in Bihar as zirat, nij-*sir*, or kamat where any such land is held under a lease for a term of years or under a lease from year to year."

And it is to be observed that the beneficial provisions of Ch. 6, which ameliorated the position of non-occupancy raiyats, were excluded from operating in zirat lands held under a lease for a term of years or from year to year. In 1907 the section was amended and the heading "record of proprietor's private lands" was changed into

"non-accrual of occupancy and non-occupancy rights and record of proprietor's private lands."

In the body of the section the area saved from the operation of Chs. 5 and 6 was widened by the inclusion of lands acquired under the Land Acquisition Act, and lands belonging to the Government within a cantonment. At the same time S. 45, which was one of the sections in Ch. 6, was wholly repealed. That section provided for the service of notice and six months' limitation. The result of its repeal was that in suits for ejectment of non-occupancy raiyats on expiry of their leases service of notice was done away with on the ground that it was unnecessary and difficult to prove and the provision as to limitation was put into Sch. 3, Art. 1 (a). The question is, what is the effect of the repeal on the words :

"nothing in Ch. 6 shall apply to a proprietor's private lands ?"

In order to construe the words it is certainly not necessary to read them as meaning no raiyats shall acquire non-occupancy rights in proprietors' private lands held for a term of years. The amendment of the heading does to some extent assist the contention of the respondent before us, but in the absence of any authority I do not think the words of the heading should be allowed to affect the construction of the section. In my opinion the body of the section means that the rights and liabilities of non-occupancy raiyats in the matter of paying the rent agreed between them and their landlord (S. 42), enhancement by registered agreement (S. 43), ejectment (S. 44), conditions of ejectment on the ground of refusal to agree to enhancement (S. 46) shall not be enforced in the case of raiyats of private lands. But there are other rights and liabilities enjoyed by and imposed upon non-occupancy raiyats by other parts of the Act and there is nothing in S. 116 which excludes the operation of those parts of the Act from the holdings of non-occupancy raiyats in zirat lands held on a lease for a term of years or from year to year. It is quite clear that S. 116 itself contemplates that in zirat lands both occupancy and non-occupancy rights can be acquired under certain circumstances, and if it was the intention of the framers of the Act that in zirat lands held for a term of years or from year to year the cultivator should not acquire the status of non-occupancy raiyats they have signally failed to carry out that intention. If again their intention was to recognize the non-occupancy status of such a cultivator and to leave him in the same position as that in which he was before 1885 then, too, has the intention failed. Regarded from whatever point of view the result can scarcely be called satisfactory, and this class of cultivator, while excluded from the operation of Ch. 6, remains within the purview of the remainder of the Act and therefore also of Art. 1 (a), Sch. 3. The position appears to be this. Now, as before 1885, the landlord can make successive enhancements but the tenant can no longer take advantage of the protection offered by S. 13, Act 10 of 1859 or S. 14, Act 8 (B. C.) of 1869: on the tenant's failure to pay an arrear of rent he can only be ejected after decree now, though it was otherwise before 1885, and a suit for the ejectment of the tenant on expiry of his lease must now be brought within six months and not 12 years as before.

The learned counsel for the respondent has somewhat ingeniously contended that Art. 1-(a) is a necessary and inseparable part of S. 44, and if that section is excluded the Article must be also excluded. In my opinion this contention is not well-founded. Art 1-(a) is applicable to every suit in which it is sought to eject a non-occupancy raiyat. It is not limited to suits under S. 44 which are suits brought under the provisions of the Bengal Tenancy Act. A non-occupancy raiyat whose lease has expired is liable to ejectment on the general law as one who has become a trespasser. Finally a reference to S. 180 of the Act which deals with utbandi raiyats and raiyats of biara lands does, I think, assist us in elucidating the effect in S. 116 of the words "noth-

ing in Chap. 6 shall apply to a proprietor's private lands." S. 180, Cl. (2), runs thus:

"Chapter 6 shall not apply to raiyats holding land under the custom of utbandi in respect of land held by them under the custom."

Although the section does not in terms say that the raiyat in this case is a non-occupancy raiyat the reference to Chap. 6 implies that he is such a raiyat and the farmers of the section therefore considered it necessary to provide that his rent is liable to be fixed by agreement with his landlord without the protections of Chap. 6. If in respect of such a raiyat Art. 1-(a) applies, and I see no reason why it should not, the Article must also apply to the case of the appellant before us. Whether the Legislature in repealing S. 45 and removing the provision as to limitation to the Schedule intended to cut down the period of limitation and to apply it to a larger class of tenants it is not our province to speculate. The Schedule was introduced for the first time in 1885, before which the special provisions as to limitation were few and for the most part contained in S. 30, Act 10 of 1859 and S. 27, Act 8 (B. C.) of 1869. We must interpret the law as we find it, and if the result of the amendment to Act 8 of 1885 is to place the landlord in a worse position than was intended, then the only remedy is to amend the law. I am of opinion therefore that the appeal should be allowed.

Roe, J.—Any one having no previous knowledge of the subject would say upon reading S. 4 that for the purposes of the Bengal Tonancy Act there are three classes of raiyats: (a) raiyats holding either at a rent fixed in perpetuity; (b) raiyats having a right of occupancy in the land held by them; (c) raiyats not having such a right of occupancy, and would note that these three classes are for the saving of ink and paper called thereafter raiyats holding at fixed rates, occupancy raiyats, and non-occupancy raiyats. On reading S 5 he would note that any one who (i) cultivates with his own ploughs, etc. and (ii) holds directly under a proprietor is a raiyat. He would further note on reading Ch. 6 that non-occupancy raiyats have certain privileges, and on coming to Ch. 11 would note that those privileges do not prevail over a definite contract made for the cultivation of proprietors' private lands for a term of years, or a definite contract renewed from year to year. If asked what might be the position of a raiyat holding under such a definite contract, he would reply tha the was a non-occupancy raiyat not protected by Ch. 6. On reading Sch. 3 it would be clear to him that for a suit to evict a non-occupancy raiyat who had, by holding over without permission become a trespasser the limitation was six months from the date of the trespass. On his attention being drawn to the fact that S. 45 had been repealed and Sch. 3, Cl. 1 (a), substituted for it, he would say that this had been deliberately done with the purpose of removing the limitation clause from Ch. 6. But for the high reputation of those learned Judges who have taken an opposite view I should have felt that there was no more to be said. Their view is, I venture to think, born of a misconception of the legislature' jealousy of encroachment upon private lands. More than twenty-five years' experience of the working of S. 120 in the Settlement, Sub-Divisional and Civil Courts has taught me that when once a proprietor has let out what he claims to be private lands it is almost impossible for him to prove that they are private lands.

The old law (S. 6, Act 10 of 1859) gave a loophole to the proprietor to deny occupancy rights to raiyats holding over after the expiry of a lease for a term of years. It ran:

"But this rule does not apply to *sir* land let on lease for a term or year by year."

To prevent the argument that a holding over was equivalent to a letting year by year the Act of 1885 deliberately re-cast the phrase and S. 116 runs:

"When any such land is held under a lease for a term of years or under a lease from year to year."

Section 8 of Act of 1859 ran:

"Raiyats not having rights of occupancy are entitled to pattahs only at such rates as may be agreed on between them and the persons to whom the rent is payable."

That was the position of non-occupancy raiyats until the Act of 1885 gave to all, save those inducted under a definite contract to cultivation of private lands, the protection of Ch. 6. Even for those cultivating private lands S. 8 was further cut down and a proviso added

that not only the rates but also the term must be a matter of agreement. It cannot be suggested that in these amendments of the law there was any desire to keep sacred lands claimed as zirat, *nij*, *sir*, or kamat. On the contrary, it was deliberately made as difficult as possible to prove that the lands were zirat, and deliberately enacted that a tenant taking lands proved to be zirat should have a clear understanding with the proprietor of the term for which he would be permitted to cultivate them. Believing this to have been the temper of the Legislative Council in 1885 I can see no reason for holding that the council in 1907 would, if it had intended to nullify in favour of the proprietor the taking of the limitation clause out of Ch. 6 into a schedule, have been content to make this intention apparent by such a clumsy expedient as the changing of the heading of Ch. 6. Anyone not on the look-out for veiled intentions would imagine that the change was merely an amplification made because the old heading referred only to Ss. 117—120. The new heading refers also to S. 116 and is now complete.

It is only when words are of doubtful meaning that the Courts should look to probable intention. Granting that the arguments of Woodroffe, J., give reason to believe that the Act is open to an interpretation different to that apparent on its surface, I am of opinion that the most probable intention in placing the limitation clause in the schedule was to limit the exercise of the proprietor's right to evict a raiyat cultivating private lands to six months. It is a fallacy to suppose that there is a hardship in reducing the proprietor's limitation from twelve years to six months. The moment the proprietor accepts rent without taking a new agreement, the raiyat is holding over without a lease and is protected by Ch. 6. No proprietor could be so foolish as to leave his private lands in the possession of a stranger for twelve years without accepting rent. Even the most exorbitant decree for mesne profits for three years would not balance the loss of twelve years' rent. No sane proprietor would fail to sue within three years. In the interest of the raiyat the proprietor should not be allowed to tempt him to continue cultivation without a title and then not only take from him by a claim for mesne profits the whole produce of his labour, but also ruin him by the costs of the inevitable litigation. If a proprietor has any love for his private lands he should be able to make up his mind in six months as to what he will do with them. If he is uncertain of his love for them it is open to him to enter into a new agreement with regard to them. If he cares so little about them that he cannot be troubled to make definite arrangements for their cultivation he deserves that they cease to be his private lands.

In considering the intention of the legislature we have to consider not the intention of the Select Committee but those of the council. In the Bill of 1907, as laid before the council, there was a clause taking the procedure for commutation of rent out of Ch. 5 into Ch. 8. The intention was clearly said in the statement of objects and reasons to be:

"Under S. 40 only occupancy-raiyats are allowed to apply for commutation. It seems reasonable that the same privilege should be conferred on all classes of raiyats."

This proposal was vetoed by the council. Surely the council's attention having been drawn to the proposal to repeal S. 40, we must presume that it was also drawn to the effect of repealing S. 45. I am of opinion that the amendment made by the Act of 1907 indicates a general intention to prevent suits for mesne profits against raiyats not having a right of occupancy holding over after the expiry of the term of their agreement; and, having regard to the conditions of agriculture in this province, feel strongly that this intention has been well expressed by the limitation of a suit in ejectment to a period of six months from the expiry of the agreement. I can find nothing in the Act to indicate that proprietor's private lands are to be protected from this general intention. I would decree this appeal and dismiss the plaintiff's suit with costs in all Courts.

Jwala Prasad, J.—This appeal arises out of a suit in ejectment. The Courts below have decreed the plaintiff's suit, holding that the lands were the kamat or zirat lands of the plaintiff landlord and were settled with the defendants for a term of nine years under a registered kabuliyat dated 6th May 1903, and that the defendants have no right to remain in possession of the lands after the ex-

piry of the term of the lease. The term of the lease expired on 31st May 1912. The suit was instituted on 5th December 1912, that is, more than six months by four days after the expiry of the term of the lease. The Courts below have held that six months' limitation prescribed by Art. 1 (a), Sch. 3, Ben. Ten. Act, does not apply to the case, as the lands held by the defendants are the proprietors' private lands described as kamat or zirat in S. 120 of the Act. On appeal to this Ccurt by defendant 1 Atkinson, J. (see *Janki Singh* v. *Jagan Nath Das* (11) has confirmed the view of the Courts below, holding that

"defendant 1 in point of law could not acquire in the zirat lands of the plaintiff the non-occupancy right."

The defendants have preferred a further appeal to this Court under the Letters Patent and repeat their contention that the suit is barred by Art. 1 (a), Sch. 3. The question raised is of the utmost importance and is by no means free from doubt or difficulty. Art. 1 (a), Sch. 3, requires that a suit "to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease" should be brought within six months from the expiration of the term. This article was for the first time introduced in the Schedule by the Bengal Tenancy Amendment Act [I. (B. C.) of 1907] and has taken the place of S. 45 of the Act, repealed by the Amending Act. S. 45 of the Act ran as follows:

"A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non occupancy raiyat unless notice to quit has been served on the raiyat not less than six months before the expiration of the term and shall not be instituted after six months from the expiration of the term."

The provisions in S. 45 were two-fold: (1) that a notice shall have been served not less than six months before the expiration of the term; and (2) that the suit for ejectment should be brought within six months from the expiration of the term. The Amending Act repealed the provision regarding the notice to quit but retained the provision regarding the limitation for a suit for ejectment of non-occupancy raiyats on the ground of the expiration of the term of the lease. By the amendment in 1907 S. 45 was reduced to a simple clause providing limitation for a suit for ejectment and was therefore rightly transferred to and included in Sch. 3 as Art. 1 (a) of the Act, read with S. 184 of the Act, which deals specially with limitation for suits.

Section 45 occurred prior to its repeal in 1907 in Ch. 6 headed "non occupancy raiyats." S. 116 excludes the application of Ch. 6 to the proprietor's private lands if any such land is held under a lease for a term of years or under a lease from year to year. So there was no question before 1907 that the limitation of six months then provided by S. 45 did not apply to a suit for recovery of possession of zirat lands held under a lease for a term of years. The question is whether the aforesaid Cl. 1 (a) in Sch. 3 would apply to kamat of zirat lauds held under a lease and the period of 12 years limitation, which prior to 1907 applied to a suit for recovery of possession of zirat land, would now be curtailed to six months applicable to suits for ejectment of non-occupancy raiyats. There is a conflict in the decisions of the Calcutta High Court passed since the aforesaid amendment of 1907: vide *Ganpat Mahton* v. *Rishal Singh* (1), Mookerjee and Beachcroft, JJ.; *Dwarkanath Chowdhury* v. *Tafazar Rahaman Sarkar* (2), Woodroffe and Choudhuri, JJ. Woodroffe, J., who delivered the judgment in the last case referred to the insertion in 1907 of the words "non accrual of occupancy and non-cccupancy rights" in the heading of Ch. 11 as one of the grounds for the purpose of holding that no rights of occupancy or non-occupancy can accrue in kamat or zirat lands when let out for a term of years.

Formerly the heading of Ch. 11 was "Record of Proprietors' Private Lands." The words "non-accrual of occupancy and non-occupancy rights" were added in the heading at the same time that the limitation clause in S. 45 was transferred to Sch. 3. It has been said that the heading of a chapter cannot control an enactment in a statute. The authorities quoted in Maxwell's Interpretation of Statutes [82 (1912]) will show that the headings prefixed to sections or sets of sections have been frequently used for the purpose of interpreting the meaning scone and intention of statutes. Lord Coke (1. Inst. 79) laid down the well-known cannon that the recital or preamble of an Act of Parliament is a key for opening the meaning and intent of the Act. This canon has

(11) [1917] 39 I. C. 389.

been applied in *Rex* v. *Bigg* (12), *Hughes* v. *Chester and Holyhead Ry. Co.* (13), *Rayson* v. *South London Tramways Company* (14), *West* v. *Gwynne* (15) and *Union Steamship of New Zealand* v. *Mellourne Harbour Commissioners* (16). Baron Channel in *Easternn Counties etc.*, *Companies* v. *Marriage* (17) observed as follows:

"As might have been expected, the enactment contained in the statute embrace various objecte or purposes. In different parts of the Act there are to be found classes of enactments applicable to some special object. Such enactments are in many instances preceded by a heading, special no doubt in one sense, as addressed to the object or purpose, but where not otherwise provided for general in its application to enactments passed to accomplish the object. These. . . . , headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain these enactments. but as affording as it appears to me, a better key to the constructions of the sections which follow than might be afforded by a mere preamble."

In the present case where there is an intentional alteration of the heading it is impossible to ignore it for the purpose of interpreting the meaning, intention and scope of the legislature in inserting Art. 1 (a), Sch. 3, and in adding at the same time the heading to Ch. 11 of the Act. If there was any purpose in the alteration in the heading, it was absolutely to bar the accrual of occupancy or non-occupancy rights in the zirat or khudkasht lands, provided such lands are let out by the proprietor under a lease for a term of years or under a lease from year to year. The alteration in the heading does not appear to have been considered in the case of *Ganpat Mahton* v. *Rishal Singh* (1) referred to above. To my mind the heading was intended to safeguard against possible misapprehension in the application of Art. 1 (a) of the schedule, which did not apply prior to the amendment by expressly adding the words to the heading of Ch. 11, "non-accrual of occupancy and non-occupancy rights." The intention of the legislature can well be gathered by the express words in the heading of Ch. 11 as being to exclude kamat or zirat lands from the operation of Art. 1 (a) of the schedule. I am therefore of opinion that the limitation of 12 years is not curtailad by Art. 1 (a) prescribing six months limitation and that the article has no application to the present case. The condition prescribed by S. 116 of the Act, namely, the letting out of the zirat lands for a term of years is fulfilled in this case according to the findings of the Court below, so that the defendants were not non-occupancy raiyats under Art. 1 (a) of the Schedule. but were mere trespassers upon the land after the expiry of the term of the lease.

Even irrespective of the heading the result to my mind is the same, namely, that a person holding the proprietors' private land such as kamat or zirat would not be a non-occupancy raiyat within the meaning of Art. 1 (a) of the Schedule provided the land is let under a lease for a term of years, or under a lease from year to year. In order to arrive at this result one has to look at the history of the legislation on the subject. As pointed out by my learned brother Chapman, J., prior to the Rent Act of 1859 there was no such classification of raiyats as occupancy and non-occupancy and the raiyats were divided into two classss, namely "resident cultivators" and 'non-resident cultivators." The regulations relating to the Decennial and Permanent Settlements scrupulously protected the right of landlords or zamindars with regard to the lands in their khas possession. In Act 10 of 1859 and in Act 8 of 1869 the manner in which a right of occupancy could be acquired was for the first time defined. S. 6 of the Act ran as follows:

"Every raiyat who shall have cultivated or held land for a period of 12 years shall have a right of occupancy in land so cultivated or held by him whether it be held under a patta or not, so long as he pays the rent payable on account of the same: but this ruling does not apply to kamat, nij-note, or sir land belonging to the proprietor of the estate or tenure and let by him on a lease for a term or year by year."

It was pointed out in *Bhugwan Bhagut* v. *Jug Mohun Roy* (7)

"that the express purpose of the legislature in the section was to prevent the zamindar's rights in this particular class of land from being invaded or restricted by the growth of the occupancy rights on the part of a raiyat to whom he had let it for periods equal to or exceeding 12 years; Phear and Morris, JJ."

The same Judges in *Janoo Mundur* v. *Brijo Singh* (10) held that a landlord has

(12) [1717] 24 E. R. 1127.
(13) [1861] 31 L. J. Ch. 97.
(14) [1893] 2 Q. B. 304=62 L. J. Q. B. 593.
(15) [1911] 2 Ch. 1=80 L. J. Ch. 578.
(16) [1884] 53 L. J. P. C. 59=9 A. C. 365.
(17) [1860] 11 E. R. 639.

a right to make his own terms of the tenants of nij-jote lands as to enhancement of the rent and that he has no right to have a judicial assessment at an enhanced rate and that he can turn out the tenant of the occupation if the tenant does not agree to the rent proposed by him. They further held that a tenant who holds hover after the expiry of the leas does so on the terms on which the land was let to him. Similar was the view taken recently by Stephen and Doss, JJ., in *Syed Khalilur Rahman* v. *Rupan Mahton* (18), where they held that the tenant-defendant had no defence to the landlords' action for recovery of lands after the expiration of the lease in 1896, as he was a mere trespasser on the lands which were kamat. In short the view taken in that case appears to be that a tenant of kamat land does not acquire a right of occupancy by holding it over after the expiry of the lease. From the above it is clear that the kamat or zirat lands of the landlord were protected under the Acts of 1859 and 1869 from the accrual of occupancy rights by tenants holding for a term. Non-occupancy rights were not dealt with or defined in those Acts. In 1885 for the first time non-occupancy rights were introduced. Tenants under the Act of 1885 are classified under the following heads "for the purposes of the Act," namely: (1) tenure-holders, (2) raiyats, (3) under raiyats; and raiyats again have been divided into three classes: (a) raiyats holding at fixed rates, (b) occupancy raiyats, that is to say, raiyats having a right of occupancy in the land held by them, and (c), non-occupancy raiyats, that is to say, raiyats not having such a right of occupancy.

The classification of tenants in S. 4 is not exhaustive. As an instance may be mentioned the class of tenants known as 'settled raiyats' under S. 20. It was pointed out in *Kuldip Singh* v. *Chhatur Singh Roy* (19) that every occupancy raiyat, is not necessarily a settled raiyat, though every settled raiyat is a raiyat of occupancy as the status of a settled raiyat cannot be transferred and can only be acquired by holding some land as a raiyat in the village for twelve years, whereas an occupancy right may be acquired by purchasing a transferable occupancy holding. Ch. 3 deals with tenure-holders; Ch. 4 deals with raiyats at fixed rates; Ch. 5 with occupancy raiyats; and Ch. 6 with non-occupancy raiyats. Thus the rights and incidents of each class of raiyats have been dealt with in a separate chapter: those of non-occupancy in Ch. 6 S. 116 of the Act is intended to exclude the proprietor's private lands from the operations of Ch. 5 and 6 provided the proprietor has taken the precaution indicated by the concluding words of the Section i. e, when any such land is held underlease for a term of years, or under a lease from year to year. The words in S.116, namely, "nothing in Ch. 6 shall apply to the prcprietor's land" can bear one and only one interpretation, that no right of non-occupancy can arise in lands known as zirat or kamat where such land is let out by the proprietor for a term of years; for in excluding such lands from the operation of Ch. 6 it was intended that the rights and incidents of non-occupancy raiyats as defined or described in Ch. 6 shall not apply to such lands. There does not appear to be any other interpretation.

While introducing the "occupancy rights" in the Act of 1885 the legislature intended that these rights shall not accrue with respect to the proprietor's private lands in the same way as the occupancy rights did not accrue in respect of these lands prior to 1885. This protection is expressed in S. 116 of the Act. The history of land tenures in the Province clearly shows that the lands in the khas possession of the zemindars or proprietors were protected by the legislature from any rights of occupancy and non-occupancy accruing thereon under certain conditions as set forth in S. 116. The decennial and the permanent settlement recognized the distinction between the proprietor's khas lands and the lands which may be said to be the raiyati stock. Khamar lands denote proprietor's private lands as distinguished from those let out to tenants. The khamar lands have always been recognized as being in a special and exclusive sense a private property of the zamindar as distinguished from all the rest, cultivated or cultivable, which may be called raiyati land, and in respect of which the zamindar's rights were merely to receive a share of the produce or equivalent in money: Finucane and Ameer Ali, Bengal Tenancy Act, Edn. 2, pp. 533-34. It was to protect the latter class of lands

(18) [1908] 12 C. W. N. 436.
(19) [1906] 3 C. L. J. 235.

that in S. 8, Regn. 1 of 1793 (Permanent Settlement) it was declared as follows:

"The Governor-General in Council will, whenever he may deem it proper, enact such regulations as he may think necessary for the protection and welfare of the dependent taluqdars, raiyats, and other cultivators of the soil".

In S. 39, Decennial Settlement Regn. 8 of 1793 the khamar lands were understood to signify lands appropriated to the subsistence of zamindars and their families. The distinction between such lands and the malguzari or raiyati lands was recognized and the former was annexed to and assimilated with the latter for the purposes of the security of the revenue and for such security only *Jonab Ali* v. *Rakibuddin* (6). The raiyati lands in the regulation were the lands cultivated by residents of village known as khudkasht raiyats and those cultivated by the non-residents known as paikasht tenants. The enactments passed since the Permanent Settlement are all in accordance with the declaration in S. 8, Regn. 1 of 1793, referred to above, and were directed to the protection of the raiyats with regard to the raiyati lands as distinguished from the khamar lands Rampini, Bengal Tenancy Act, p. 12, Introduction. The expression in S. 116 has also been held to mean as barring the acquisition of non occupancy, rights in proprietors' private lands: Vide *Sheo Nandan Roy* v. *Ajodh Roy* (8), where it was held that a person brought on the malik's zirat lands by a lease for a term of years cannot acquire any right of occupancy or non-occupancy on the said lands and that he is a trespasser only on the expiry of the lease and is liable to ejectment.

In *Damodar Narayan* v. *Dalgliesh* (20) their Lordships of the Privy Council, disagreeing with the Calcutta High Court, upheld the decree of the Court below for possession claimed by the landlord in respect of zirat lands which were leased to the defendants for a term. The Subordinate Judge had expressly held that "under S. 116 the defendant is neither an occupancy or non-occupancy raiyat in respect of the lands".

This statement of the law has not been taken exception to by their Lordships of the Privy Council while dealing with and affirming his judgment. The effect of all the decisions is that the clause in S. 116, "nothing in Ch. 6 shall apply to the proprietor's private lands" is to bar the acquisition of non-occupancy rights in respect of zirat lands. A Court is required to have regard to the custom in determining whether a person is a raiyat or not (S. 5 of the Act). No custom is more certain than that a tenant in zirat is not a raiyat. This custom has been recognized in every text book and in a multitude of enactments and decisions: vide also Sir Courtenay Ilbert's Speech on the Tenancy Act. The Bengal Tenancy Act does not purport to be a complete and exhaustive Code even in respect of the law of landlord and tenant; *Kripa Sindhu Mukerjee* v. *Annada Sundari Debi* (21). A person holding under a lease for a term of years the zirat land is not a raiyat and will not be governed by the Bengal Tenancy Act but by general law. He does not become a non-occupancy raiyat after the expiry of the lease and is a trespasser only. Art. (1) (a) of the schedule, which applies expressly to non-occupancy raiyats does not apply to persons holding under a lease the proprietor's private lands. Thus apart from the heading added to the section the history of the legislation, the object and scope of the Act and the meaning and true interpretation of the actual words used in the Act lead to the conclusion that the general limitation of twelve years applicable to trespassers under the general Limitation Act will apply and that the new Art. 1 (a) does not apply to the case.

It cannot be contended that the provisions barring the acquisition of non-occupancy rights cease to apply when the tenant holds over after the expiry of the term of the lease. S. 51, Ben. Ten. Act, clearly lays down that when a tenant holds over, the conditions under which he held the land in the last preceding agricultural year shall be presumed to continue. This is also the general principle of holding over. The authorities on the point noticed above both under the old and the new Act clearly support the view that when the tenant has been brought on the land for a term of years under the lease, he is a trespasser on the land after the expiry of the lease and can be ejected if the suit is brought under the ordinary law applicable to the eviction of trespassers, i. e., twelve years from the expiry of the lease. For the

(20) [1911] 38 Cal. 432=9 I. C. 913 (P. C.).

(21) [1908] 35 Cal. 34 (F. B.).

above reasons I hold that the suit is not barred by Art. 1 (a), Sch. 3 of the Act and that the appeal should be dismissed.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 412

CHAMIER, C. J. AND SHARFUDDIN, J.

Durga Prasad Nath Misir—Defendant—Appellant.

v.

Dineshwar Nath Misser and *others*—Plaintiffs—Respondents.

Appeal No. 1919 of 1915, Decided on 9th February 1917, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 2nd June 1915.

Execution—Sale—What passes—Rent decree in respect of whole tenure comprising five villages—Tenure described as "Bijulia asli mai dakhili' in sale proclamation and certificate—Whole tenure passed by sale.

In a suit for the recovery of rent due in respect of the whole of a tenure comprising five villages, the plaint described the tenure by naming only one village as "Bijulia asli mai dakhili" The sale prolamation and certificate in execution of the decree obtained in the suit also described the tenure as "Bijulia asli mai dakhili."

Held: that the whole tenure passed by the sale and not merely the single village Bijulia.

[P 412 C 2]

Atul Krishna Ray—for Appellant.

Syed Mahomed Tahir—for Respondents.

Chamier, C. J.—This appeal arises out of a suit brought by respondents 1—6 for possession of a 1 anna 4 pies share in a village called Hetha. They claim title to it under a kabala executed in their favour in the year 1891 by three persons Sidnath, Jagatpalnath and Daleshwar, members of the family to which respondents 9, 10 and 11 belong. The zemindar of the property is respondent 7 Maharaja Partab Uda Nath Sah Deo. In 1903, the Maharaja brought a suit for recovery of arrears of rent due in respect of a tenure known as 2 annas 8 pies in lot Bijulia. He obtained a decree against the recorded holders of the tenure, in execution of which he caused certain property to be sold. The property was purchased at the execution sale by the respondent Cloete and was by him transferred to the appellant, who was impleaded in the suit as defendant 6. The decision of the case turns on the question, what was put up for sale in execution of the decree obtained by the Maharaja. It appears that lot Bijulia comprises 5 villages called Bijulia, Hetha, Ekaguri, Mariatu and Hehal and carries an annual rent of Rs. 62. The property was attached under the description of "Bijulia asli mai dakhili." In the proclamation for sale the property was described as 2 annas 8 pies "Bijulia asli mai dakhili," and in the certificate for sale it was described in the same way. The purchaser having obtained a certificate of sale applied for possession of a 2 annas 8 pies share of all the villages in the tenure and an order was passed that he should be put into possession of that share and formal possession was delivered to him. But neither the petition for possession by the purchaser nor the warrant for delivery of possession can be used for the purpose of ascertaining what was put up for sale. Both the Courts below have held that all that was sold was a 2 annas 8 pies share in the one viilage Bijulia.

It appears to me that the decisions are erroneous. The suit brought by the Maharaja was obviously a suit for recovery of the rent due in respect of the whole tenure. The rent has not been in any way distributed between the different villages in the tenure and in the ordinary course the landlord would proceed to enforce his decree for arrears of rent by the sale of the whole tenure and not by sale of a single village in the tenure. The sale proclamation appears to me to place the matter beyond any sort of doubt. The gross income is given as Rs. 582-9-0, which was the gross income of the whole tenure. The rent is stated to be Rupees 62-6-0 which is the rent of the whole tenure. The profits are stated to be Rs. 520, which are the profits of the whole tenure and the property was stated to be worth about Rs. 5,200. It appears to be perfectly certain that the Court intended to put the whole tenure up for sale. It has been suggested here that the Maharaja was not entitled to bring the whole tenure to sale without the sanction of the Commissioner. But that is not so. What the law in force at the time provided was that if the Commissioner thought fit he could prohibit the sale of the whole or any portion of a tenure. Every reason given by the Courts below for the conclusions at which they arrived appears to me to be a reason for holding that whole tenure was put up for sale and not merely village Bijulia. The tenure seems to have been commonly known as "lot Bijulia," and this no doubt explains the fact that the property sought

to be sold was described both in the plaint and elsewhere as Bijulia and the names of the smaller villages were omitted. I attach no importance to the use of the word dakhili in the sale proclamation or in the application for attachment. The word dakhili was probably not intended to apply to the villages other than Bijulia, but it appears to me that the documents leave no doubt that the word Bijulia was used to denote the whole tenure and not merely a single village Bijulia in that tenure.

Some of the defendants in the suit pleaded that the respondent Cloete did not purchase the property for himself but merely as farzidar for the holders of the tenure. No issue was fixed upon this question and nothing of the kind was alleged by the plaintiff, and therefore it is unnecessary to obtain a finding upon this question. As in my opinion the decision of the Courts below upon the question what passed at the sale is erroneous, I would allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiff-respondent's suit with costs throughout payable to the defendant-appellant only.

Sharfuddin J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 413

ROE AND ALI IMAM, JJ.

E. I. Ry. Company—Appellants.

v.

Jago Ram—Respondent.

Second Appeal No. 191 of 1917, Decided on 22nd March 1918, from a decision of Dist. Judge, Gaya, D/- 1st November 1916.

Civil P. C. (1908), S. 100—Wilful negligence—Whether there is any evidence at all to go to jury is question of law—Question whether wilful negligence has been established is finding of fact.

In a case where wilful negligence is alleged, the question whether there is any evidence at all to go to the jury is a question of law, but if there is such evidence, the question whether wilful negligence has been established, is a question of fact. Where there is evidence to go to the jury, the High Court will not interfere with the finding of fact whether there was or was not wilful negligence. [P 415 C 1]

Shushil Madhab Mullick and *Siva Narain Bose*—for Appellant.

Rajendra Prasad—for Respondent.

Roe, J.—The facts of this case are that the plaintiff consigned a number of tins of ghee from Palmerganj to Calcutta, a distance of over three hundred miles. Either before the journey commenced or during the journey, sixty-two of these tins weighing nearly a ton disappeared. The plaintiff therefore brought a suit for damages against the railway. The Courts below have made a decree in his favour on the ground that although the goods were despatched under a risk-note making the railway liable only in the case of wilful negligence the evidence on the record justified the inference that there had been wilful negligence. In second appeal it is argued that the question of wilful negligence is a mixed question of fact and law, and therefore this Court is required to go into the evidence on the record and satisfy itself that legal wilful negligence has been proved. Failing that, it is urged that there is no direct allegation of wilful negligence in the plaint and nothing in the evidence of the plaintiff to show negligence at all on the part of the railway, and that the Judge if he had been assisted by a jury would have been required to direct the jury as soon as the plaintiff's case was closed that there was no evidence on which they could give a verdict. Further it is urged that the railway did substantially prove that the goods were lost through a running train theft, and that the words running train robbery which in the risk-note, is a specific cause of loss against which the railway is protected, includes an ordinary running train theft. We may take firstly the question whether it was the duty of the learned Subordinate Judge in the first instance to refuse to go further into the case when upon the plaintiff's own evidence there was nothing to show wilful negligence.

It is true that the learned District Judge has recognized that the burden of proof was on the plaintiff to show that his case came within one of the exceptions stated in this risk note. It also may be true that if the defendant company had when the plaintiff had finished his evidence, adopted the course now suggested, that is to say, had it declined to enter into evidence and relied upon the fact that there was from the plaintiff's side no evidence of negligence, the Court would have had not option but to dismiss the plaintiff's suit. But the Railway Company were not content with this. It undertook to show that it had taken all reasonable precautions. Both the Courts below were of opinion that it had

entirely failed to show this. The District Judge went further than the Subordinate Judge. The Subordinate Judge on an erroneous application of S. 76, to questions involved in cases in which the company is protected by a risk-note, had thrown the burden upon the defendant of due diligence. The learned District Judge set himself to show that from the witnesses produced by the defendants themselves, there was evidence upon which wilful negligence had been proved. We are not in sympathy with the argument of the learned vakil for the appellants that having all this evidence before him the learned Judge should not have regarded it at all, but should have decided the case upon the plaintiff's evidence alone. Having placed the evidence upon the record the company cannot say that it was not to be taken into consideration. Nor are we in sympathy with the suggestion that the plaint itself disclosed no cause of action.

It stated simply that the company undertook to carry goods and failed to deliver them. The written statement stated that as the company was protected by a risk-note it was not liable. Had the written statement stopped there, the case might possibly have been dismissed on the pleadings. But the written statement did not stop there. It set forth a substantive case that the goods had been lost owing to a running train robbery. It would have been open to the company no doubt to confine its written statement to the production of the risk-note. It would have been the duty of the Court to call upon the plaintiff to amend his pleadings by specific allegations of wilful negligence, but seeing the nature of the defence put up by the company, there was no necessity for any amendment of the plaintiff's statement of the facts. It has always been held in the Court in England that the Judge's duty is merely to say to the jury that there is or is not evidence on the record which they must consider. If he rightly directs the jury to take into consideration the facts indicated by the evidence, the verdict of the jury as to the bearing of those facts upon the question of wilful negligence, is a final verdict and cannot be disturbed in appeal. The learned Judge set out a number of facts apparent on the record from which he held that wilful negligence might be deduced. There had been a suggestion in the cross-examination of the defendants' witnesses that the carriage door was not locked, and no attempt had been made to get rid of this suggestion. This cross-examination also indicated that the only precaution taken with this valuable consignment, was the affixing of a leaden seal which might be broken without difficulty. The discovery of the breaking of the seal was made on the night upon which the theft probably occurred. It was suggested by the learned Judge that if proper steps had been taken immediately to check the contents of the waggon, the bulk and weight of the goods lost was such that prompt action would have resulted in the recovery of at least a great part of the stolen goods. Speaking for myself I do not propose to consider for a moment whether or not the Judge should have found on these facts that there had been wilful negligence on the part of the railway. I am certainly of opinion that it would have been extremely wrong for a Judge with all these facts upon the record to have informed a jury that there was no evidence at all on which they could base a verdict. That being so, I am of opinion that the learned Judge's decision was a final decision on the question of negligence, and in this conclusion I am fortified by the decision in *Metropolitan Ry. Co.* v. *Jackson* (1) in which it is said:

"In an action arising for personal injuries by negligence, it is the province of the Judge to say whether there is evidence from which negligence may be reasonably inferred, and of the jury (if the evidence is left to them) to say whether it ought to be inferred."

In *Vaughan* v. *Menlove* (2) it was stated by Tindall, C. J., that:

"The care taken by a prudent man has always been the rule laid down: and as to the supposed difficulty of applying it, a jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question."

A similar view was taken by the Judicial Committee in *Madras Railway Co.* v. *Zamindar of Carvetnagarum* (3). At p. 282, it is stated:

"Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party. . . . . Their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence

(1) [1878] 3 A. C. 193.
(2) [1837] 3 Bing. (N. C.) 468.
(3) [1874] 22 W. R. 279 (P. C.).

was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts."

The position therefore is that we as Judges of law have in second appeal to decide whether there was evidence to put before a jury. I am of opinion that there was evidence that should have been laid before a jury, and holding that opinion I must decide that the learned Judge's decision on the facts, was a final as a jury's verdict would have been. With regard to the last ground taken it is sufficient to say that theft is not robbery unless violence goes with the theft. I would dismiss this appeal with costs.

Imam, J.—I am in complete agreement with the decision given by my learned brother. The second appeal is concluded by the finding of fact on the question of wilful negligence. The contention that that question is one that should not have at all been treated by the lower appellate Court inasmuch as there was a total absence of evidence before the Court to support the allegation of wilful negligence, has little substance. The grounds stated in the judgment of the learned Judge show that there was evidence bearing upon the question of wilful negligence. The probative value of that evidence was for the Judge to consider. So far as we bere are concerned, we are bound to accept the decision of the learned Judge on the question of wilful negligence as ascertained by him on the evidence. Therefore I agree that this appeal should be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 415

ROE AND JWALA PRASAD, JJ.

Sohagbati—Petitioner.

v.

Sourendra Mohan Singh and *others*—Opposite Parties.

Civil Revn. No. 217 of 1917, Decided on 26th February 1918, from decision of Munsif, Banka.

Evidence Act (1872), S. 114—Party attempting to rebut presumption that official act has been regularly performed- Court cannot itself give assistance to other side—Execution sale.

There is a presumption under S. 114 that an official act has been regularly performed but when an applicant before the Court is attempting to rebut that presumption it is not for the Court itself to give assistance to the other side or to deal with the matter otherwise than impartially. [P 416 C 1]

When a Court sale is challenged it is not the business of the Court to collect materials upon which the sale may be supported for the sake of the reputation of the Court [P 416 C 1]

Lalit Mahan Ghosh—for Petitioner.

Naresh Chandra Sinha and *Surendra Mohan Das*—for Opposite Parties.

Judgment.—We are asked in revision to consider the following judgment:

"This is an appeal against the decision of the Munsif of Banka setting aside a sale held in execution of a decree. The judgment of the learned Munsif deals also with another application to set aside the decree. This tends to cause confusion and should not have been done. The applicant before him had only a share in the land sold and her relations contested the suit and appeared in the execution proceedings. This has not been noticed by the learned Munsif who has dealt with the case in a perfunctory manner. The auction-purchaser should have been summoned and the sale should not have been set aside in his absence. He has appeared in this Court and objected to the proceedings below and rightly so. There is an order by the learned Munsif that the execution record should be sent for but strange to say these have not been produced and the case has been dealt with without them a most uusatisfactory proceeding. The question whether the application was barred by limitation has not been considered at all. This was necessary, as unless the provisions of S. 18, Lim. Act the application were applicable is barred To talk of the fraud of the decree-holder without specifying it is to beg the question at issue. The error in the plaint in describing the applicant as a widow cannot be held to be material irregularity justifying the setting aside of the sale. Nor because the service of sale proclamation and attachment was not proved can fraud be declared. The learned Munsif should certainly have inspected the execution record and examined the serving peon. The latter is an officer of his Court and the reputation of the Court is at stake if the peon is guilty of misconduct. I wish this view were borne in mind by judicial officers. It is impossible to support the findings of the Munsif. The application should have been dismissed as being barred. This appeal is allowed and the order of the lower Court set aside with costs and pleader's fee Rs. 8."

We would suggest to the learned Judge that a superior Court, when upbraiding a Subordinate Court for perfunctoriness, should be particularly careful not to lay itself open to the same charge.

Two applications had been made in the Court of the Munsif one for the setting aside of a decree obtained ex parte on the ground that no summons had been served; the other that the sale held in execution of that decree be set aside on the ground of material irregularities in the conduct of the sale. The issues raised on these two applications were tried together by consent of parties. The learned Judge says that this should not have been done

because it tends to cause confusion. Why it should cause any confusion at all we cannot see. The whole proceedings were closely interwoven. If the decree was obtained by fraud the probability that the sale was fraudulently conducted was enhanced. If it was honestly obtained the probability that the sale was honestly proclaimed was also enhanced. The learned Munsif found on the evidence that the summons in the suit had not been served on the applicant and that the sale proclamation had been fraudulently suppressed. He therefore set aside both the decree and the sale. The decree-holder did not appeal against the order setting aside the decree and the original suit is we understand now being retried. The auction purchaser did not appeal against the order setting aside the sale. The decree-holder did appeal. The learned Judge says thas the auction-purchaser should have been summoned and the sale should not have been set aside in his absence. The learned Munsif had been at pains to record that a notice had been served on the auction-purchaser and that the auction purchaser had been carefully kept out of Court at the instance of the decree-holder with whom he was in collusion. The whole judgment of the learned Judge indicates that he is of opinion that when a Court-sale is challenged it is the business of the Court to collect materials upon which the sale may be supported for the sake of the reputation of the Court. This we consider a view unfair to those who contend that a sale hase been improperly conducted. There is a presumption under S. 114, Evidence Act that an official act has been regularly performed but when an applicant before the Court is attempting to rebut that presumption it is not for the Court itself to give assistance to the other side or to deal with the matter otherwise than impartially. The real issue in the case was: Were the sale proclamations fraudulently suppressed? The learned Munsif found that they were. If that is correct the sale was fraudulently held and fraudulently concealed from the applicant and limitation saved by S 18. The issue has not been touched by the learned Judge. All that he says is that fraud cannot be declared merely because the service of the sale proclamation has not been proved and that it is impossible to support the findings of the Munsif. We are of opinion not only that the judgment is not a judgment in accordance with law but also that it is no judgment at all. It is merely an indignant protest against the setting aside of a sale held by officers subordinate to the Judge. The learned Judge had no jurisdiction to reverse the order of the lower Court without writing a judgment in accordance with law. We therefore set aside the order made and direct that the appeal be re-heard. In view of the attitude of the learned Judge towards the respondent's case we direct that it be re heard by the District Judge of Monghyr.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 416

MULLICK AND ATKINSON, JJ.

Shiba Das—Appellant.

v.

Gajendra Nath Das—Respondent.

Civil Appeal No. 11 of 1916, Decided on 18th July 1917, from decision of Collector, Balasore, D/- 2nd September 1916.

Bihar and Orissa Tenancy Act (1913), Ss. 57, 215, 220 and 221—Under-raiyati interest is incumbrance—Auction-purchaser not taking steps to annul incumbrance as prescribed by S. 221, cannot eject under-raiyat under S. 57.

An under-raiyat in occupation of land is an incumbrancer upon such land within the meaning of S. 215. [P 417 C 1]

A purchaser at an auction-sale has one, and only one, remedy open to him for annulling an incumbrance, namely that prescribed by S. 221, and in cases where this remedy is not followed and a year is allowed to elapse by the purchaser without taking steps to annul the incumbrance affecting the lands or interest he has purchased, he is not entitled to eject the under raiyat under S. 57 of the Act. If the purchaser does take the steps open to him to annul the incumbrance and the under-raiyat refuses to give up possession consequential thereon, he can be ejected under S. 57, but if the purchaser does not avail himself of the only remedy which is open to him he is not entitled to eject the under-raiyat in any other way. [P 417 C 2]

S. N. Sen Gupta—for Appellant.

B.N Singh—for Respondent.

Judgment.—The plaintiff in this suit seeks to eject the defendant from the land in suit of which he is in occupation as an under-raiyat. The facts shortly are as follows: The plaintiff purchased the occupancy right in the land in suit at a rent sale held on 1st February 1915. The original tenant fell into arrear in the payment of his rent; and one of the

cosharer landlords instituted a suit for the recovery of the arrears of rent due, making the other cosharer landlords defendants with the tenant, and obtained a decree for, it is alleged, part of the total rent. We must take it, having regard to the course which the case has pursued in both the lower Courts, that the decree which was obtained in the suit against the original tenant was a rent decree; and that the sale which took place on 1st February 1915 was a sale in pursuance of a rent decree. At the sale the plaintiff became the purchaser of the occupancy interest in this holding. At the date of sale there was on the holding an under-raiyat who was in possession of the entire holding and who is now the defendant in this suit. The holding was about 10 to 11 acres in area; and the learned Deputy Collector has found that the entire holding of the original tenant was sold at the sale held on 1st February 1915. The present plaintiff seeks to eject the defendant from the lands in suit relying upon S. 57, Orissa Tenancy .Act and he alleges that he has served the notice required by S. 57, Orissa Tenancy Act upon the under-raiyat and that therefore he is entitled to maintain this action for ejectment.

The case put forward by the defendant, the under-raiyat, is that this action is not maintainable having regard to the special provisions of S. 215 read in conjunction with Ss. 220 and 221, Orissa Tenancy Act. The learned Collector, disagreeing with the opinion of the Deputy Collector, has held that the plaintiff is entitled to seek relief under S. 57. The Deputy Collector on the contrary held that the provisions of S. 57 did not apply; and that the rights of the parties were governed by the true interpretation of Ss. 220 and 221, Orissa Tenancy Act. S. 215 of the Orissa Act, defines what an "incumbrance" is; and undoubtedly an under raiyat in occupation of land is an incumbrancer upon such land within the meaning of S. 215, Orissa Tenancy Act, and upon this point there seems to be no controversy. Therefore we may take it that over the lands in suit there was an incumbrance to the extent of the interest of the under raiyat therein. That being so, Ss. 220 and 221 regulate in what way and in what manner the incumbrance can be got rid of by an auction-purchaser. He is not in the same position as the original intermediate landlord, viz. the original tenant. The Act has provided that his rights are to be something less. But it appears that if an auction-purchaser desires to annul an incumbrance, the Act specifically prescribes what steps are to be taken by him for doing so and the Act is careful to specify that by no other steps and by no other means can the incumbrance be annulled or got rid of. S. 220, sub-S. (2), runs as follows:

"The purchaser at a sale under this section may, in manner provided by S. 221, and not otherwise, annul any incumbrance on the holding."

I take that section to mean that it is incumbent upon the auction-purchaser, if he desires at annul an incumbrance, to follow strictly the procedure prescribed by the section. S. 221 prescribes that when a purchaser desires to annul an incumbrance he must do so by serving a notice within one year from the date of sale, or the date upon which he first had notice of the incumbrance, through the Collector upon the incumbarncer. Now it is not contended here for one moment that the procedure prescribed by S. 221 was followed. On the contrary, it is contended by the plaintiff that he has served a notice within the meaning of S. 57 and that no other notice is necessary, and that he is entitled to maintain the present suit. This is a case of first impression; but it appears to us upon a fair and reasonable interpretation of the Orissa Tenancy Act that what was intended was that a purchaser at an auction sale had one and only one remedy open to him for annulling an incumbrance, namely that prescribed by S.221; and that in cases where this remedy is not followed and a year is allowed to elapse by the purchaser without taking steps to annul the incumbrance affecting the lands or interest he has purchased, the purchaser is not entitled to eject the under-raiyat under S. 57 of the Act. No doubt, if the purchaser did take the steps open to him to annul the incumbrance and the under-raiyat refused to give up possession consequential thereon, the under raiyat could be ejected as a trespasser under S. 57 of the Act; but if, as in this case, the purchaser does not avail himself of the only remedy which is open to him he is not entitled to eject the under-raiyat in any other way. The opinion which we have formed corres-

ponds with the interpretation given to the corresponding enactment in the Bengal Tenancy Act in *Janaki Nath Hore* v. *Prabhasini Dasi* (1). We think that the conclusion at which the learned Deputy Collector arrived was right. No doubt his judgment leaves much to be desired as to its form and method of expression; but upon a careful consideration of the law and the facts we think that he was right in dismissing the plaintiff's suit.

We accordingly set aside the order of the lower appellate Court and allow this appeal with costs.

V.S./R.K. *Appeal allowed.*

(1) [1916] 43 Cal. 178=30 I. C. 898.

A. I. R. 1918 Patna 418

MULLICK AND THORNHILL, JJ.

Dalip Narain Singh—Petitioner.

v.

Baijnath Goenka—Opposite Party.

Civil Revns. Nos. 240, 255 and 286 of 1917, Decided on 27th May 1918, from order of Sub-Judge, Monghyr.

Civil P. C. (5 of 1908), S. 151—Execution—Sale set aside by execution Court—Purchase-money withdrawn by auction-purchaser—Sale confirmed by High Court—Auction-purchaser is bound to refund purchase-money—Proceedings for refund of money—Court should not enter into adjudication between—auction-purchaser and stranger.

An auction sale was set aside and the auction purchaser was allowed to take out the purchase-money which he had deposited in Court. Subsequently the order setting aside the sale was upset by the High Court and the sale was consequently confirmed.

Held: that the auction-purchaser was bound to refund the purchase-money which he had taken out from the Court. [P 419 C 2]

It is not in accordance with justice, equity and good conscience that in a summary miscellaneous proceeding for refund of money taken out by an auction-purchaser, the Court should enter into an adjudication between the auction-purchaser and a person who is strictly no party at all to the proceedings but is alleged to be the real auction-puchaser. [P 419 C 1, 2]

Manuk, Jagannath Prasad, Fakhruddin, Ramprasad and *Sivanandan Rai*—for Petitioners.

Purnendn Narain Sinha, Naresh Chandra Sinha, Sisir Kumar Mitter, Jadubans Sahay and *Upendra Nath Chatterjee*—for Opposite Party.

Mullick J.—These applications for revision arise out of a sale held in 1908 in execution of a decree obtained by the decree-holder Baijnath Goenka against the Mohunt of Shuja Asthal. At that sale one Makhu Lal, an opposite party in Civil Revision No. 240 of 1917, purchased 15 lots for Rs. 36,431, while Bikramajit Singh, petitioner in Civil Revision No. 286 purchased 6 lots for Rs. 2,425 and Jagarnath Das, petitioner in Civil Revision No. 255, purchased 7 lots for Rs. 6,476. The Subordinate Judge however set aside the sale. The decree-holder then appealed to the High Court of Calcutta with the result that on 4th February 1913 the decision of the Subordinate Judge was set aside and the case remanded to him for disposal. The Subordinate Judge, therefore, on 10th May 1913 confirmed the sale. Meanwhile the auction-purchasers had after the sale was first set aside by the Subordinate Judge, withdrawn their purchase moneys. The decree-holder therefore after the sale was finally confirmed, called upon them, on 14th May 1913, to refund the moneys they had withdrawn. They appeared and made various objections and so far as Bikramajit and Jagarnath Dass are concerned, there were no complications and an order was made against them as prayed for.

In regard to Makhu, however, the matter is not so simple. Makhu filed his objection on 13th June 1913. On 21st April 1914 the decree-holder conceived the idea of joining one Dalip Narain, the petitioner in Civil Revision No. 240, on the footing that Makhu was a benamidar at the auction in his behalf. On 8th August 1914, the Subordinate Judge rejected the decree-holder's prayers for leave to make Dalip Narain a party in the restitution proceedings. The decree-holder appealed to the High Court and succeeded, and it was directed in the absence of Dalip Narain that he should be joined but should be free to raise whatever objections he thought fit. The Subordinate Judge has, in spite of Dalip Narain's protest, now held that Dalip Narain was the real auction-purchaser and has directed him to refund the amount withdrawn by Makhu. Hence these revision applications by Dalip Narain, Bikramajit and Jagarnath Das. It will be convenient to deal first of all with the grounds which are common to the three applications.

The first ground is that neither Makhu nor Bikarmajit nor Jagarnath Das were joined as parties to the order of the High Court of 4th February 1913, and that

therefore they are not bound by the order of 10th May 1913, confirming the sale. The reply to this is that under the Civil Procedure Code of 1882, which seems to have been the Code applicable to the appeal when it was filed, the auction-purchaser was not a necessary party. *Surendra Mohini Devi* v. *Loharam Chattopadhya* (1) is authority for this proposition. The auction purchasers therefore are bound by the order of confirmation.

The next objection is that the Subordinate Judge should not in the exercise of his inherent jurisdiction under S. 151, Civil P. C., have directed the refund. The reply to this is that the order for refund was in accordance with the principle laid down in *Sukhdeo Dass* v. *Rito Singh* (2). In my opinion the Subordinate Judge was right in correcting what amounts to an abuse of the process of the Court. The third ground is that no interest should have been ordered and that in any event it should be charged, not from 21st May 1908 which was the date of withdrawal, but from 10th May 1913, which was the date of confirmation of the sale. The reply is that the auction-purchaser is liable to pay interest if he was in possession of the property as well as the money. Whether he was in possession is a question of fact, into which we cannot enter in revision. We cannot therefore interfere with the learned Subordinate Judge's order in this respect. The result is that the applications in Civil Revisions Nos. 255 and 286 of 1917 must be dismissed with costs. Hearing fee Rs. 16 each. There remains the application in case No. 240. In this case the matter is complicated by the introduction of Dalip Narain. Makhu appears as one of the opposite parties and submits that having been allowed to draw out the money without objection 10 years ago, it is not equitable that he should have to return it. I see no injustice in this, but his liability is not the matter with which we are concerned in the case before us. We are concerned only with the propriety of the order made against Dalip Narain.

Now it does not seem to me to be in accordance with justice, equity and good conscience that in a summary miscellaneous proceeding for refund of money taken out by an auction purchaser, the Court should enter into an adjudication between the auction-purchaser and a person who is strictly no party at all to the proceedings. Mr. Pugh on behalf of the decree-holder relies on *Puran Chand Boid* v. *Surendra Narain Singh* (3), but that case turned on the construction of S. 73, Civil P. C., 1908 and the learned Judges there held that a decree-holder who came in under that section for rateable distribution must be a real decree-holder and that the Court could inquire whether or not he was a benamidar for the judgment debtor. That case therefore does not assist us here. On the other hand *Nagendra Bala Dassi* v. *Debendra Nath* (4) comes somewhere near this case and shows that an execution Court cannot adjudicate upon a question of benami between the apparent decree-holder and a third party. I think that I should also refer to one other case, though it has not been cited by either party. In *Jointee Chunder Sein* v. *Anundo Lal Doss* (5), where the plaintiff sued in ejectment and failed, and where the defendants asked the Court to throw the costs of the suit on a third party, alleging that he was the hidden plaintiff, Phear, J., sitting on the original side of the High Court of Calcutta held an enquiry into the third party's privity with the apparent plaintiff and finding that he had through the apparent plaintiff committed fraud upon the Court directed the costs to be levied from this third party. But here Dalip Narain is not shown to have been guilty of any fraud or of any abuse of the process of the Court. Nor is there any question here as to costs. I cannot persuade myself that equity, justice and good conscience require that he should be fixed with liability for a large sum of money on the very meagre evidence which has been accepted by the Subordinate Judge.

In my opinion this is not a case for any further extension of the inherent jurisdiction of the Court. I think the fairer course would have been to order Makhu Lal to refund the money and if he failed to do so, to leave the decree-holder to take such other steps as he thought fit in the civil Courts against Dalip Narain. In my opinion the Subordinate Judge in

(1) [1912] 39 Cal. 687=14 I. C. 67.
(2) [1917]2 P. L. J. 561=1 P L. W. 551=39 I. C. 763.
(3) [1912] 16 I. C. 795.
(4) [1918] 44 I. C. 13.
(5) 14 W. R (O. C.) 1.

exercising his inherent powers against Dalip Narain assumed a jurisdiction which he did not possess and his order must therefore be set aside. The application is allowed with costs. Hearing fee Rs. 16.

Thornhill, J.—I agree.

V.S./R.K. *Application allowed.*

A. I. R. 1918 Patna 420

ATKINSON AND JWALA PRASAD, JJ.

Balak Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 172 of 1917, Decided on 20th August 1917, from order of Asst. Sess. Judge, Saran, D/- 3rd July 1917.

Criminal P. C. (1898), Ss. 284 and 285—Trial with aid of only one official assessor is illegal.

The trial of an accused person was fixed for a certain date when only one duly qualified assessor was present in Court and capable of acting as such whereupon the Judge ordered another person who happened to be present in Court but who was not on the official list of assessors to act as an assessor:

Held: (1) that having regard to the provision of S. 284, the trial was illegal; [P 420 C 2]

(2) that S. 285 was inapplicable to the case, inasmuch as the trial started with only one duly qualified assessor and was altogether abortive and contrary to law. [P 420 C 2]

S. Sinha—for Appellant.

Fakhruddin—for the Crown.

Atkinson, J.—In this Criminal Appeal No. 172 of 1917 a very ingenious point has been taken by Mr. Sinha on behalf of the accused person Balak Singh, who was charged and convicted under S. 467, I. P. C., of forgery, in respect of a hand-note for a sum of Rs. 200. The trial of the accused was fixed for a certain date when only one duly qualified assessor was present in Court and capable of acting as such; whereupon the Judge ordered any other person who happened to be present in Court, whether on the official list of assessors or not, should be required to act as an assessor. A certain gentleman who was present in Court was brought before the Judge and was compelled, though not an official assessor; to act as an assessor. The person who acted as such assessor was not a person summoned or chosen from among the official list of persons appointed to act as assessors for the year 1917 prepared by the District Magistrate in conjunction with the District Judge. The trial started thus with only one person as an official assessor and the trial proceeded and terminated with only one person presuming to act as an assessor.

It is quite clear that a trial instituted in such a form is clearly illegal. S. 284 provides that

"when the trial is to be held with the aid of assessors, two or more shall be chosen, as the Judge thinks fit from the persons summoned to act as such.

Now clearly under the provisions of S. 284, Criminal P. C., the trial was not valid; and Mr. Fakhruddin on behalf of the Crown frankly admits that only one person acted as assessor throughout the trial and that the other person who purported to act as an assessor was not upon the official list of persons appointed for the year 1917, though he had been an assessor in the previous year and was not summoned to act as such for the year 1917. Mr. Fakhruddin attempted to rely upon S. 285. Obviously S. 285 has no application to the facts of the present case. That section provides that if in the course of a trial with the aid of assessors, at any time before the finding any assessor is from sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, then the trial may proceed with one assessor. Here the trial proceeded with only one official assessor, and not with two duly qualified assessors, hence the trial was utterly abortive and contrary to law. The cases of *Khub Singh* v. *Emperor* (1) and *Man Singh* v. *Emperor* (2) are authorities on the point and clearly govern the case. Mr. Fakhruddin does not seem to controvert the facts stated by Mr. Sinha and upon the facts as stated it is quite clear that the conviction of Balak Singh, the petitioner, cannot stand. We think that the proper order that we should make is that the conviction and sentence pronounced by the Assistant Sessions Judge on 3rd July 1917 be quashed and that the conviction and sentence be set aside, and we direct that the District Magistrate shall take such steps as he may be advised to try Balak Singh again on the charge of forgery.

Jwala Prasad, J. I agree.

V.S./R.K. *Conviction set aside.*

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(1) [1910] 13 O. C. 337=11 Cr. L. J. 724=8 I. C. 874.

(2) [1913] 35 All. 570=21 I. C. 894=14 Cr. L. J. 654.

A. I. R. 1918 Patna 421

ROE AND COUTTS, JJ.

Basawan Singh and *others*—Appellants.

v.

Gangaphal Rai and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 108 of 1917, Decided on 16th July 1918, from decision of Dist. Judge, Shahabad.

(a) Mortgage—Execution of mortgage decree.

Property passing in execution of a mortgage decree is dependent upon the terms of the plaint. [P 421 C 2]

(b) Mortgage—Suit on—Prayer by plaintiff for sale of property subject to prior lien—Auction-purchaser cannot dispute subsistence of lien.

Where in a mortgage suit the plaintiff prays for the sale of the property subject to a prior lien, it is not open to the auction-purchaser in execution of the decree obtained in that suit to dispute the subsistence of the lien. [P 421 C 2]

(c) Transfer of Property Act (1882), S. 76—Mortgage extinct—S. 76 does not apply.

Section 76 does not apply to a case where the mortgage has in fact become extinct.

[P 421 C 2; P 422 C 1]

Kulwant Sahai and *Rai Guru Saran Prasad*—for Appellants.

Parameshwar Dayal—for Respondents.

Roe, J.—The facts relevant to the decision of this case are as follows:

In 1884 the plaintiffs, with other co-sharers who were no parties to the two cases before us, took a usufructuary mortgage of 42 bighas of land for a consideration of Rs. 2,372 and between that date and 1891 advanced sums amounting to Rs. 1,084 on simple mortgages on the 16-annas of the village. On 30th July 1897 one Jakhar Mian took a second mortgage upon the 16 annas of the village and subsequently brought a suit and made the present plaintiffs parties to that suit, on the ground that they were purchasers of a part of the mortgaged property, and praying that the property might be sold subject to the plaintiffs' prior mortgage. The purchase referred to in this plaint was made on 1st April 1898, and by that purchase the several mortgagees took each to themselves a definite share in the village on a consideration of a definite sum of money admitted by the mortgagor to be due at that date on that part of the property transferred to each of the plaintiffs. The learned Munsif was of opinion that this splitting up of the mortgage, the conversion of bighas into annas and the reduction of the property, 16 annas, to the property sold, approximately six annas resulted, in a transaction not covered by S. 101, T. P. Act, and in addition relied on the oral statement made by the plaintiff himself to the effect that the lien on the mortgaged property was destroyed by the sales. The learned District Judge was of opinion that the matter could not be open to question, for the reason that by virtue of the decree made in Jakhar Mian's suit upon his mortgage it was res judicata that the plaintiffs' lien still subsisted upon the property.

The auction-purchaser at Jakhar Mian's execution of his mortgage decree appeals against the order of the District Judge, on the ground, firstly, that the decision of the learned District Judge upon the question of res judicata was wrong, and secondly, on the ground that the Munsif's decision upon the question of the effect of S. 101 was right. It is settled law that property passing in execution of a mortgage decree is dependent upon the terms of the plaint. In the plaint in the suit of Jakhar Mian and here the learned Munsif had made an error; it was clearly stated that the plaintiffs now before us were purchasers of a part of the mortgaged property.

The learned Munsif says that the plaint in the former suit does not show that Jakhar Mian and others had any knowledge of the plaintiffs' purchases. The learned Munsif is wrong. Obviously the present plaintiffs would not have been described as purchasers in that suit if Jakhar Mian had not been fully aware of the fact that they were no longer mortgagees, but had made a purchase of the property in extinction of the mortgages themselves; and having regard to the frame of the relief sought in the suit upon the mortgage, I am of opinion that the present defendants cannot contest the lien actually imposed upon the property in the plaint itself. The plaint having asked for the sale of the property subject to Jakhar Mian's lien, the auction-purchaser could not take it free of that lien. The only question therefore to decide is that of the account to be made. There is no definite ground of appeal upon the manner of making up the account in the decree by the learned District Judge. It was suggested only that credit should be given to the defendant of the profits made from the property since the entry of the plaintiffs into possession. This suggestion is based on S. 76, T. P. Act. This sec-

tion is not applicable to the circumstances. The mortgage is in fact dead and from the date of the purchase the plaintiffs were no longer mortgagees. The lien surviving under S. 101 survives intact. The defendants were required to redeem at the sums actually due at the time of the plaintiffs' purchase. Mr. Parmeshwar Dayal has shown us an account from which we are satisfied that this liability had been accurately estimated in the deeds of sale, and nothing has been suggested on the other side to show this account to be inaccurate. I would therefore dismiss this appeal with costs.

Coutts, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 422

DAWSON-MILLER, C. J. AND JWALA PRASAD, JJ.

E. G. Stonewigg—Defendant — Appellant.

v.

Dwarka Singh and *others*—Plaintiffs—Respondents.

Appeal No. 53 of 1917, Decided on 17th April 1918, from original decree of Dist. Judge, Darbhanga, D/- 2nd February 1917.

(a) Landlord and Tenant—Tenancy right—Nature of—Lease in respect of share in zamindari—No specific land mentioned which lessee has to cultivate—Lease only creates tenure—Bengal Tenancy Act (1885), S. 22.

Where a lease is executed in respect of a certain share in zamindari and no specific land is mentioned in the lease which the lessee has to cultivate, the lease creates only a tenure. [P 425 C 1]

(b) Landlord and Tenant — Occupancy rights—Tenure-holder cannot acquire occupancy rights in lands comprised in Ijara—Bengal Tenancy Act, (1885), S. 22.

A tenure-holder cannot acquire a right of occupancy in the lands comprised in his ijara or farm while holding the village as an ijaradar or a farmer. [P 426 C 2]

(c) Bengal Tenancy Act (1885), S. 22—To determine whether right conferred by lease is that of tenure holder, intention of parties should be looked into.

In order to determine whether the right conferred by a lease is that of a tenure-holder under the Bengal Tenancy Act, the intention of the parties has to be looked into. The principal object of giving the lease of an entire village or a share therein is to enable the lessee to collect rents from tenants. The fact that the lessee may bring under cultivation some lands in the village will not alter the character of the tenure created by the lease. There can be no lease for the purpose of cultivation in a village where no lands to be cultivated are specified in the lease. [P 425 C 1]

A lessor, who is a part proprietor in an ijmali or joint village, has no right to create any right in respect of any specific lands in the village to the prejudice of the other co proprietors without their consent. [P 426 C 2]

(d) Landlord and Tenant — Occupancy rights — Co-proprietor cannot acquire occupancy or non-occupancy rights in village.

A co-proprietor in a village cannot acquire any occupancy or non-occupancy right in the village. [P 426 C 2]

Rajendra Prasad—for Appellant.

Ganesh Dutt Singh—for Respondents.

Dawson Miller, C. J.—I have had an opportunity of consulting with my learned brother in this case and I entirely agree with the judgment he is about to pronounce.

Jwala Prasad, J.—This appeal arises out of a suit brought by the plaintiffs for partition of their share in Mouza Damodarpore, Chak Giasuddin, bearing Tauzi No. 4044. The said viliage is held by the plaintiffs and the defendants as follows: The plaintiffs have a share of two annas odd, defendant 1, first party, four annas odd, defendants 2 to 12, second party, four annas odd and defendants 13 to 31, third party, the remaining share in the village. Defendant 32, fourth party, is a purchaser from defendant 12, one of the defendants second party. The share of the plaintiffs and defendants second party, viz., 6 annas 11 gandas 3 kauris 1 karant 17 rains, 8 paras in the village out of the entire eighteen annas was leased to defendant 1 under two separate leases executed jointly by the plaintiffs and defendants second party in favour of defendant 1. The first lease was executed on 15th June 1882 and was for a term of nine years, 1290 to 1298. The second lease was executed on 20th December 1896 and was for a term of 15 years, 1304 to 1318. In the interval, that is from 1299 to 1303, defendant 1 is said to have been in possession of the property under a verbal lease, as negotiation for the second lease executed on 20th December 1896 was going on between the parties. The second lease expired in 1911. Yet defendant 1 continued to be in possession of the property and refused to give up possession. The plaintiffs further alleged that while in possession of the said share of six annas odd leased to him defendant 1 fraudulently got his name recorded as a non-occupancy raiyat in respect of

45 bighas 14 cottas 7 dhurs, in Khatas Nos. 156 and 246 of the Survey Record of Rights finally published in the years 1899 and 1900, although the said lands belong to all the proprietors in the village as their khas lands and defendant 1 has no raiyati rights in the said lands and was only a Thiccadar or farmer in respect of the share of six annas odd, the leasehold property.

On the above allegations the plaintiffs prayed for partition and separats possession of their own share in the village and for declaration that defendant 1 has no right to remain in possession of the leasehold property after the expiry of the lease and that he has no raiyati interest in respect of the specific 45 bighas odd which belong exclusively to all the Malliks in the village. There does not appear to be a serious contest with regard to the claim of the plaintiffs for partition and for recovery of possession of their share in the village leased to defendant 1. The real dispute relates to the specific lands of 45 bighas odd referred to above recorded in Survey Khatas Nos. 156 and 246. Defendant 1 claims that the said lands were in his possession long prior to the leases referred to above and that he has acquired a right of occupancy in the said lands. Defendant 1, therefore resists the claim of the plaintiffs to heve a partition of the said lands among the proprietors and to recover possession of their share in these lands. The Court below decreed the plaintiffs' suit, holding that defendant 1 has acquired no raiyati right in the lands and that the plaintiffs are entitled to khas possession of their share in the same. There is a further direction awarding mesne profits to the plaintiffs as claimed by them for the period of their dispossession. Defendant 1 has appealed to this Court.

The contention of the defendant that he was in possession of the lands as a tenant prior to the leases referred to above has no substance in it. The evidence on behalf of the defendant to prove his possession previous to the first lease of 1882 is wholly unreliable. It consists of the statement of two witnesses, both of whom are cultivators in the village, They say in their evidence recorded in 1917 that defendant 1 was in possession of the land for the last 30 to 35 years, that is from or just a little before 1882 when the first lease was executed. It is neither alleged nor even disclosed in evidence as to how defendant 1 came to be in possession of the lands as a tenant before he took lease of the village. No settlement is alleged to have been made with him of the lands in suit by the proprietors of the village. No receipts in proof of payment of rent to any of the landlords are produced on his behalf. In short there is absolutely no documentary evidence on his behalf to show that he acquired any tenancy right prior to the lease in the lands. On the other hand, the evidence on behalf of the plaintiffs is reliable and shows clearly that defendant 1 was not in possession of the lands previous to the leases in question. The learned vakil appearing on behalf of the appellant has rightly refrained from relying upon the oral evidence on his side. He however relies upon the entries in the Survey Record of Rights (Exs. B and C). Ex. B shews that the Record of Rights was finally framed and published on 17th April 1900 whereas Ex. C shows that it was published on 9th June 1899. The former recorded defendant 1 as Gair Dakhilkar (non-occupany tenant) in respect of khata No. 246 for six years and the latter as Gair Dakhlikar for seven years in respect of khata No. 156. It is said that the aforesaid entries shew that defendant 1 was in possession of the lands as a non-occupancy tenant in or about the year 1892, that is a year after the expiry of the first lease of four years prior to the execution of the second lease of 1896. In the first place, this falsifies the allegation of the defendant that he was in possession of the lands prior even to the first lease. In the second place, the fact that he was in possession after the expiry of the first lease and previous to the execution of the second lease goes only to shew that he simply held over after the expiry of the first lease, as negotiations were going on between the parties for ths execution of a fresh lease. There ie positive evidence to the effect that defendant 1 held over and continued to be in possession after the expiry of the first lease on the same terms as those mentioned in the lease. The Court below has accepted this evidence. I agree with the Court below in its finding that in the interval between the expiry of the first lease and the execution of the second lease, defendant 1 simply held over and

was in possession of the lands as a lessee of the 6 annas odd share under the first lease of 1882. He therefore came to be in possession of the lands in suit on account of and under the lease executed by the plaintiffs and defendants second party. The absence of rent receipts goes to show that defendant 1 was in possession under the lease and not independent of it.

As to the contention of the defendant that the presumption of the entry in the Record of Rights that he was in possession of the lands as a non-occupancy tenant should prevail, it is enough to state that the evidence and the circumstances of this case have fully rebutted the presumption if any. The entry in the Record of Rights is simply an inference and opinion of the Assistant Settlement Officer as to the status of the defendant. The next contention on behalf of defendant 1 is based on the terms of the lease in question. It is said that he was given a lease for cultivating purposes, that he has been in possession of the lands for over 12 years and has thus acquired an occupancy right in them. The first lease of 1882 has not been produced, but it is agreed at the Bar that the terms of that lease were exactly similar to those of the lease of 1896 which is on the record. The lease executed by the plaintiffs and defendants second party is printed at p. 14 and the kabuliyat or the counterpart of it executed by defendant 1 at p. 8 of the paper-book. The terms of both are the same and the following is an extract from the lease at p. 14 :

"We (the plaintiffs and defendants second party) have given in lease to Mr E. G. Stonewigg and Mr. John Stonewigg, Englishmen, by occupation indigo planters and proprietors, Managers and residents of Indigo Factory at Gungauli (1) the entire and whole six annas, our ancestral share, and 11 gandas 3 kauris 1 karant 17 rains and 8 paras, our purchased share in all 6 annas 11 gandas 3 kauris 17 rains and 8 paras out of 16 annas of Mauza Damodarpur, Chak Ghyasuddin, asli mai dakhli, together with tolas and badhs appertaining to the said Mauza, Pergana Saraisa, bearing Tauzi No. 4022 (apparently a mistake for 4044) at an annual jama of Rs. 668-4-6; (2) 3 kauris 2 karants 1 dant and 5 rains out of 4 gandas 2 kauris 2 karants 2 dants 17 rains and 4 paras, which covers an area of 8 bighas 16 cottahs and 3 dhurs according to our quota, i.e., after excluding 4 bighas 15 cottahs and 12 dhurs of land which is in our possession, the remaining area to the extent of 4 bighas and 11 dhurs at an annual jama of Rs. 24-2-6 at the rate of Rs. 6 per bigha situate in Mauza Bhushan Tara, Pergannah Saraisa, Ijmali Patti Touzi No. 12759, Thana Dalsingh Serai, Division Samastipore, district Darbhanga, together with Malwajhat, Saer Wajhat, all grains, Jalkar, Bankar, Ahar, Pokhar, water, reservoir, tanks, pucca and kutcha wells, palms and date trees, gardens of mangoes and jack trees, bamboo topes, fruit bearing and non-fruit bearing trees, occupied and non-occupied houses of tenants. Mutharfa, Bardana, salt, Sayer and fishery rights, etc., in the mahal, in other words all the zamindari rights appertaining thereto; (3) and 26 bighas 13 cottahs and 6 dhurs at Rs. 7 per bigha and 6 bighas 7 cottahs and 12 dhurs at the rate of Rs. 6 per bigha, in all 33 bighas and 18 dhurs of the Zerait Khudkasht lands situated within our partitioned pattis in Mauza Bhushar Tara, Pergannah Saraisa aforesaid, at an annual jama of Rs. 24-15-0 excepting the items of Brahmotar, Shibator, Neaz Dargah, Chanda of Chandadarans which have been coming down from before, i. e., we have let out on lease the above shares on a consolidated, fixed and uniform annual jama of Rs. 917-6-0 in company's coin, half of which is Rs. 458-11-0, as including road and public works cess for a term of 15 years extending from 1304 to 1318. We have received Rs. 3,000 as zerpeshgi bearing interest at the rate of 12 annas per cent per mensem and have appropriated the same. The said Saheb, the thicadar, should remain in possession and occupation of the leasehold property to the end of the term, should make proper cultivation thereof at ease of his mind or should get the same cultivated by others by sowing indigo or any other crops according to his desire; and should enjoy the produce of the same. Having set off the principal amount of the zerpeshgi money and its interest against the aforesaid amount of fixed rent he shall pay to us the proprietors, on taking receipts and Farkhati, such sums out of the amount of profit as may be found due to us instalment after instalment and year after year . . . . and he shall cease to have any connection with the leasehold property on the expiry of the term. The expenses relating to boundary disputes and new items of expenditure shall be borne by us, the proprietors. The expenses relating to the Thana and Police shall be borne by the Thiccadar and the duty of compliance with the orders which may be passed by the officers under the law now in force or that may come in force hereafter shall also rest with him. In the last year of the term, i. e., in 1318, the said Saheb shall retire from the zerait lands of indigo on payment of rent for ten annas kist to us the proprietors for 1319 fasli according to the above rate if any such zerait will be found to exist with the khas partitioned patti of us the executants in Mauza Bhushat Tara, Pargana Saraisa."

The lease was given to defendant 1 of the six annas odd share of the plaintiffs and defendants 2nd party in village Damodarpore Chak along with certain shares in another village Bhusdar Tara, some specific lands detailed and described in the lease measuring 33 bighas odd out of the Zerait Khudkasht lands situate in Bhushar Tara. No specific land was leased as appertaining to village Damodar-

pore Chak with which we are concerned in this litigation. The lands in dispute, 45 bighas odd, are not at all specifically leased to defendant 1, nor are they mentioned in the lease. The lease in question is of a twofold character: (1) it confers a right upon the lessee 'to hold possession of certain shares in the village in place of the lessors, i. e., to collect the rents of the same and possibly to have some direct cultivation of such lands as the lessee himself could cultivate and (2) it gives the right to cultivate specific lands mentioned in the lease of the zerait khudkasht lands in village Bhushar Tara. The lessee is therefore a tenure-holder in respect of six annas odd share leased to him in village Damodarpore Chak and a lessee for cultivating purposes in respect of the specific lands mentioned above in Bhushar Tara. In order to meet the double right conferred by the lease a general clause is added, namely:

"The said Saheb, the thiccadar, should remain in possession and occupation of the lease-hold property, should make proper cultivation thereof, or should get the same cultivated by others by sowing indigo or any other crops according to his desire."

This clause has been relied upon by the learned vakil for the appellants as conferring upon his client a right to cultivate lands in Damodar Chak and hence it is said that the lease was for cultivating purposes and was not a lease of a tenure. In order to determine whether the right conferred by the lease is that of a tenure-holder under the Bengal Tenancy Act, the intention of the parties has to be looked into. The principal object of giving the lease of an entire village or a share therein is to enable the lessee to collect rents from tenants. The fact that the lessee may bring under cultivation some lands in the village will not alter the character of the tenure created by the lease. There could be no lease for the purpose of cultivation in village Damodarpore Chak when no lands to be cultivated are specified in the lease. "Raiyat" has been defined in the Bengal Tenancy Act to mean "a person who has acquired a rjght to hold land for the purpose of cultivating them.' If any raiyati interest was intended to be conferred in respect of the lands situated in Damodarpore Chak, it would have been surely specified and described in detail as in the case of land situated in Bhushar Tara. The zamindari rights in the share in Damodarpore Chak were clearly intended to be leased to defendant 1, as is obvious from the words used in the lease itself. The rights given by the lease have been summed up in the words "All the zamindari rights appertaining to it," and the lessee has been described in the lease as thiccadar. The concluding words quoted in the extract from the lease will shew that there is a special stipulation in respect of the zerait lands leased to defendant 1 for the purpose of cultivating indigo. There is no such stipulation with regard to such lands as the lessee might directly cultivate in Mouzah Damodarpore Chak with which we are concerned. I am therefore of opinion that the terms of the lease, particularly the clause relied upon by the appellant, do not confer on the lessee the right of a cultivating tenant or raiyat in respect of the lands situated in Damodarpore Chak, but that in respect of that mouzah he occupies the position of a tenure-holder. The learned vakil has relied upon the case of *Ramdhari Singh* v. *Mackenzie* (1) for the construction that, he contends, should be put upon a lease of this kind. The lease quoted in that case shews that Mr. Mackenzie was given a lease of 2 annas 13 gandas share in a village and also of specified lands of 18 bighas 1 cottah of zerait together with 4 bighas 1 cottah which he had obtained from certain tenants in the village.

The suit in that case related only to the said specific lands of 18 bighas and 4 bighas mentioned in the lease. It was found as a fact by the Courts below in that case that about 11 bighas out of 18 bighas were Mr. Mackenzie's kasht lands (raiyati lands) prior to the execution of the lease and that 4 bighas were the kasht lands of other tenants acquired by Mr. Mackenzie. It was further found as a fact by the lower Courts that Mr. Mackenzie was holding land in the village for more than 12 years. In second appeal, on the facts found by the lower Courts, Rampini and Caspersz, JJ., held that the lease of the particular lands specified therein was only for cultivating purposes and conferred upon the lessee the rights of a raiyat. The real reason for the decision in that case appears (at p. 354) to be that the lessee could not divest himself of his raiyati right acquired prior to the

(1) [1906] 10 C. W. N. 351.

lease by describing it as a zerpeshgi lease or the lands as zerait of the proprietors. It further appears that the share of 2 annas 13 gandas odd leased to Mr. Mackenzie was held by the lessor landlord exclusivsly and without any joint ownership with anybody else; whereas in the present case the 6 annas share leased to defendant 1 was held jointly by the lessor with other co-proprietors. The facts of that case and the decision in that case with regard to the lease of specific lands cannot be any guide for the construction of the lease in the present case where we are concerned with the lease of zemindari rights of a joint share in a village given to defendant 1. On the other hand the lease in the present case agrees in all its material terms with the lease referred to in the case of *Bairagi Raut* v. *Mackenzie* (2) decided by Rampini and Brett, JJ. Rampini, J., who was a party to the decision of the case in *Ramdhari Singh* v. *Mackenzie* (1), makes a distinction, with which I entirely agree between a lease of specific lands and the lease of certain shares in a village. He says:

"Now the learned District Judge has interpreted these leases as being cultivating leases; and as giving occupancy rights to the defendants and there is not the slightest doubt that as regards the first lease, that is, the lease of 4th December 1861 relating to the 15 bighas he is perfectly right. But we cannot take the same view as he has done of the remainder of the leases. In the first place it will be seen that in Ex. F, the grantee is spoken of as thiccadar and in Ex. 2, dated 12th April 1874, the grantee is described in a similar manner. Although this latter lease gives to the grantee the right to cultivate personally the share of the mouzah or to cause it to be cultivated by others, yet there are certain provisions in it which seem to us to convey but the rights of a tenure-holder, as it will be seen that the plaintiffs convey to the grantee by this document all zemindari rights save and except Brahmotar, Shebattar and Bishnuprit land etc., prohibited by law."

This view was upheld in the case of *Raghubar Mohto* v. *H. Manners* (3), decided by Mookerjee and Teunon, JJ., where the decision in *Ramdhari Singh* v. *Mackenzie* (1) was distinguished and where the lease was similar in its terms to that in the present case. The interpretation put upon the lease in that case would therefore apply to the present case. I have therefore no hesitation in holding that the lease in question conferred upon the defendant only the rights of a tenure-holder in respect of the lands in village Damodarpore Chak.

If defendant 1 was a tenure-holder, he could not acquire a right of occupancy in the lands in suit comprised in his ijara or farm while holding the village as an ijaradar or farmer, vide Cl. 3, S. 22, Ben. Ten. Act, as it has already been shewn that he came to be in possession of the land in suit after the execution of the first lease as a lessee and that he was never in possession of the lands in suit prior to that lease. Again the lessors in this case were part proprietors of the village which was an ijmali or joint village. They had no right to create any right in respect of any specific lands in the village to the prejudice of the other co-proprietors without their consent. Defendant 1 acquired only such rights to hold possession of the lands as the lessor had.

The lessor could cultivate specific lands; he could not possibly acquire a tenancy right as against the other co-proprietors, inasmuch as he could not hold adversely to himself and other co-proprietors. This principle has recently been pointed out in *Ram Lal Sukul* v. *Bhela Gazi* (4). It has not been suggested, and in fact there is absolutely nothing on the record to shew, that defendant 1 acquired a tenancy right in the lands in suit as against the other co-proprietors. It was urged on behalf of the respondents that defendant 1 is a co-proprietor in the village and was co-proprietor when the lease was executed. He could not therefore under Cl. 2, S. 22, Ben. Ten. Act, acquire any occupancy right in the village. This point does not appear to have been raised in the Courts below. There is no issue nor any finding on it. On the other hand the learned vakil on behalf of defendant 1 tried to shew that defendant 1 acquired his proprietary interest in the lands from 1895 to 1915, that is, subsequent to the execution of the lease. A reference has been made to certain entries in a certified copy of extracts from Register D of the Collectorate. This Register shews that defendant 1's name was mutated in respect of 4 annas odd in place of other proprietors from 1895 to 1915 on the basis of purchases made by him from time to time from proprietors, but when those purchases were actually made is not men-

(2) [1908] 7 C. L. J. 475.
(3) [1911] 11 I. C. 389.
(4) [1910] 37 Cal. 709=6 I. C. 370.

tioned. Possibly these purchases were after the lease was taken by the defendant.

But with respect to 14 gandas he has been entered in the Register as original proprietor without any date. That would shew that he was a part proprietor in respect of 14 gandas soon after the Land Registration Act came into force in 1876 and hence prior to the first lease of 1882. If that is so, then Cl. 2 certainly bars him from acquiring any right of tenancy, occupancy or non-occupancy in the lands. The defendant lastly relies upon Cl. 2, S. 22, Ben. Ten. Act, for his contention that he cannot be dispossessed from the lands but that he is only liable to payment of rent to the co-proprietors. This might have been so as long as the village was held jointly by all the proprietors, but on a partition of the lands the defendant as co-proprietor has no right to claim possession of the lands under Cl. 2, S. 22 of the Act. The clause is intended to prevent a co-proprietor from acquiring occupancy rights in the lands transferred to him: vide *Ram Lal Sukul* v. *Bhela Gazi* (4). In the next place the argument of the defendant is based upon the assumption that he acquired an occupancy right in the land. But as a matter of fact, as already shown, neither under the lease nor upon evidence on the record the defendant acquired any raiyati interest, occupancy or non-occupancy in the lands in suit. I fail to appreciate the contention of the learned vakil for the appellant that conceding that he could not acquire an occupancy or non-occupancy right under Cl. 2 as a co-proprietor, still he has some interest under Cl. 2, S. 22, and that he could not be deprived of that right to hold possession of the lands. But the defendant was either a raiyat or a landlord.

It has been shown that he is not a raiyat and is only a co-proprietor. He is therefore bound to give up possession of the lands held by him as a lessee and to allow the lands to be partitioned and distributed between the co-proprietors of the village. As a matter of fact there is absolutely no evidence on behalf of defendant 1 that the lands were either cultivated by himself or on his behalf. All that is said in evidence is that the lands were in his possession, which would be so as he was a lessee of the share in the village and as also he was holding the entire 16 annas of the village partly as a lessee and partly as a co-proprietor: vide evidence of P. W. 2, Genda Lal Patwari: p. 13 of the paper-book. Thus it is clear that even if under the lease defendant 1 could acquire tenancy right in respect of such lands as he would cultivate himself or through others, he has failed to shew that the lands in question were actually in his cultivating possession directly or through others and hence he could not acquire any raiyati interest in the lands. The claim of defendant 1 to hold the lands as a raiyat or tenant must therefore fail and the plaintiffs are entitled to have them brought under partition. The third point urged by the appellant is that the suit of the plaintiffs is barred by limitation. This contention is based upon Sch. III-1 (a), Ben. Ten. Act, which requires that suits for ejectment of non-occupancy tenants should be brought within six months from the expiry of the lease under which the lands are held. In this case there is no claim by the plaintiffs to eject the defendant from the lands. The plaintiffs' suit is principally and solely a suit for partition of his share in the village. It is simply prayed that the lands in suit be declared to be the lands of the Maliks and not the lands in respect of which defendant 1 has acquired occupancy or non-occupancy rights. This declaration was necessary to obtain the principal relief. Again, as held above, defendant 1 has neither occupancy nor non-occupancy rights in respect of these lands and therefore Sch. III-1 (a) has no application. The Full Bench case of *Janki Singh* v. *Jagannath Das* (5), relied upon by the appellant, does not go far enough to hold that the present suit is barred by limitation. I therefore hold that the suit is not at all barred by limitation. I would dismiss the appeal with costs.

V.S./R.K. *Appeal dismissed.*

(5) A. I. R. 1918 Pat. 398=44 I. C. 94.

A. I. R. 1918 Patna 427

CHAMIER, C. J. AND SHARFUDDIN, J.

Krishna Prasad — Decree-holder — Appellant.

v.

Bidya Nanda — Judgment-debtor — Respondent.

Misc. Appeal No. 106 of 1917, Decided on 26th July 1917, from order of Dist. Judge, Patna, D/- 17th February 1917.

Civil P. C. (1908), O. 21, R. 38 — Warrant of arrest must be executed within limits of jurisdiction of Court issuing same.

The jurisdiction to issue a warrant for the arrest of a judgment-debtor in execution of a decree is territorial, that is to say, a warrant of arrest issued by an executing Court must be executed, if at all, within the limits of the jurisdiction of that Court, but the fact that the judgment-debtor, at the time of the application, does not reside within the jurisdiction is not necessarily a sufficient reason for refusing to issue a warrant. In such a case however a time must be fixed for the return of the warrant.

[P 428 C 1]

Tribhuan Nath Sahai, Nirsu Narain Singh and *Lachmi Narain Singh*—for Appellant.

Ram Prasad—for Respondent.

Chamier, C. J.—This is an appeal against an order of the District Judge of Patna affirming an order of the Subordinate Judge, Second Court, Patna, dismissing an application for the issue of a warrant for the arrest of the judgment debtor. The Subordinate Judge says that the decree-holder is not entitled to the issue of a warrant because the judgment-debtor does not reside within the jurisdiction of the Court. This is not a sufficient reason for refusing to issue a warrant. The District Judge says that the jurisdiction of the Court to arrest in execution is territorial only and he therefore dismissed the appeal. I agree with the District Judge that the jurisdiction is territorial, that is to say, that a warrant of arrest issued by the Subordinate Judge of Patna must be executed, if at all within the limits of the jurisdiction of the Subordinate Judge of Patna, but the fact that the judgment-debtor, at the time of the application, did not reside within the jurisdiction is not necessarily a sufficient reason for refusing to issue a warrant. The decree-holder may have information that the judgment debtor is about to come within the jurisdiction and he may apply for a warrant in order that he may arrest the judgment-debtor as soon as the latter comes within the jurisdiction. By this I must not be understood to mean that it would be proper for the Court to issue a warrant to lie in the office for an indefinite time. A time must be fixed for the return of the warrant. The decree-holder in this Court suggests that it would be possible to execute the Subordinate Judge's warrant outside the territorial jurisdiction of the Subordinate Judge.

I cannot accept the suggestion. I would set aside the orders of the Courts below and direct them to dispose of the application according to law. As however the intention of the decree-holder seems to have been to execute the warrant outside the jurisdiction I would make no order as to costs.

Sharfuddin, J.—I agree.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 428

DAWSON-MILLER, C. J. AND MULLICK, J.

Adwat Prasad — Decree-holder—Appellant.

v.

Radhika Raman Prasad Singh and *another*—Judgment-debtors—Respondents.

Misc. Appeal No. 298 of 1917, Decided on 7th November 1918, from order of Sub-Judge, Second Court, Arrah, D/- 11th September 1917.

Hindu Law — Joint family—Ancestral or self-acquired property—Presumption—Member long since separated—Doing business in his own name and owning large fortune—Presumption is in favour of self-acquisition than ancestral.

In the case of a testator who was living separate from his family and had admittedly a large fortune of his own and had for many years been carrying on business on his own account, even although he had originally acquired some ancestral property, it is impossible to say that any presumption arises in favour of the proceeds of an ordinary business transaction being ancestral rather than self-acquired property. [P 431 C 1, 2]

Pugh, B. C. Sinha and *A. Husain*—for Appellants.

Kulwant Sahay and *Rai Gurusaran Prasad*—for Respondents.

Dawson-Miller, C. J.—This is an appeal from an order of the Subordinate Judge of the Second Court at Arrah, dated 11th September 1917, in execution proceedings in which he allowed the objections of the judgment-debtors and dismissed the case. Tha facts leading up to the present proceeding are as follows: On 11th February 1896, Raghunath Prasad, a wealthy Hindu Mahajan of Benares, died leaving a widow and daughter, but no male issue. Many years before his death he had separated from the other members of his family. He left a will made shortly before his death, by which after providing for the payment of certain legacies and numerous annuities the bulk of his property was left to his widow for life, but provision was made that if she should have a son, the son should take an absolute interest to the exclusion of the mother. Otherwise subject to the widow's

life-interest the estate was dedicated to the testator's family god. He appointed his widow executrix and in addition appointed guardians to see that the widow conducted herself in a manner becoming a pardanashin lady. It appears also that his intention was that the guardians were to administer the property as executors together with the widow. They in fact ultimately proved the will and were appointed executors. No provision was made for adoption of a son by the widow, but in January 1903 she in fact adopted the present plaintiff as son to her late husband. He was then a boy 4 or 5 years old and has not yet attained majority. The validity of the adoption and its effect upon the will formed the subject of litigation which was finally decided by the Privy Council on 28th February 1916 : see *Adwaitya Prasad* v. *Baldeo Das* (1) in favour of the validity of the adoption.

The present appeal relates to the execution of a decree, obtained by Raghunath's executors, after his death and before the adoption took place, against the present defendants under a mortgage executed by them in favour of Raghunath during his lifetime. The plaintiff-appellant is Adwat Prasad the adopted son, suing through his guardian. The defendants are the judgment-debtors under the decree just mentioned. The questions argued before us were in the main two : (1) Whether the appellant has any right to execute the decree ; and (2) Whether the decree has in fact been fully discharged.

It appears that in March 1893 some three years before Raghunath's death, a mortgage was executed in his favour by the present reepondents. After his death his executors brought a suit against the mortgagors to recover the sum due under the mortgage. The suit was compromised. By the terms of the compromise the amount of the claim including interest pendente lite was fixed at Rs. 91,880-1-9. This was to be paid by equal half-yearly instalments extending over a period of 10 years. In addition interest calculated at 10 annas per mensem per hundred rupees on each instalment as it became due was to be paid until the whole of the decretal money had been paid in full. Details of each instalment and interest as they became due each half year are set out in a schedule and a decree was to be passed for the amount so ascertained. It was further provided that if the decretal money with interest set out in the schedule should not be paid instalment after instalment and there should be default in three consecutive instalments, the decree-holders should have power to realise the whole decretal amount with interest at one time without waiting for the expiry of future instalments and the mortgaged property was to remain hypothecated as security for the payment of the decretal amount with interest. On 31st July 1902 a decree was passed in the suit embodying the terms of the compromise. At this time the adoption had not taken place and the present plaintiff was not and could not have been a party to that suit. None of the instalments were paid punctually, but for the first two or three years the instalments, when paid, as they were, about a year late in each case, were sufficient to satisfy not only the instalments and interest to the due date, but interest between the due date and the actual date of payment or, as it is sometimes called, post diem interest. In fact the first five instalments were more than sufficient for this purpose, in each case there being an excess of a small sum varying from Rs. 16 to Rs. 60. From the 6th instalment onwards although the payments were never made punctually, they ceased to include any interest beyond that payable on the due date as set out in the schedule, and towards the end several of the instalments were not paid until after there had been default in the next two succeeding ones. The 13th, 14th and 16th instalments are instances where this occurred and the last four were from three to four years late.

No steps however were taken at any time by the decree holders to exercise their power of realising the whole decretal amount before the remaining instalments became payable. The instalments were in each case paid into Court by the Court of Wards which was administering the estate of the judgment-debtors, and in each case the amount, when paid was taken out of Court by the decree-holder, as far as appears, without protest or objection. The payments were made in Court under challans giving particulars of the person on whose behalf the money was tendered, the person to whose credit the amount was to be placed in the Court books, the title of

(1) [1916] 33 I. C. 852.

the action, the amount tendered and in most cases the number of the instalment.

They were taken out by the decree-holders by the petitions filed for that purpose. The last four instalments which were paid in between July 1912 and April 1915 were taken out together on a petition dated 13th July 1915. It recites that the instalments of the decretal amount under the decree have been deposited in Court by the judgment-debtors on the dates noted below and prays for a payment order for amounts deposited, stating the petitioners have withdrawn from the Court the amounts deposited on account of several previous instalments and that the necessary particulars of their right to withdraw are noted in the record. Here the matter ended so far as the executors are concerned, and there can be little or no doubt that they were, and had been for some years, satisfied to accept the instalments together with the interest up to the due date without insisting upon the payment of additional interest during the periods when the instalments were overdue. It is also noticeable that although they might have claimed on more than one occasion the whole amount of the balance payable owing to three payments being in arrears, they refrained from doing so. On referring to the terms of the compromise it is at least open to question, although in the view I take of this case it is unnecessary to decide the point, whether any interest beyond that set out in the schedule was payable at all and it may be that the executors took the view that they were not entitled to claim post diem interest, or at all events that their claim to do so was very doubtful and accepted the payments as made, preferring to do so rather than run the risk of entering into further doubtful litigation.

The present plaintiff however whose status as adopted son of the testator was finally decided by the Privy Council in February 1916, now seeks to obtain further execution of the decree, claiming a sum of Rs. 10,144-1 3, the aggregate amount of interest on the last 15 instalments for the period between their due date and the date of actual payment, together with interest thereon at the decretal rate up to the institution of the present suit. The judgment debtors object: (1) that the present plaintiff is not entitled to execute the decree obtained by the executors and to which he was no party, (2) that if any interest was payable under the decree for the period during which the instalments were in default, which they do not admit, the executors waived any claim they might have had to such interest and gave a full discharge. The Subordinate Judge decided both questions in favour of the respondents. In answer to the first objection it is contended by the appellant that as the adopted son of Raghunath Prasad he takes by survivorship, and not under the will and that the whole of the testator's property devolves on him notwithstanding the terms of the will, and that in the circumstances which supervened the will has become inoperative. The determination of this question would seem to depend upon whether the property in suit was the self-acquired property of the testator or family property which the plaintiff would take by survivorship. In my opinion, the interest of the adopted son in the property in question does not arise by survivorship. There is a passage in the judgment of the Privy Council in the adoption suit referred to, which indicates that this question had been discussed and decided in that suit in the Court of first instance and not challenged on appeal. The passage in question is in these words:

> "The question whether assuming authority to adopt to have been given to the widow, the adoption of Jadunath's son would make him a son of the testator capable of taking under the terms of the will, was raised before the Judge of first instance. He decided the point in favour of the adopted son and it was not argued again in the Court of appeal and cannot be raised now."

In the judgment of the Subordinate Judge of Benares in that suit the first issue dealt with the validity of the will and the testator's power to make it, and in dealing with this issue the learned Judge, after stating that neither party contended that the testator was not of sound mind, continues:

> "If it were meant that in the will he was dealing with properties which were not his self-acquired but ancestral, this neither is the case of any party. Both admit that the deceased had absolute power and control over his property."

It is true later there are passages in the judgment to the effect that the adoption rendered the will inoperative, which would seem to imply that in the opinion of the learned Subordinate Judge who tried that case the adopted son took by survivorship, but these passages can be

reconciled with the passage quoted if they are considered as referring to the main provisions of the will, by which the vast bulk of the estate is left to the widow and after her death to the idol. In any case it is now well settled that even in a Mitakshara family the father has full power of disposition over his self-acquired property and if and in so far as the will purports to dispose of self-acquire dproperty, it is clear that the appellant can have no claim thereto by right of survivorship. The onus is upon him to shew that the property in question in the present case was ancestral property and he fails in my opinion at theoutest to establish such a case. It is admitted that the testator left property worth over 3 lakhs and from his will it appears that his share of the ancestral property at the time he separated from his brothers was Rs. 34,187 in cash becides a house and some ornaments, the balance being his self-acquired property. He had for many years been dealing as a money-lender and it is not unreasonable to suppose that the proceeds of a mortgage decree entered into by him in the ordinary course of his business formed part of his self-acquired property and in my opinion no presumption can arise in the circumstances of the present case that the subject-matter of this suit is ancestral rather than self-acquired property. In *Bodh Singh* v. *Guneschander Sen* (1), where a family held ancestral property in joint possession but some of them had acquired separate property of their own and dealt with it as such, it was held by the Privy Council that such a state of things may be fairly held to weaken if not altogether rebut the ordinary presumption of Hindu law as to property in the name of one member of the joint family, and to throw upon those who claimed as joint property that of which they have allowed their coparcener, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence. In the present case, where the testator was living separate from his family and had admittedly a large fortune of his own and had for many years been carrying on business on his own account, even although he had originally acquired some ancestral property, it is impossible to say that any presumption arises in favour of the proceeds of an ordinary business transaction being ancestral rather than self-acquired property. I hold therefore that the appellant has failed to establish his case to deal with the property in question by right of survivorship.

He contends however that under the terms of the will he takes as residuary legatee and that under the provisions of O. 21, R. 16, the interest in the decree is transferred to him by operation of law and that he is entitled to apply for execution thereof to the Court which passed it. Primarily where a decree is obtained by the executors of a deceased person, they and they only are the propers person to execute such decree, but the appellant contends that the executors or some or one of them assented to the bequest to him as residuary legatee and that under Ch. 8, Probate and Administration Act this assent divests the executor's interest and transfers the subject-matter of the bequest to the legatee. Ch. 8 of the Act, which consists of some six sections refers primarily to specific bequests, but assuming that it applies to the interest of a residuary legatee, I think it must be taken that there could be no transfer to the residuary legatee until the residue had been ascertained. In the present case there were a large number of annuities, and there is nothing to shew that these have been paid off or that any specific sum has been set aside for the purpose of meeting these charges on the estate. In fact the estate is still being administered by the executors and having regard to the fact that the plaintiff's status as adopted son was the subject of litigation which was not finally determined until February 1916, it is improbable that the executors or any of them would, at all events up to that time, have assented to the plaintiff taking as residuary legatee under the will. The only evidence which the appellant puts forward in support of his contention that there was any assent is, first, a passage in the judgment of the Subordinate Judge of Benares, dated 21st September 1909, in the suit brought by Baldeo Das, one of the executors, against the present plaintiff to have the adoption declared invalid, and, secondly, the fact that in the year 1916, Moti Chand, one of the executors, was appointed guardian of the person and properties of the plaintiff by

(1) [1874] 19 W. R. 356 12 B. L. R. 317 (PC)

the District Judge of Benares in place of the widow who had been appointed in 1903. It appears that there was some dispute amongst the executors themselves as to the administration of the estate and as to the plaintiff's status and Baldeo Das instituted the action referred to, claiming a declaration that the adoption was invalid. Mt. Saraswati Bibi was one of the defendants in that suit and the following passage relied on by the appellant occurs in the judgment of the Subordinate Judge:

"Saraswati's defence is that she adopted Adwat Prasad observing all the ceremonies of the Hindu law and the adopted son is now become owner of the estate of Raghunath Prasad, the will of the deceased and the plaintiff's guardianship being no longer in operation. As motive for the suit she alleges that the trustees have got it instituted because she had demanded of them to render account and restore possession of the estate to her as guardian of the minor adopted son."

It is impossible to infer from this bald statement in the judgment that Saraswati was assenting or had at any time assented to the plaintiff's claim to the estates as residuary legatoe. The inference which I draw from that passage in the judgment is that Saraswati's contention was that the will was inoperative and that Adwat Prasad, the adopted son, was entitied to the property by survivorship and this view would appear to be confirmed by a reference to another part of the judgment, in which it is stated that Baldeo Das contended, firstly, that there was no valid adoption, and, secondly, that if there was, Adwat Prasad had no right to the properties under the will inasmuch as the testator by his will had made a complete dedication to them to the idol. Saraswati's answer to this was that the will was no longer in operation. The appellant also contended that Saraswati. the executrix, must be taken to have assented to the legacy when she was appointed guardian of her adopted son in June 1903, and further that the same inference must be drawn in the case of Moti Chand when he was appointed guardian in 1916. There is however nothing whatever to shew that either Saraswati or Moti Chand took any steps to get possession of the estate of the minor in his capacity as residuary legatee, and I decline to draw any inference to this effect from the mere fact that a guardian was appointed who happened also to be a trustee. It is for the plaintiff to establish his case and he has entirely failed to adduce any evidence either positive or inferential on which an assent can be made out. Having arrived at thls conclusion it folfows that appellant is not entitled to execute this decree and his application to do so accordingly fails. The appellant having failed to establish his right to sue, his appeal cannot succeed and it is not necessary to consider whether a waiver by the executors to claim the interest now sought to be recovered acts as a full discharge to the judgment-debtors or whether such a waiver amounts to an adjustment of the decree which the Court cannot recognize unless certified or recorded in compliance with the provisions of O. 21, R. 2. The appeal will be dismissed with costs.

Mullick, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 432
Special Bench

CHAPMAN, ATKINSON AND ALI IMAM, JJ.

Lal Nriparaj Singh—Appellant.

v.

Mohan Gauntia—Respondent.

Letters Patent Appeal No. 110 of 1917, Decided on 12th February 1918, from declsion of Roe and Jwala Prasad, JJ., in First Appeal No. 396 of 1915, D/- 21st May 1917.

(a) C. P. Land Revenue Act (1881), S. 65-A—Object is to retain certain selected families in gauntiaship of their villages.

The object of S. 65-A is not to the benefit of the zamindar but to retain, if possible, certain selected familes in the gauntiaships of their villages, and to protect them against transfers and sub-divisions. [P 443 C 1]

(b) C. P. Land Revenue Act (1881), S. 65-A, Cl. (4)—S. 65-A, Cl. (4), is mandatory—Right of eldest male heir to resign rights as gauntia must be exercised when succession opens.

Section 65-A, Cl. (4), is mandatory in its terms. The right of the eldest male heir to resign or renounce his rights as a gauntia, with a view to giving up all claim to inherit the estate which has by statutory devolution descended upon him must be exercised at the time when the succession opens, viz., on the death of the last protected gauntia. [P 446 C 2]

(c) C. P. Land Revenue Act (1881), Ss. 65, and 132—S. 132 does not empower Deputy Commissioner to deal with suit for ejectment or for recovery of Gauntiaship—Such suit is cognisable by civil Courts.

The provisions of S. 132 were drawn up with reference to S. 65-A of the Act and were intended to enable the Daputy Commissioner merely to determine claims to protection under that section and to enforce the provisions of that section

It was never intended that the Dy. Commissioner should be empowered to deal with a suit for ejectment or for the recovery of a Gauntiaship. Such a suit is cognizable by the civil Courts. [P 445 C 2]

(d) C. P. Land Revenue Act (1881), S. 65-A (4) (b)—Right of election under S. 65 A (4) (b) must be exercised in respect of entire estate devolving on eldest member —There can be no splitting up estate or tenure into different parts.

Per *Atkinson, J.*—The right of election under S. 65-A, Cl. (4) (b), must be exercised in respect of the entire estate which devolves on the eldest male heir. If two or more villages form the protected tenure of a Gauntia, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption in respect of all or none of such villages; there can be no splitting up of the estate or tenure into different parts having distinct entities. [P 446 C 2; P 447 C 1]

(e) C. P. Land Revenue Act (1881), S. 65 A (4) (b)—Death of person on whom two Gauntiaships are vested — Eldest heir can resign at time of succession in favour of another heir either both or one Gauntiaship.

Per *Imam, J.*—There is nothing in S. 65-A to show that the protection afforded to the tenure of a Gauntia is to extend to a group of tenures. Where a person in whom two Gauntiaships are vested dies, it is open to his eldest heir to resign at the time of his succession in favour of another heir either both the Gauntiaships or one of them.

Abani Bhusan Mukherjee—for Applt.

Umacharan Laha—for Respondent.

[Facts appear from the following judgments of.]

Roe, J.—The plaint in this case was filed on 2nd April 1913 in the Court of the Subordinate Judge at Sambalpur by Mohan Gauntia, son of Karuna Gauntia. Karuna was the Gauntia of two villages, named Bandipali and Sargipali. These villages are part of the zemindari of Barpali. In 1891 Karuna received a certificate as a protected Thiccadar of these two villages. In Sambat 1957 corresponding to 1900 A. D., Karuna died leaving him surviving the plaintiff Mohan Gauntia and two younger sons, Kuber Gauntia and Balaram Gauntia. In 1907 Kuber Gauntia executed an ekraranama in favour of the Darpali estate, surrendering Sargipali village to the Barpali zemindar and acknowledging receipt of a sum of Rs. 2,300 in consideration of improvements made to the village during his tenure thereof. In 1908 Mohan Gauntia filed a petition in the office of the Court of Wards, who had by that time assumed charge of the Barpali estate, denying Kuber's right to surrender the village and requesting that the village of Sargipali be restored to himself. The Court of Wards refused to give up the village. The plaintiff Mohan Gauntia therefore sues to recover it from the Court of Wards.

The learned Subordinate Judge has decreed the suit and against that decree the present appeal is made. A preliminary objection is made by the plaintiff-respondent that that appeal filed is out of time. In this suggestion there is no substance. The date of the Subordinate Judge's decree is 20th May 1914. An appeal was filed in the District Court on 26th June 1914. The memorandum of appeal was returned to the appellant under the instructions of the District Judge on 17th August 1915 and the present appeal was filed in the High Court on 16th August 1915. The first ground taken in appeal is that the suit is bad by reason of the failure of the plaintiff to give due notice of suit in accordance with the Central Provinces Court of Wards Act. Under that Act a plaintiff is required to state definitely in his plaint the date of the notice. The plaintiff recites in his plaint that he served this notice on 11th October 1901. The petition filed by the plaintiff before the Officer-in-charge of the Court of Wards, bearing date 11th October 1909, contains the following phrase:

"Therefore the applicant should not be driven to the necessity of bringing a civil suit for the recovery of the village."

The plea taken by the appellant is a purely technical plea and were I of opinion that the suit should be decreed on the merits, I would accept this direct limitation that the plaintiff was prepared to enforce his rights by a civil action as sufficient notice of his intention to sue. No particular form of notice of suit is required by the Central Provinces Court of Wards Act, and it is not suggested that the suit must be filed within any definite period after the notice is given. It is said only that the suit shall not be filed within two months of the receipt of notice. In my view the Act contemplates only an intimation to the Court of Wards that a party proposing to sue the Courts of Wards has a grievance which requires investigation. In this view the notice dated 11th October 1909 is sufficient intimation that the plaintiff has a grievance which he may be driven to redress in the Civil

Courts. In dealing with the case on the merits I propose to set down firstly the facts upon which the documents on the record and the admissions of the plaintiff must be held to be beyond dispute. Karuna, the plaintiff's father, died in July 1900, (Shraban-Bhado, 1957). Prior to that date he had signed all receipts granted to tenants with his own hand. After that date all receipts granted to tenants for lands held in the village Sargipali are signed by the hand of Kuber. No receipts to any Sargipali tenant bears the signature of Mohan Gauntia.

Mohan also admits that by an agreement dated 1901, the Bhogra lands of Sargipali were made over to Kuber and Balaram. He does not suggest that prior to the date of that agreement he cultivated them himself. His witness Madan Gabir says: "The Bhogra lands left by Karuna used to be cultivated by Kuber and Balaram." It must be held to be beyond dispute that from 1901 at least Mohan ceased to have any direct connection with the Sargipali tenants and the Sargipali Bhogra lands. The final publication of the Record of Rights was made in the year 1907. To those who are cognisant of settlement methods it is clear that the preliminary records must have been prepared about the year 1905. Evidence is given by Markand Singh, the defendant's witness, that Mr. Kaluram, the Assistant Settlement Officer, came to Baripali in 1905 and that the papers of Sargipali were made over by him to Kuber and those of Bandipali to Mohan. The plaintiff's evidence upon this point is as follows:

"I got the rent rolls of Bandipali from Mr. Tholon, the Assistant Settlement Officer. Mr. Tholon gave the rent roll of Sargipali to Kuber."

Whether the Assistant Settlement Officer was Mr. Tholon or Mr. Kaluram is immaterial. It must be held to be beyond dispute that when in 1905 the Assistant Settlement Officer (whoever he was) came to the village Mohan acquiesced in the delivery of the rent roll of Sargipali to Kuber. After the relinquishment by Kuber of Sargipali in 1917, the Manager of the Court of Wards took steps to settle the Bhogra lands. There were a number of applicants for the settlement of these Bhogra lands. Mohan Gauntia's offer of Rs. 380 was accepted. His offer is dated 8th June 1908, and the order granting him the lease is dated 26th June 1908. On 10th July 1908 Mohan Gauntia filed a petition saying

"that Bhubno, Chintamoni and Damru are cultivating the aforesaid Bhogra lands. I therefore pray that I may be given possession of the aforesaid Bhogra lands. In four or five days the above named cultivators be ousted from the said lands or else by delay the proper time for cultivation will be over and I will be put to serious loss."

On 4th September 1908 a further petition was made repeating this prayer and again on 6th January 1906 Mohan Gauntia reported that as he had not been able to get possession of the lands he would not be able to pay the rent payable, Rs. 380. It was not until 11th October 1909 that Mohan Gauntia made any suggestion that the surrender by Kuber was invalid. It must be held to be beyond dispute that from 4th June 1908 to 11th October 1909 he acquiesced in the claim made by the Court of Wards to re-settle the Bhogra lands of Sargipali. Under S. 65 (a), Central Provences Land Revenue Act of 1881, the tenure of a Gauntia who has been declared to be protected shall not be partitioned and shall devolve on one member only of the thiccadar's family, and where there are two or more heirs bearing the same relationship to the former thiccadar, the eldest of such heirs shall succeed. It is incontestable that Mohan Gauntia was entitled on the death of his father to succeed to both Bandipali and Sargipali. It is for the defendants to prove that at some time prior to 1907 Mohan divested himself of all rights in Sargipali in favour of Kuber. It is certain that since 1901 Mohan has had no direct connection either with the tenants or the Bhogra lands of Sargipali. It is certain that in 1905 he acquiesced in Kuber's claim to be recorded as Gauntia of Sargipali. It is certain that in 1908 he acquiesced in Kuber's surrender of the village. These three facts seem to me conclusive proof of the defendant's case. No real attempt is made to explain away the last two facts. Mohan in his evidence explains Kuber's collection of the rents from the Sargipali tenants by an assertion that, having collected them, Kuber made them over in their entirety to him and from them he (Mohan) paid the dues of the Bargipali estates for a time to the Baripali Zemindars themselves and thereafter to the

usufructuary mortgagee who was put in possession of the property by the Baripali Zemindar.

It is pretended that this arrangement was made by a written agreement drawn up in 1901 and the Patwari took away this written agreement on the plea that the Zemindar wanted it and that it has never been given back. What the position may have been for the first year of Karuna's death is absolutely immaterial. We may accept the plaintiff's story that during this period the three brothers were quarrelling. The sole point of importance is what was the nature of the agreement by which the quarrel was settled. Did Mohan thereby surrender his rights as Gauntia, or did he thereby appoint Kuber his agent for the collection of rents? The learned Subordinate Judge takes it that Mohan Gauntia must have remained the Thiccadar of Sargipali, for the reason that many of the receipts for rents paid to the Zemindars were given to him personally and that many of the chalans issued by the Zemindars for the supply of wood, goats and such like were directed to him and are in his possession and have been produced by him. He also attaches importance to the fact that a takavi loan for the improvement of Sargipali was taken in Mohan's name and the repayments upon this loan were made in Mohan's name, and that the challans showing these repayments are in Mohan's possession. Now all these papers may well be in the possession of the plaintiff without his having in the first instance received them. Kuber bas not been put into the witness box on either side. It is impossible to say on which side he is now standing, but common considerations of interest would suggest that he is siding with his brother. He has certainly nothing to gain by siding with the Zemindar, and if indeed he is siding with his brother, the fact that receipts which should in the first instance have been given to Kuber are now in the possession of the plaintiff is by no means proof that the plaintiff was in the first instance entitled to receive them.

That they are in the name of the plaintiff is to my mind immaterial. The arrangement by which Kuber was in possession of Bhogra lands in Sargipali and collected the rents of Sargipali was not reported either to the Zemindar or to the Deputy Commissioner. The papers produced by the plaintiff prove no more than this: that for some years after Karuna's death, Mohan's name remained in the registers as the recorded Gauntia, and that after 1901 the brothers were sufficiently good friends for payments of rent and takavi instalments to be made sometimes by the hand of Mohan and sometimes by the hand of Kuber. They throw no light at all upon the real nature of the agreement of 1901 by which Kuber was actually in possession of Sargipali. On the other hand the granting of rent receipts to raiyats in the name of Kuber, the record in the Jamabandi of 1903-04 (Ex. 1) of Kuber's name as Gauntia of Sargipali, the acquiescence of Mohan in the giving in 1905 of the rent roll of Sargipali to Kuber, and the acquiescence of Mohan in 1908 of Kuber's surrender of Sargipali are cumulatively conclusive proof that by the agreement of 1901 Mohan surrendered his rights to Kuber, and that the story that the agreement of 1901 merely constituted his agent in that village is entirely untrue.

The learned Subordinate Judge is of opinion that as Karuna died in 1900 and the agreement whereby Kuber entered into possession of Sargipali was not made till 1901, the transfer even if made would be void. Granting for the sake of argument that Mohan Gauntia did not finally divest himself of all interest in the village until the settlement proceedings of 1905, I am of opinion that the final transfer confirmed by the proceedings during settlement in 1905 would be valid as against Mohan Gauntia. So much of S. 65 (a) as is necessary to this discussion runs as follows:

"The tenure shall be heritable, but not transferable by sale, gift mortgage or dower when on the death of a Thiccadar there are two or more heirs bearing the same relationship to him, the eldest of such heirs shall succeed, provided that the eldest of two or more such heirs shall be at liberty at the time of succession to resign his rights in favour of another heir bearing the same degree of relationship to the deceased Thiccadar as he himself does."

It is suggested by the learned Subordinate Judge that the transfer made after possession had been taken by succession is not legal and that such a transfer would be void as against the transferor. The only penalty provided for such a transfer is that on contravention by the

transferor of the condition of his tenure contained in Cl. (a) the Settlement Officer or Deputy Commissioner may with the previous sanction of the Chief Commissioner declare such Thiccadar, Gauntia, or farmer to have forfeited the protection previously conferred. The position I take is much the same as that of an occupancy right in Bengal. The transfer is good as against the transfer but not good as against the landlord. There is nothing in the Act to suggest that the transferor himself can recover possession of property transferred in contravention of the provisions of Ss. 65-A, Act, 47,4 (a). On a perusal of the analogous sections of the Central Provinces Tenancy Acts 47, 48, 70 and 71, it will be apparent that the transferor of occupancy rights cannot deny his right to make such a transfer. The only persons who can sue to set such a transfer aside are the nearest heirs of the transferor or failing them, the landlord. That I take to be the position in the case before us. Mohan, at least, is not entitled to deny the validity of the transfer of his rights to Kuber. His suit must fail.

We are not concerned here with the question whether Kuber actually received Rs. 2,300 from the Barpali Zemindar as a consideration for the relinquishing of his rights. The Court of Words is much to blame for failing to put Kuber into the witness-box and for failing to produce the account books of the estate in which might have been displayed the entry of this payment. It is sufficient for the purposes of the case before us to find definitely that at the time when Kuber did relinquish these rights the plaintiff had no interest in the village which would justify him in protesting against such a transfer. That the plaintiff had in 1907 no subsisting right in the village is in my opinion conclusively proved. I hold that the suit is not on the merits maintainable by the plaintiff to deny Kuber's proprietorship of the tenure or to recover the property from the person to whom Kuber has transferred it. I would therefore allow this appeal and direct that the plaintiff's suit be dismissed with costs throughout.

Jwala Prasad, J.—I regret I am unable to agree with my learned brother, although it would have given me very great pleasure to be able to subscribe to his view of the case. I have carefully considered the evidence in the case and the law embodied in S. 65-A, which has been incorporated into the Central Provinces Land Revenue Act 18 of 1881, regarding the incidence of the tenure of a Gauntia in the Sambalpur District to which the village in dispute appertains.

I entirely agree with the Subordinate Judge of Sambalpur who tried the case both as regards the findings of fact arrived at by him and the law applicable to the case. I must at once say that the plaintiff Mohan Gauntia, being the eldest son of his father Karuna, the previous Gauntia of the village succeeded to the Gauntia right in the village in dispute in 1900 after the death of his father and that there was no relinquishment of his right in favour of his younger brother Kuber either "at the time of succession" or at any time, and that the deeds of surrender and agreement executed by Kuber in favour of defendant 1, the Zemindar of the village, in the year 1907 are invalid and illegal and do not confer any right on defendant 1 to take possession of the tenure as against Mohan the plaintiff, his sons and the other members of the family who have vested rights in the tenure in dispute, being their ancestral family property, though only one of them was recognised and declared as a Gauntia thereof for the purpose of performing the duties of a Gauntia imposed upon him by law. The plaintiff is therefore entitled to the declaration of his right to and recovery of possession of the village in claim including the sir and khudkast lands specified in the plaint. The suit has been properly decreed by the Court below and the appeal should therefore be dismissed with costs.

It is undisputed that Karuna, the father of the plaintiff, was the former Gauntia of the village Sargipali in dispute and of another village Bandapali, both appertaining to the zemindari of Barpali of which defendant 1 is the proprietor. In 1891 Karuna received a certificate as a protected Thiccadar of the two villages. He died in 1900 leading him surviving three sons, Mohan the plaintiff, Kuber and Balaram. Mohan being the eldest son succeeded to both the villages under S. 65, Cl. 4 (b), which enacts that,

"when on the death of a Thiccadar there are two or more heirs bearing the same relationship to him, the eldest of such heirs succeeds."

Kuber therefore did not succeed being the second son of Karuna. On 5th October 1907, Kuber however executed a deed of relinquishment, Ex. B, called " wapsi patta," surrendering the Gauntia right of village Sargipali in favour of defendant 1. This was followed by a deed of agreement Ex. F, executed by Kuber the next day, 6th October 1917, in favour of the zemindar, defendant 1 which runs as follows ;

" That on 5th October 1917, I surrendered to you the entire 16 annas Gauntia interest of Mauza Sargipali in Baripali zamindari, District Sambalpur, with all the bhogra lands and my dwelling houses, etc., and delivered possession thereof to you. As I effected improvements of the bhogra and the houses, etc., in the said Mauza Sargipali and constructed kata and band, etc., I take from you Rs. 2,300 in cash on account of these improvements. I shall have no claim in the said village. On receipt of Rs. 2,300 in cash in the presence of the witnesses, I do hereby execute the deed of agreement that it may be of use when necessary."

The zamindar defendant 1 is in possession of the Gauntia right of village Sargipali on the basis of the aforesaid deeds of surrender and agreement executed by Kuber from the date of the execution thereof in 1907. The plaintiff's claim to recover possession is resisted solely on the aforesaid documents. The question is whether Kuber had a right to surrender the village in question and whether the deed of surrender executed by him conferred any right upon defendant 1 as against the plaintiff and whether it is valid and operative in law and whether the plaintiff is bound by the surrender made by his younger brother Kuber. As to the right of Kuber to surrender the village defendant 1 in his written statement alleged as follows :

" (1) It is admitted that Karuna, father of plaintiff, Kuber and Balram, was the protected Thiccadar of Mauza Sargipali. Karuna was also protected Thiccadar of Mauza Bandipali, (2) after Karuna's death Mohan remained at Bandipali and acted as Thiccadar thereof whereas Kuber remained at Sargipali and acted as Thiccadar; (3) the allegations in para. 3 of the plaint are not true. Kuber acted in Sargipali as Thiccadar on his own behalf and not as agent of his brother Mohan."

N.B.—The allegations in para. 3 of the plaint referred to herein are that the plaintiff dwelt in Mouza Bandipali and in the year 1901 he appointed his younger brother Kuber, defendant 2, as his agent to manage Mauza Sargipali on his behalf and accordingly Kuber realized rents from the tenants on behalf of the plaintiffs.

" (4) That at the Dewar Settlement Mohan was recorded as Thiccadar of Bandipali and Kuber of Sargipali. This was on the application of Kuber and Mohan, not having accepted the Thiccadari of Mauza Sargipali and agreeing to the Record of Rights being in the name of Kuber, relinquished his right in favour of his younger brother."

From the above it is clear that in the written statement the right of Kuber as Gauntia of Sargipali is said to be based on the fact that Kuber acted as Thiccadar on his own behalf in the village and that at the time of the preparation of the Record of Rights Mohan did not accept the Thiccadari of village Sargipali and agreed to the name of Kuber being recorded in the Record of Rights. and thus relinquished his right in favour of Kuber. There is no case made out in the written statement that Mohan resigned his right in favour of his younger brother Kuber at the time when succession ensued after the death of his father Karuna in terms of the proviso of S. 65 A, Cl. 4, which runs as follows:

"Provided secondly that the eldest of two or more heirs shall be at liberty at the time of succession to resign his right in favour of another heir bearing the same decree of relationship to the deceased thiccadar as he himself bears".

Indeed the evidence on behalf of the defendants is that after the death of Karuna, Mohan became the Gauntia of Sargipali. Markund Singh, witness 1 on behalf of the defendant, says:

"In Sargipali there is no cosharer; Kurna was the sole Thiccadar of the village. . . . . After his death Mohan became Gauntia of Sargipali . . . Karuna had got a protected certificate in 1901 in respect of Sargipali. Mohan remained thiccadar of Sargipali for about a year after the death of Karuna".

This witness admitted Ex. 1, the receipt granted to Mohan bearing, his signature, with respect to which he says in his evidence:

"We took patwari and other ceses from the plaintiff Mohan on 2nd November 1903 for Sambat 1958 and 1959."

There is no reason why this statement of this witness should not be accepted. He is a relation of the zamindar defendant and is in his service since 1875 as his ammukhtar and has been looking after the management of this village and also holds Bhogra lands after the surrender by Kuber. There is no evidence that Mohan resigned the Gauntia tenure in favour of Kuber at the time when succession ensued after the death of Karuna. On the other hand, the positive evidence is that Mohan succeeded to the Gauntia right and was recognized by the zamindar, defendant 1, as the Gauntia

of the village. Defendant 1 admitted that Mohan was the Gauntia of Sargipali in Ex. 8, and a usufructuary mortgage bond, dated 14th April 1902, executed by him in favour of Bairagi Dora for Rupees 6,000, wherein village Sargipali along with other villages of the zamindar was mortgaged. The plaintiff was directed to pay the annual rent of Rs. 149-3-0 of village Sargipali to the mortgagee Bairagi Dora. About the same time Mohan executed a registered agreement, Ex. 6, agreeing to pay Thicca Jama of Sargipali to Bairagi Dora, the mortgagee, in accordance with the aforesaid mortgage bond. The rent receipts Exs. 3 to 3-C of the period 1903 to 1907 show that Thicca Jama of Sargipali was paid to Bairagi Dora for the Sambat 1959 to 1961 and 1963. All these receipts are in favour of Mohan Gauntia.

Exhibit 3-A mentions that the money was received on behalf of Mohan Gauntia through Kuber. Ex. 4 is a letter from Bairagi Dora, the mortgagee, to the plaintiff demanding rent from him for village in dispute. Ex. 1, dated 2nd November 1903, a receipt for patwari and other cesses, mentions that Mohan Gauntia paid these cesses for Sambat 1958 and 1959. All the receipts granted by the zemindar are in the name of Mohan, described as Gauntia sometimes the money is is said to have been received from Mohan himself and sometimes through Kuber. The letters in the shape of parwanas, Ex. 5 series, I B. and L E, issued from 1903 to 1907 by the zemindar mention sometimes the name of Mohan and sometimes only the Gauntia of Sargipali without any name, but never the name of Kuber as Gauntia of the village. The Government Treasury Challans 2 to 2-J show that money was paid by Government to Mohan as Gauntia of the village for effecting improvements of Sargipali and that the money was returned to Government from 1906 to 1912 by Mohan Gauntia personally. The words in the Challans are: "Brought by Mohan Gauntia tendered by self." In two instances the words are: "Brought be Mohan Gauntia of Sargipali, tendered through Kuber (Ex. 2)." In one instance, Ex. 2 G, the words are: "Brought by Mohan Gauntia' paid by Balaram Gauntia" (the youngest brother). These documents clearly show that Mohan was recognized as the Gauntia of the village all through and held responsible for the performance of the duties of a Gauntia of the village both by Government and by defendant 1, the zamindar. Kuber's position was never recognized as being higher than that of an agent of Mohan. The rent receipts Ex. A to A 25, of four tenants of the village produced on behalf of the defendant as shewing that Kuber collected the rents of the village, are not inconsistent with the case of the plaintiff, which is that Kuber was his agent and was collecting rents in the village on his behalf.

It is clear from the above that Mohan did never relinquish his right in favour of Kuber. There is no deed of relinquishment executed by Mohan in favour of Kuber in respect of the Gauntia tenure of the village in dispute or any other documentary evidence to show that Mohan did at any time resign his right in favour of Kuber. Witness 1, Markund Singh, Am-Mukhtar of the defendant, says:

"I do not know how the village was given to Kuber either by written (?) or verbally, as I was not present on that occasion."

The defendant examined 8 witnesses in this case, but none of them says a word about Mohan's having relinquished his right in favour of Kuber. The Mukaddam Gumasta of Sargipali, the only witness on the point, says that he is unable to say whether Kuber used to realize the rent of the village on his own behalf, or on behalf of Mohan, and is silent as regards any relinquishment by Mohan to Kuber. He was sued by Mohan in the Court of the Munsif in 1902 and in Paus last a criminal case was brought against him by Mohan for assaulting his son. This witness is of no value and is unreliable. An attempt has been made to show that the name of Kuber was recorded in the settlement record, which terminated in 1907, with the consent of Mohan. It is said that Mohan even put in a petition stamped with 8 annas court-fee before the Settlement Officer, asking that Sargipali might be recorded in the name of Kuber. The petition has not been produced, nor the register showing the entry of such an application. Witness 8, a Patwari Fund clerk, has been produced to show that he made a search for the document but could not find it. He admits that he is not in charge of the papers which re-

main in the record room, and that the record-keeper is in charge of them. The record-keeper is not produced. This witness made a search of his own accord. He says that these papers are not in his office but they might be in the record room and there is nothing to show that any such application ever existed. The Khewat, Ex. H, does not contain any note by the Assistant Settlement Officer that any petition was filed by Mohan or any statement was made by him that Kuber should be recorded as the protected thiccadar of the village

Markund Singh is too much interested to be relied upon on behalf of defendant 1, being his relation and his Am-Mukhtar, when he says that the plaintiff Mohan Gauntia agreed to the name of Kuber being recorded at the time of settlement. I agree with the Subordinate Judge that the evidence on behalf of the defendant as to having relinquished his rights in favour of Kuber before the Assistant Settlement Officer is wholly unworthy of credence. Kuber, either of his own accord or in collusion with defendant 1, might have got his name recorded before the Assistant Settlement Officer. Mohan had nothing to suspect that Kuber would get his own name recorded, for Kuber had never before done any act in breach of the confidence reposed in him by Mohan. Even if it be held that Mohan did actually consent either by a petition or verbally to Kuber's being recorded by the Settlement Officer as a Gauntia, it would be several years after his succession to the Gauntia right and the recognition of his right by the zamindar and the Government as shown above. He had, in 1904, no right to relinquish the tenure in favour of his brother before the Settlement Officer, for it would then amount to a transfer of the right already accrued to, and enjoyed by, him, by way of gift in favour of Kuber. It was not a surrender to the zamindar but a transfer to a third person as against the zamindar. This is not permissible. S. 65, Cl. 4-A prohibits absolutely a transfer of the Gauntia tenure in any way either by sale, gift or mortgage. The relinquishment, if any, made by Mohan in favour of Kuber in 1904, which had already been shown to have never taken place, is wholly inoperative and invalid in law. No consent of the zamindar in my opinion would validate the transfer declared by law to be illegal. It is admitted that this was the ancestral family property. Under the special rule of succession provided by S. 65 A, out of the several heirs bearing the same relationship to the deceased Gauntia the eldest of such heirs succeeds and is not liable to partition. The gauntia tenure in question was an ancestral property in the hands of the father of the plaintiff and his brothers in which all of them had acquired an interest by birth. The tenure was created long before 1898, when S. 65 A was enacted after amendment. Karuna's ancestor Dhunda originally held the tenure, which in succession came to be held by Karuna and Gajadhar, son of Dhunda. Karuna also was however granted a certificate in accordance with Act 16 of 1889. The effect of the certificate was not to take away the rights of other members in the family, as held by the learned Judicial Commissioner of the Central Provinces in *Fagwa* v. *Budhram* (1). The history of the tenure in that case is exactly similar to that in the present case. Prior to 1891, two brothers, Sakhru and Pathari, held the tenure for which in 1891 a certificate was given to Pathari alone. It was held that the certificate did not create two new rights personal to Pathari alone and that Pathari's nephew did not cease to have an interest in the tenure. Pathari, his sons and nephew were held to be joint owners of the thiccadari village. The law regarding the rights of the person declared as protected in status by certificate in 1891 and other members of the joint Hindu family has been summarised in that case as follows :

"There is absolutely nothing in the Act of 1898 to suggest that the vested right was intended by the legislature to be taken away from him. Property which is joint property and enjoyed as such does not cease to be joint property merely because a subsequent Act does not recognize the partition. . . . It cannot be seriously argued that these restrictions on the right to partition have taken away from the cosharers in Sambalpur Khalsa villages all rights of property, and conferred them on the lambardar gauntia."

The right recognized by the Settlement Officer is not merely a personal privilege. The learned Judges further held that the fact that the certificate was issued in the name of one member does

(1) A. I. R. 1914 Nag. 48=24 I. C. 855=10 N. L. R. 64.

not affect the rights of the other members and that the question of privity of contract between the zamindar and the other members of the family does not affect the right as against each other. In Second Appeal No. 2878 of 1914, in *Lal Narupraja Singh* v. *Bhabani Teli* (2), in connection with the suit brought by the zamindar, after the surrender by Kuber in 1907, to eject some relations of Kuber from parcels of Bhogra lands held by them, the learned Chief Justice overruled the defendant's contention of law that a protected Gauntia is unable to relinquish his right. The question whether Mohan did as a matter of fact relinquish his right in favour of Kuber and whether Kuber on the strength of his name being entered in the Record of Rights could validly surrender the tenure to the prejudice of the plaintiff, was not raised and could not be investigated in that second appeal. It was for the purpose of that case however assumed that Kuber was a protected Gauntia of the village. Mohan was not a party to that litigation. I regret the above authorities were not cited to us in the course of the arguments by the learned vakils in Cuttack representing the parties. In the present case however the plaintiff has been able to show that he himself did succeed as a gauntia under the law and was recognised as such by defendant 1 and that he did not relinquish it in favour of Kuber.

Hence Kuber was not competent to surrender it to the zamindar. It follows from the principles of the ruling in *Fagwa* v. *Budhram* (1) already cited that a Gauntia, having succeeded to the protected tenure under S. 65 A of the Act, cannot transfer the rights by gift in favour of one to the prejudice of the rights of the other members of the family in the property. In the present case Mohan, having succeeded to the tenure and having been recognized as such for a number of years could not transfer the right in favour of Kuber to the prejudice of the youngest brother and his own sons and the sons of the other brothers. Under the Hindu law the transfer by one member, unless as a Karta of the family, is not binding upon his brothers and nephews, as the members of the family acquire vested rights by birth in the ancestral property. Under the special law a person succeeding to the gauntia tenure in preference to the other members of the family has no right to transfer the tenure. In this view of the law the relinquishment by Mohan to Kuber before the Assistant Settlement Officer in 1904 was absolutely invalid and illegal and is not binding upon Mohan or the other members of the family. As a matter of fact it appears that there was no relinquishment at all. The Record of Rights does not affect the right of the plaintiff, nor does it seem to have been acted upon. The documentary evidence already referred to shows that even after the alleged relinquishment by Mohan and the preparation of the Record of Rights, Mohan Gauntia continued to be recognized as the thiccadar of the village and to pay rents and cesses to the zamindar, and to his mortgagee, and also the takawi dues to Government (vide the rent receipts of 1902 to 1907, Parwanas of 1903 to 1907 and the Treasury Chalans of 1906 to 1914). All these documents were produced by the defendant before the Court of Wards in 1909, and in the present suit, from his own custody.

There is no reason why these documents would be with the plaintiff if he had parted with his rights in the village in favour of Kuber. I have no hesitation therefore in agreeing with the learned Subordinate Judge that there was no relinquishment of his rights by Mohan in favour of Kuber at any time and that his rights are not affected by the Record of Rights. It is possible that Kuber being in charge of the village did in collusion with defendant 1 get his name entered in the Record of Rights either for his own benefit or for the benefit of the zamindar, to whom he is said to have surrendered soon after the Record of Rights was finally published. But the deed of surrender executed by Kuber in favour of defendant 1 on 5th October 1907, and followed by a deed of agreement on 6th October 1907, would not affect the rights of the plaintiff as he was no party to it. It is not necessary for the plaintiff to show that the surrender made by Kuber in favour of defendant 1 is not a bona fide document or without any consideration, for the plaintiff has succeeded in proving that Kuber had no right to surrender. But it may be mentioned that the circumstances connected with the execution of the deed of surrender are suspicious enough to raise

(2) [1917] 37 I. C. 107.

a reasonable doubt as to the bona fides of the transaction. In order to bolster up the case, defendant 1 made some of his witnesses to say that Mohan was himself present at the time of the execution of the deed of surrender and the payment of Rs. 2,300 to Kuber. Markund Singh, the am-mukhtar of the defendant, however gives up the show when he himself does not say that Mohan was present at the time of the execution of the deed of surrender. The deed of surrender was presented for registration by Markund Singh, the am-mukhtar of defendant 1. It does not mention any consideration for which the village is said to have been surrendered.

The deed of agreement however mentions that Kuber received Rs. 2,300 in cash on account of the improvements made by him in the village. As to the payment of Rs. 2,300 to Kuber, the evidence is most unreliable. It is admitted that money was not paid at the time of the execution of the deed of surrender, but it was paid afterwards. This witness 4 is the only witness who speaks as to the payment of Rs. 2,300 to Kuber, but he is contradicted by Markund Singh, witness 1, as to the time of payment. Rupees 2,300 is said to have been paid in consideration of the improvements made by him in the village, but Markund Singh admits that Kuber did not make any improvements, but that the improvements were made by his father.

Markund further admits that the money paid to Kuber was entered in the account book of defendant 1, but no such account book has been produced. Then it is not shown why Kuber would, after the improvements made in the village which are estimated at Rs. 2,300, part with the village. It has not been proved nor is it the case of any party that the surrender was made for the interest of the family and it is doubtful if such a surrender would bind the plaintiff and the other members. I am personally inclined to hold that the tenure being ancestral the surrender by Kuber even if he was a gauntia of the village would not bind the plaintiff and the other members of the family as the surrender is not shown to be for the benefit of the family. In this I am supported by the ruling in *Fagwa* v. *Budhram* (1) cited above which distinctly lays down that in case of such a tenure no privity of contract between the zemindar and any member of the family would affect the rights of the other members. It would also in my opinion defeat the object and intention of the legislature which is to afford protection to the gauntia against arbitrary ejectment by the zamindar.

It is however needless to investigate further into this matter except for the purpose of showing that the transaction appears to be colourable in which the hand of Markund is visible in order to secure to the zamindar the gauntia right of the village by the surrender. It is then said that when the Court of Wards took over charge of the village in 1908 after the surrender the plaintiff himself applied for taking lease of the Bhogra lands of the village which was being settled by the Court of Wards and thus acquiesced in the surrender made by Kuber. There is no force in this contention for when the Court of Wards was settling them with others the plaintiff would naturally be too anxious to prevent strangers from taking settlement of the same. This does not militate against the right that he claims to hold the village as gauntia. It only shows that he was anxious to secure to himself possession of the Bhora lands and does not show that he acquiesced in any way in the surrender made by Kuber or that he is estopped from claiming his right in the suit. On the other hand it is clear that soon after the relinquishment and when the Court of Wards assumed charge of the village in 1908 the plaintiff did apply to the Court of Wards to be put in possession ascertaining his right as a gauntia of the village and repudiating the surrender made by Kuber as being collusive and illegal and requiring the Court of Wards to give back possession to him.

The plaintiff filed before the Court of Wards all the receipts and other documents in proof of his claim which have already been noticed before. It has been shown already that he continued to pay the rent of the village to the zamindar and the zamindar continued to recognise him as a gauntia even after the execution of the deed of surrender. The parwana, dated 25th December 1907, signed and issued by defendant 1 to the Sargipali Gauntia was received by the plaintiff and he has produced it in this

case. It is admitted in evidence by the defendant that the zamindari papers would show as to who actually paid the rents but these papers have not been produced. The defendant has failed to prove that Kuber was recognized by him as the gauntia of the village before the alleged surrender in 1907 by him or that the plaintiff did lose his right in the village by virtue of that surrender. The plaintiff's claim therefore cannot be defeated. A formal objection was taken by the appellant that the suit is bad for want of a proper notice under S. 26, Act 24 of 1869, Central Provinces Court of Wards Act. This section is in all respects similar to S. 80, Civil P. C., which requires that no civil suit shall be brought until the expiration of two months after notice in writing stating the name and place of abode of the intending plaintiff, the cause of action and the relief claimed, has been delivered to and left at the office of the Court of Wards. The petition dated 9th July 1910, Ex. C-4, satisfies the requirements of these rules. Therefore the suit is not bad for want of notice.

In conclusion I agree with the learned Subordinate Judge that the plaintiff has conclusively established that he being the eldest son was entitled to and did in fact succeed his father to the gauntia right in the village and that he never resigned his right in favour of Kuber his youuger brother either at the time of the succession or thereafter in 1904 before the Assistant Settlement Officer and that he was recognized all through as gauntia of the village by the zamindar and the Government and that the position of Kuber was no better than that of an agent for Mohan in making collection of rents in the village and that Kuber had no right to surrender the gauntia right in favour of defendant 1 and that defendant 1 has not acquired any right to remain in possession of the village and to deprive the plaintiff of his right. The suit has been rightly decreed by the learned Subordinate Judge. The appeal is dismissed with costs.

By the Court.—As we are divided in opinion, the decree of the lower Court must be affirmed under S. 98, Cl. (2), Civil P. C. The appeal accordingly is dismissed with costs.

Chapman, J.—One Karuna Gauntia was the gauntia of villages named Bandipali nd Sargipali. In 1891 he received a certificate under S. 65-A, Central Provinces Land Revenue Act of 1881 declaring him to be protected for the purposes of that section. In 1900 Karuna died leaving him surviving three sons named Mohan, Kuber and Balaram. In the Survey and Settlement of the district of Sambalpur which was concluded about the year 1906-07, Kuber, the younger son, was recorded as the gauntia of the village of Sargipali, Mohan being recorded as the gauntia of Bandipali. In October 1907 Kuber executed a document purporting to surrender the Gauntianship of Sargipali to the zamindar on receipt of Rs. 2,300, in consideration of the improvements which he alleged he had made in the village during his gauntiaship. The zamindari was taken charge of by the Court of Wards some time in the year 1908. Mohan thereupon took a lease of the home-farm in the village of Sargipali from the Court of Wards. Subsequently in October 1909 he presented a petition to the Court of Wards claiming that he was entitled by inheritance to the gauntiaship of Sargipali, that Kuber had no right to surrender the gauntiaship to the zamindar and that he should be restored to the gauntiaship. This petition appears to have been rejected and in consequence Mohan instituted the suit out of which this appeal arises asking for the recovery of the gauntiaship of the village of Sargipali. The suit was instituted in the year 1913 and was decreed by the learned Subordinate Judge. On first appeal to this Court the learned Judges who heard the appeal differed, Roe, J., being of the opinion that the appeal should be allowed and Mohan's suit dismissed and Jwala Prasad, J., being of the opinion that the learned Subordinate Judge was right in decreeing Mohan's suit and that the appeal should be dismissed. In accordance with the rules of the Court the appeal was accordingly dismissed. Against that decree an appeal has been preferred under the Letters Patent and that is the appeal which we have now to consider.

It is desirable to state in the first instance what can be gathered in regard to the status of a protected gauntia from the provisions of the Central Provinces Land Revenue Act of 1881 and for this purpose one must refer to S. 65-A of that Act. It appears from the provisions of

that section that it was thought desirable to provide for the protection of certain selected thiccadars gauntias and farmers of villages. "Gauntia" is the name ordinarily given to village headmen but the use of the term in connexion with thiccadars and farmers indicates that the name was generally used in the Central Provinces for the person who was responsible for the collection of the rent in a village. S. 65-A provides that where a gauntia is able to prove that he has been in possession of a village or part of a village for a period of not less than 20 years or where he is able to prove that he or those from whom he has inherited, has or have established the village or substantially improved it, at his or their cost, he is entitled to claim the protection provided for by that section. The protection consists partly of a protection against ejectment by the zamindar except under certain conditions, and partly of protection against sub-division or transfer of the gauntiaship. It further provides that a protected gauntiaship shall be heritable and not transferable by sale, gift, mortgage or dower, that it shall not be saleable in execution of any decree nor shall any decree be passed for the sale thereof, that it shall not be partitioned and that it shall devolve on one member only in the family. The protection further deals with the rights of a gauntia to renew his gauntiaship lease upon terms which may, in case of disagreement, be settled by the Deputy Commissioner. It is quite clear from the recitals in these provisions that the object of the enactment was not for the benefit of the zamindar ; but that the object was to retain, if possible, certain selected families in the gauntiaships of their villages and to protect them against transfers and subdivisions. It is important to bear this general intention of the law in mind in dealing with the facts of the present case.

As I have said, Karuna was the protected gauntia of the villages of Bandipali and Sargipali. He died in the year 1900 leaving him surviving three sons : Mohan, Kuber and Balaram. There is no evidence that there was any separation in the family and the presumption is that the family remained joint. In these circumstances the law on the subject clearly is that Mohan succeeded to the gauntiaship of the two villages of Bandipali and Sargipali, unless at the time of his succession he elected to resign his right in favour of one or other of his two brothers. This is clear from the provisions of sub-S. (4) (b), S. 65-A, Central Provinces Land Revenue Act, which says that

"when on the death of a thiccadar there are two or more heirs bearing the same relationship to him, the eldest of such heirs shall succeed,"

provided that the eldest of two or more such heirs shall be at liberty, at the time of succession, to resign his right in favour of another heir bearing the same degree of relationship to the deceased thiccadar as he himself bears. It is quite clear therefore that in the absence of evidence of resignation by Mohan at the time of his succession he was entitled to the gauntiaship of the two villages of Bandipali and Sargipali and that his right was superior to that of his younger brother Kuber. Kuber would therefore not be entitled to make the surrender which he purported to make in the year 1907 in favour of the zamindar. So far therefore as the provisions of this section are concerned, Kuber could only succeed upon evidence that at the time when Mohan succeeded to the gauntiaship on the death of his father, he (Mohan) resigned his right in Kuber's favour. The question we have to determine, in the first place, is whether there was any such resignation. The appellant is met at this stage with a difficulty : the suit brought by Mohan out of which this appeal arises was not contested by Kuber himself ; and Kuber was not called as a witness in the case. The suit was contested only by the Court of Wards on behalf of the zamindar in whose favour the surrender had been made by Kuber in 1907. There is thus no statement or evidence by Kuber that there was any such resignation in his favour ; and there is no other evidence of any kind bearing on this question. There is also no definite plea in the zamindar's written statement that there was in fact any such resignation. We have been asked to infer that a resignation actually took place from the following circumstances :

A series of rent receipts commencing with the year 1901 proving payment by some four tenants of the village of Sargipali, most of which are signed by Kuber as "Kuber Gauntia." Reading these re-

ceipts together with the case of the plaintiff that Kuber did actually collect rents of the entire village of Sargipali, we may accept the fact that Kuber did collect rents of the village and that he did sign himself as "Kuber Gauntia." There is also one instance of the year 1906 (Ex. J) in which Kuber sued a tenant of Sargipali and obtained a decree for rent. The appellant also relies upon the fact that Kuber was recorded as the Gauntia of Sargipali in the khewat (Ex. H) and that the jamabandi prepared by the Settlement Officer was in accordance with that khewat. The appellant further relies upon the fact that after the Court of Wards had taken charge of the zamindari in 1903, Mohan, without objecting to the surrender which had in the meantime been made by Kuber, applied to the Court of Wards for the settlement of the home farm. To some extent the appellant also relies upon the fact that Kuber made the surrender in 1907 describing himself as the gauntia of the village. Some little inference may also be rightly drawn from the fact that Mohan in his evidence pretends that he was not aware of the entry in the khewat until 1908. A case was attempted to be made out in the first Court that the entry in the khewat was made with the consent of Mohan and it was even suggested that Mohan put in a petition consenting to the entry of Kuber's name as the Gauntia of Sargipali. The only evidence however which was adduced to support this case was that of a witness who was discredited in cross-examination, and I agree with the learned Subordinate Judge and with the opinion expressed by Jwala Prasad, J., in this connexion that the story is untrue. Even if this evidence were accepted as true however it would in my opinion be difficult to infer that it amounted to a resignation at the time of Mohan's succession.

There is a considerable body of evidence on the other side. It appears to be incontrovertible that so far as the zamindar and the Government were concerned, Mohan succeeded to his father Karuna as gauntia and was treated as the gauntia from the time of the death of his father right up to the year 1912, within a short period of the institution of this suit. So far as the zamindar is concerned, in respect of the period prior to the actual surrender by Kuber, there is a series of rent receipts showing payment by Mohan in his capacity as gauntia ; there is a mortgage bond of April 1902 executed by the zamindar in favour of one Bairagi Dora in which the zamindar recites that Mohan was the Gauntia of Sargipali and empowers Bairagi to realize rent from Mohan in discharge of the debt due by the zamindar to Bairagi. Of about the same date there is an agreement executed by Mohan as Gauntia of Sargipali in favour of Bairagi Dora agreeing to pay him the annual rent of the two villages Bandipali and Sargipali. This is further supported by a series of receipts of 1903, 1904, 1905, 1906 and 1907 showing payments of rent by Mohan as Gauntia of Sargipali to Bairagi Dora. One of these receipts shows that the payment was made through Kuber. There is nothing to show that Kuber took any part in the payments of the other years. There is a letter written in 1908 by Bairagi Dora to Mohan Gauntia asking the latter to pay the rent and there are also demands made from time to time by the zamindar. There is also a series of payments made to Government, apparently in discharge of a loan given by the Government for village improvement. These receipts run up to the year 1912 showing payments made by Mohan as gauntia of the village.

From this evidence one thing is certain, and that is that upon the death of Karuna, Mohan was treated as Karuna's sole successor as gauntia of the two villages of Bandipali and Sargipali ; Mohan accepted that position, and the zamindari papers show that they were framed upon that understanding. It is moreover quite clear that there was no resignation in any sense of the term so far as the zamindar and the Government were concerned. In these circumstances I think it is impossible to infer from the mere fact that Kuber was permitted to collect rent of the village and that he succeeded in getting his name recorded in the Survey and Settlement papers, apparently with a view to making the surrender in favour of the zamindar, that any resignation by Mohan in favour of Kuber took place at the time of his succession. It is quite clear that after Mohan had once entered as the heir of his father, it was not open to him under the provisions of the Central Provinces Land Revenue Act to transfer by sale, gift or otherwise in favour of his brother Kuber. It has been suggested that if he did so, he

would be estopped from pleading that he was not entitled to do so. It is in my opinion not necessary to expressly decide whether the law of estoppel would operate as a bar in such an event, having regard to the clear provisions of the statute. The cases relied on by Roe, J., in this connexion are distinguishable, inasmuch as they relate to transfers of occupancy rights, the law in respect of which is expressly for the protection of the zamindar. As I have pointed out, the law upon the subject of transfers of gauntiaship has no concern whatsoever with the interest of the zamindar. Moreover, the leading case on the subject of estoppel in a case of transfer of occupancy rights, viz., *Bhagirath Changa* v. *Sheikh Hafizuddin* (3), itself expressly distinguishes a case in which a transfer had been made in a representative character. The fact is that in the present case I am unable to hold that there was any transfer by Mohan in favour of Kuber and if ever there was a case which would be excluded from the operation of .the principle of estoppel, it is this one; for, in the first place, it is manifest that Mohan throughout held himself out as gauntia of the two villages; and in the next place, he was treated as gauntia by the zamindar right up to the date of the surrender by Kuber. It is therefore quite impossible for the zamindar to plead that he was misled by Kuber in regard to the gauntiaship of Sargipali. He appears to have been perfectly aware up to the date of Kuber's surrender that Mohan was the gauntia; and it is certainly open to considersble doubt whether, when he knew that Mohan was entitled to succeed to his father and that there was an express provision of law forbidding Mohan from making a transfer in favour of his brother, hereally believed that Kuber was the gauntia in respect of Sargipali.

Some reference has been made to a judgment of this Court in which the late Chief Justice said that he could discover nothing in the incidence of the tenure of a gauntia which showed that the gauntia was not entitled to relinquish his rights: *Lal Narupraja Singh* v. *Bhabani Teli* (2). That observation was made only by way of obiter dictum and it appears to me that it is unnecessary for the present appeal that we should determine the point. At the same time it is desirable to mention that I am of opinion, having regard to the nature of the protection given to a protected gauntia by S. 65-A that if it were held that a gauntia could surrender in favour of the zamindar, it would be possible to render the provisions of the Central Provinces Land Revenue Act infructuous, inasmuch as the zamindar could obtain a surrender from a gauntia and thereafter lease the gauntiaship to some other person and thus transfer the gauntiaship to another, which is the result which the Act is intended to prevent. I am of opinion therefore that the defendant-appellant has entirely failed to prove that there was any resignation by Mohan in favour of Kuber either at the time of his succession or subsequently. In these circumstances I am of opinion that the suit was rightly decreed.

Certain preliminary objections were taken by the learned vakil appearing on behalf of the appellant. It was contended that the suit was not maintainable in the civil Court by reason of the provisions of S. 132 read with S. 152 (a), Central Provinces Land Revenue Act. S. 132 enables the Deputy Commissioner to enquire into the claims of gauntias and to declare them to be protected for the purposes of S. 65-A. S. 152 provides that no civil Court shall entertain any suit concerning any matter which the Revenue Officer is empowered to determine or dispose of. It is contended that this was a suit for the enforcement of the claims of a gauntia and that therefore the Deputy Commissioner was empowered to dispose of it: and that the civil Court was prohibited by the provisions of S. 152 from entertaining it. In my opinion however it is quite clear that the provisions of S. 132 were drawn up with reference to S. 65-A and were intended to enable the Deputy Commissioner merely to determine claims to protection under S. 65-A and to enforce the provisions of that section. It was never, in my opinion, intended that the Deputy Commissioner should be empowered to deal with a suit for ejectment or for the recovery for a gauntiaship. In regard to the objection upon the ground of want of notice of suit I agree with the judgments of Roe, J., and of Jwala Prasad, J. Some argument has also been addressed to us upon the provisions of S 237, Contract Act, which entitles a person dealing with

(3) [1900] 4 C. W. N. 679.

an agent to believe that the agent is acting within his powers. Nobody has ever suggested in this case that the zamindar was induced to believe that Kuber was empowered by Mohan to surrender his gauntiaship and therefore the provision of the section referred to has no application to the present case.

Reference is also made to Ss. 68 and 82, Ben. Ten. Act, which require Settlement Officers to record the fact of actual possession and provide that the entry regarding the fact of actual possession shall be presumed to be correct until the contrary is proved. Now all that the entry in the Record of Rights shows is that possession of the gauntiaship at the time of the publication of the Record of Rights was with Kuber. The presumption attaching to the entry in the Record of Rights is only in regard to possession, and it is sufficient to enable Mohan to succeed in this action that he should establish a better title than Kuber, whatever the fact of possession might have been in the year 1906-1907. Having regard to all the circumstances of the case and the fact that the surrender in favour of the zamindar took place so soon after, I am of opinion that the presumption attaching to the entry has been sufficiently rebutted by the other evidence to the effect that Mohan was treated by the zamindar and by the Government as the sole successor to the gauntiaship upon the death of his father Karuna. Moreover the presumption, as I have said, is only one in favour of possession, and apart from the evidence as to possession Mohan would be entitled to succeed upon the evidence that he has a better title. In all the circumstances of the case I am of opinion that the suit was rightly decreed by the learned Subordinate Judge and I would therefore dismiss this appeal with costs.

Atkinson, J.—I entirely agree in the conclusions arrived at by my learned brother. I desire however to add my own opinion as to what I believe to be the true construction of S. 65-A, Cl. (4) (b), Central Provinces Land Revenue Act, 1881, in so far as it concerns the question arising for our decision. S. 65-A was mainly designed to afford protection to the class of persons owning a proprietary interest in land known as gauntias, and to secure for them, in the enjoyment of their property rights, security of tenure, and subject to the incidents attaching to their tenure to save them from arbitrary eviction by capricious landlords. Thus by the Central Provinces Revenue Act, 1881, S. 65-A, the tenure of a gauntia was declared to be heritable; but not transferable by sale, gift, mortgage or dower. The uncertainty which prior to the passing of this Act antecedently attached to the interest of a gauntia tenure-holder ceased, and he acquired a perpetual estate or interest in the lands forming the subject-matter of his tenure subject to the conditions against alienation specified in S. 65-A. Once a gauntia received the certificate contemplated and provided for by the Act, he became what is termed a "protected gauntia;" and thereupon he became but not till then, vested with all the rights and benefits conferred upon a gauntia by this Act. For obvious reasons it was thought desirable by the framers of the Central Provinces Revenue Act of 1881 to provide that the tenure should vest in one person only, even though he with others might have a joint interest therein; and accordingly the Act provided for the devolution of a protected gauntia tenure upon the death of the first and each succeeding "protected gauntia" by enacting that

"when on the death of a thiccadar there are two or more heirs bearing the same relationship to him the eldest of such heirs shall succeed, provided that the eldest of two or more such heirs shall be at liberty at the time of succession to resign his rights in favour of another heir bearing the same degree of relationship to the deceased thiccadar as he himself does.

In my opinion this section is mandatory in its terms. The eldest heir of the last protected gauntia shall succeed to the tenure, unless at the time of succession he resigns his right to inherit as a gauntia in favour of another heir of equal degree. The right of the eldest male heir to resign or renounce his rights as a gauntia, with a view of giving up all claim to inherit the estate which has by statutory devolution descended upon him must be exercised at the time when the succession opens, viz., on the death of the last protected gauntia. A right of election is conferred upon the eldest male heir and a time is definitely specified when that election must be made by him. No chance for procrastination is allowed; but there and then when the right to succeed accrues

theright of election must be exercised; and when the election is so made by the person upon whom the tenure devolves by inheritance, it is irrevocable in its operation ; and automatically one heir of equal degree is submitted for another. Further in my opinion the right of election must be exercised in respect of the entire estate which devolves on the eldest male heir. If two or more villages from the protected tenure of a gauntia, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption in respect of all or none of such villages ; there can be in my opinion no splitting up of the estate or tenure into different parts having distinct entities. To permit of such a severance of the estate would be destructive of what appears to me to be the governing intention of S. 65-A, viz., the concentration of the ownership of the entire protected gauntia tenure in one person only. S. 65-A, Cl. (4) (b), expressly says that the eldest male heir shall be at liberty at the time of succession to resign his rights in favour of another heir. I take the words " his rights" in that section to mean all the rights which have devolved upon such eldest male heir, and not merely some of them. Therefore, even if there was a resignation proved by Mohan in favour of Kuber of the village of Sargipali, only when the entire protected interest that devolved on Mohan was comprised of the two villages of Bandipali and Sargipali in my opinion such attempted resignation by Mohan would have been invalid and inoperative in law to extinguish the rights of Mohan in the village of Sargipali.

Karuna died in August 1900. Thereupon the rights of the plaintiff accrued in succession to the protected estate which devolved upon him. Upon the death of Karuna it is admitted that there was mutation of names in the landlord's rent register and books; and that Mohan was recorded by the landlord as the gauntia in respect of Bandipali and Sargipali. This, in my opinion, was an unequivocal act of adoption by Mohan of his intention to accept the estate which had devolved upon him. But irrespective of this the evidence by no means satisfies me that Mohan ever at any time resigned his rights in the village of Sargipali in favour of Kuber. The onus is on Kuber and those who derive title through him to establish as an indisputable fact the factum of resignation by Mohan. In my opinion defendant 1 has utterly failed to discharge this onus. I would just desire to add that though S. 65-A speaks of "resign" this in legal phraseology really means "release," which has an accepted legal meaning. The best proof of resignation would be the production of a deed of release, but no document in the nature of a deed of release has been produced to establish the fact of resignation by Mohan in favour of Kuber. We are asked to infer as an inference of fact from the evidence, documentary and oral, adduced by the defendant 1, that Mohan in or about the year 1902 resigned his rights in village Sargipali in favour of his brother Kuber. I for one unhesitatingly refuse to draw any such conclusion from the evidence ; nor do I think that the facts relied upon by Roe, J., warrant the deduction that he deduces therefrom. But even if evidence had been adduced from which the inference could be fairly drawn that in or about the year 1902 the plaintiff resigned his rights in respect of the village of Sargipali in favour of defendant 2, it would be of no avail inasmuch as any such resignation would have occurred long subsequent to the time when the succession opened and the right to resign accrued, there having been in the meantime after the death of Karuna a deliberate adoption by Mohan showing an intention on his part to succeed to the lands in suit.

I agree therefore that the suit was rightly decreed and that this appeal must be dismissed with costs.

Imam, J. — I am in entire agreement with the view expressed by my learned brothers that this appeal should be dismissed with costs. I, however, wish to add that I find nothing S. 65-A, Central Provinces Land Revenue Act, to show that the protection afforded to the tenure of a gauntia is to extend to a group of tenures. In the present case Karuna had two gauntiaships vested in him, namely one for Sargipali and the other for Bandipali, and in my opinion on his death it was open to Mohan to resign at the time of his succession in in favour of his brother Kuber either both the gauniashtips or one of them. On the evidence I hold that he did not do so.

Upon the evidence on the record it is quite clear that upon the death of Karuna, Mohan succeeded to the gauntiaship of the two villages; that his name was recorded as gauntia in the zamindar's books and that he continued as gauntia all along. The position of his brother Kuber, after the death of the father, was, in my opinion, that of an agent of Mohan. There having been no valid resignation by Mohan in favour of Kuber at the time of the death of Karuna, Kuber had no right whatever to the gauntiaship of the village of Sargipali. I am also of opinion that Kuber had no title whatever to make the surrender in favour of the zamindar. I agree therefore with the decision of my learned brothers.

V.S./R.K. *Appeal dismissed.*

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JWALA PRASAD, J.

Ramdhari Singh and *others*—Accused —Petitioners.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 354, 355, 356 and 357 of 1917, Decided on 9th November 1917, against order of Sub-Divl. Magistrate, Jamui, District Monghyr, D/- 2nd July 1917.

(a) Criminal P. C. (1898), S. 476—Prosecution on same or next day when witness was examined—Opportunity given to explain clear contradiction—No enquiry or notice is necessary.

Where an order under S. 476, Criminal P. C., directing the prosecution of a witness under S. 198, Penal Code, is made upon the very day on which or the day after the cross-exmination of the witness is finished upon a clear statement by him, and after an opportunity given to him to explain the inconsistencies in his statements-in-chief and in cross-examination, it is not incumbent upon the Court to institute a fresh enquiry or to give any notice to the accused. [P 449 C 2; P 450 C 1]

(b) Criminal P. C. (1898), S. 476—Sanction for prosecution for prejury must indicate statements in question—Penal Code (45 of 1860), S. 193.

A Court directing the prosecution of a witness for perjury under S. 476, Criminal P. C., must specify the statements in respect of which the offence is alleged to have been committed. [P 450 C 2]

In a case under S. 193, Penal Code, where the prosecution is based upon certain statements being falsely made by the accused, it is essential to set out the exact statements in detail upon which the prosecution wants to proceed. [P 450 C 2]

(c) Criminal P. C. (1898), S. 476—Offence and occasion when committed must be indicated to direct attention of trying Magistrate.

The object of specifying the offence and the occasion when the offence is committed is to give not only notice to the accused but also to the trying Court of the specific offences against the accused. [P 450 C 2]

(d) Penal Code (45 of 1860), S. 183—Only evidence in case of perjury is record of deposition which is the only admissible evidence under Ss. 91 and 80, Evidence Act—Record will be presumed to be correct—Administration of oath is also presumed—Evidence Act (1 of 1872), Ss. 80, 91 and 114.

The only evidence in a case under S. 193, Penal Code, regarding the statement made by a witness is the record of the deposition prepared by the Court. That record only is admissible under S. 91 read with S. 80, Evidence Act. No other evidence is admissible and the presumption attaches to the correctness of the record both as to the correctness of the statements embodied therein and of the oath having been administered to the witness. [P 450 C 2]

(e) Criminal P. C. (1898), S. 360—Deposition need not be read over the very day—It is sufficient if it is read over after end of cross-examination—It fulfils object of giving opportnuity to correct.

There is nothing in S. 360 to indicate the exact time when a deposition should be read over to a witness. It is not necessary that it should be read over the very day on which the witness makes his statement-in-chief; if it is read over at the close of the cross-examination it fulfils the requirements of the section and also its object, which is to give an opportunity to a witness to explain or correct the statements made by him. [P 450 C 1,2]

*** (f) Criminal P. C. (1898), Ss. 107 and 355—Case under S. 107 is summons case—Depositions in summons case need not be read over as under S. 355 it is only a memorandum.—Penal Code (1860), S. 193.**

A case under S. 107 is triable as a summons case, and the Magistrate is therefore not bound to read over the depositions to the witnesses, as they are only a memorandum of the substance of the statements made by them as required by S. 355. [P 450 C 1,2]

Naresh Chandra Sinha—for Petitioners.

Manohar Lal—for the Crown.

Judgment.—This is an application against an order of the Sub-Divisional Magistrate of Jamui, dated 2nd July 1917, made under S. 476, Criminal P. C., directing the prosecution of the petitioners under S. 193, I. P. C. The facts giving rise to the order of the Magistrate under S. 476 may be briefly stated as follows:

There was a case under S. 107, Criminal P. C., between Rani Mina Kumari, wife of Rai Dhanpat Singh Bahadur of Baluchar, and Kumar Guru Pershad Singh of Khaira. The petitioners were witnesses on behalf of the said Rani and

were examined before the Sub-Divisional Officer in the course of the trial under S. 107, Criminal P. C. The witnesses were examined-in-chief on 1st March 1917 and were cross-examined on 2nd July 1917. In the examination-in-chief the witnesses proved the case of the first party, whereas in the cross-examination they totally denied the statements made by them in the examination-in-chief. These witnesses after their cross-examination was over were discharged, and another date was fixed for their cross-examination. In the meantime the witnesses were somehow or other spirited away and did not appear until 2nd July 1917, after necessary steps being taken by the Magistrate to enforce their attendance. The witnesses denied entirely the statements made by them in the examination-in-chief and admitted in cross-examination that the statements made bythem in the examination-in-chief were false; that the statements made by them in the cross-examination were true, and that they were instigated or tutored by certain persons to make the statements-in-chief. The statements which they contradicted have not been given in the order under S. 476 directing the prosecution of the petitioners and in the explanation given by the Magistrate, these statements have been detailed. The explanation that the Magistrate offers for not detailing the statements in the order is that the petitioners denied entirely all the statements made by them in chief. This no doubt is a very serious irregularity. The Magistrate to my mind ought to have set forth the statements in respect of which he sanctioned the prosecution. I shall come to this point again. The Magistrate disposed of the case and discharged the second party, who were accused in the case, by his judgment dated 4th July 1917. In that judgment the Magistrate says as follows:

"While concluding I must remark on the conduct of the accused in this enquiry. The prosecution witnesses mysteriously disappeared and appeared only after three months and then they gave diametrically opposite statements. They have all been prosecuted under S. 193, I. P. C., and I do not know who is respsonsible for the fate of these men. I think without tampering with the prosecution evidence there was enough on which the defence could rely."

The Magistrate was satisfied that when the witnesses were being cross-examined they denied the statements made by them in chief, and he knew that they were telling lies. As a matter of fact he put direct questions to them whether the statements made by them in chief were true or false and they, as I have said above, admitted that the statements made by them in chief were false and those in cross-examination were true. Which of these statements-in-chief or in cross-examinations are true or false, has not to be determined in these proceedings. It is sufficient that the witnesses made irreconcilable and inconsistent statement-in-chief and in cross-examination, and that one of the statements must be true and the other false. The witnesses therefore prima facie committed perjury. The Magistrate therefore was justified in taking action against them under S. 476, Criminal P. C., and he did so by his order now under revision. One of the grounds urged by the learned vakil for the petitioners, attacking the order made by the Magistrate, is that no notice was given to them of the proceedings and no preliminary enquiry was held by the Magistrate before making the order directing the prosecution of the petitioners. In the circumstances of this case, when the orders were made upon that very date or the day after the witnesses' cross-examination had finished and upon a clear statement by the witnesses, and after an opportunity having been given to them to explain the inconsistencies in their statements-in-chief and in cross-examination, I do not think that it was incumbent upon the Magistrate to institute a fresh enquiry or to give any notice to the petitioners.

It is then contended that the depositions of the witnesses in chief were not read over to them at the time when the examination-in-chief had finished. The ground is taken in the memorandum of appeal No. 6.

"For that the examination-in-chief not being read over or explained to the petitioner and not having been taken in accordance with law, the prosecution, for making statements discrepant to those made in the said examination-in-chief, is bad in law."

It appears that there is no note below the examination-in-chief on 1st March 1917, that the statements were read over to the witnesses, but after the cross-examination there is a note to the effect that the statements were interpreted to the witnesses which were admitted by them to be correct. The explanation of

the Magistrate shows that the entire statement made by them in chief and in cross-examination was read over to the witnesses after the cross-examination was over and the note at the end of the cross-examination applies both to the statement-in-chief and in cross-examination. This is not now challenged by the learned vakil for the petitioners. It is further contended that under S. 360, Criminal P. C., the statements-in-chief should have been read over on the very day on which the examination-in-chief finished, and reliance is placed upon the following words in S. 360:

"As the evidence of each witness, taken under S. 356 or S. 357, is completed, it shall be read over to him in the presence of the accused . . . . . ."

It appears to me however that it is not necessary that the deposition should have been read over that very day. There is nothing in the section to indicate the exact time when the deposition should be read over. If the deposition is read over at the close of the cross-examination, it fulfils the requirements of the section and also the object of S. 360, which is to give an opportunity to the witnesses to explain or correct the statements made them. Therefore there is no force in the aforesaid contention of the learned vakil. At the same time it must be noted that S. 360 has no application at all to this case. The trial before the Magistrate was under S. 107, Criminal P. C., which was triable as a summons case, and the deposition to be recorded in a summons case is that provided by S. 355 of the Code, which says that

"the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds"

Cl. 2 of that section says:

"such memorandum shall be written and signed by the Magistrate with his own hand and shall form part of the record."

These requirements of S. 355 appear to have been complied with in this case, and, as a matter of fact, no objection is taken either in the memorandum of appeal presented to this Court or in the argument of the learned vakil for the petitioners that the requirements of S. 355 were not complied with. The record shows that the Magistrate has signed the depositions both in chief and in cross-examination, and that the entire deposition was written in his own hand. Section 360 lays down a certain procedure, and that is the reading over of the deposition to the witness when the deposition is taken under S. 356 or S. 357. The deposition in the present case was not taken under these sections. Therefore it was not incumbent upon the Magistrate to read over the deposition to the witnesses, as the deposition was only a memorandum of the substance of the statements made by them. I therefore overrule this contention of the learned vakil for the petitioners and hold that no irregularity in the preparation of the record of the deposition of the witnesses was committed by the Magistrate. This was practically the main ground taken by the learned vakil for the petitioner. Another ground taken was that the deposition-in-chief was not on oath. This has not been pressed, and, as a matter of fact, it appears from the record that the depositions of all the petitioners were on oath. The only evidence in a case under S. 193 regarding the statement made by witnesses is a record of the deposition prepared by the Magistrate. That record only is admissible under S. 91, Evidence Act, read with S. 80 of the said Act. No other evidence is admissible and the presumption attaches to the correctness of the record made by the Magistrate both as to the correctness of the statements embodied therein and of the oath having been administered to the witnesses as mentioned at the top of the record of the deposition. The record shows that oath was administered. These are the only grounds which have been pressed before me, and I think that the learned vakil for the petitioner has failed to make out a substantial case for interference by this Court.

I now revert to the error of the Magistrate in not specifying the statements under S. 476 directing the prosecution of the witnesses. Now the object of specifying the offence and the occasion when the offence is committed is to give not only notice to the accused but also to the trying Court of specific offences against the accused. In a case under S. 193 for perjury, where the prosecution is based upon certain statements being falsely made by the accused, it is essential to set out the exact statements in detail upon which the prosecution wants to proceed. The Sub-Divisional Magistrate has in his explanation detailed the

statements. He ought to have done so in the order under S. 476, Criminal P. C. I think that those statements should now be detailed upon which the charge is proposed to be framed against the petitioners. I therefore reject the petition and discharge the Rule. This judgment will govern the petitions in the other cases also, namely Criminal Revns. 355, 356 and 357 of 1917.

V.S./R.K. *Rule discharged.*

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MULLICK AND ATKINSON, JJ.

Arjun Suie—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 14 of 1917, Decided on 17th July 1917, against order of Sess. Judge, Cuttack, D/- 12th April 1917.

Civil P. C. (1908), O. 21, R. 32—Injunction—Meaning explained—Order in preliminary decree to furnish account is not injunction.

An injunction is in its essence the grant of a mode of relief consequential upon an infringement of a legal right. It forms part of a decree made at a hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act contrary to equity and good conscience. A preliminary decree in a suit for accounts directing the defendant to furnish and render accounts is not an "injunction" within the meaning of R. 32, O. 21, and the failure of the defendant to furnish accounts does not entitle the Court to take proceedings under that section. [P 452 C 1, 2]

Brojoraj Choudhury—for Petitioner.

Durga Prasanna Das—for the Crown.

Atkinson, J.—The petitioners before us were charged with offences under Ss. 186 and 225-B, I. P. C., and they have each been convicted of offences under these sections and sentenced, petitioner 3 to two months' and petitioners 1 and 2 to one month's rigorous imprisonment each. The facts of the case are very short and may be briefly stated as follows:

A zamindar, by name Srimati Pramada Devi, was the plaintiff in a suit in which petitioner 3 was the defendant. Petitioner 3 was the Tahsildar of the plaintiff in that suit, which was numbered Suit No. 1 of 1916. The suit was for account as between a principal and an agent and a preliminary decree was granted in that suit on 10th June 1916, and by that preliminary decree petitioner 3, who was the defendant in the suit, was required within one month from the date of the preliminary decree to furnish and render accounts. The defendant failed within the time specified in the decree to furnish the accounts and consequently it is contended that he was guilty of disobeying the "injunction" granted by the Court and that therefore the Court was entitled under O. 21, R. 32, to take proceedings against the defendant as if the defendant, petitioner 3, had been guilty of committing a breach of an "injunction." Everything in the case touching the guilt of the accused depends upon the validity of the order directing the attachment of petitioner 3. If the Court had no power to direct the attachment of petitioner 3, then no offence would have been committed under Ss. 186 and 225-B.

Order 21, R. 32, re enacts in a revised form S. 260, old Civil P. C. The old Code provided that where a party to a decree for specific performance or restitution of conjugal rights or for an order requiring the performance of or abstention from, any other particular act disobeys or refuses to comply with the order having had reasonable opportunity of obeying the decree, then such person would be liable to detention of his person or attachment of his property. Under the old Code it has been held in two cases, *Degamber Mozumdar* v. *Kallynath Roy* (1) and *Raghunath* v. *Ganpati* (2), that under the words "performance of or abstention from any other particular act," a party who has been ordered to file accounts and did not do so might be proceeded against under S. 260, old Civil P. C. But the words "performance of or abstention from any other particular act" have been completely eliminated from O. 21, R. 32, and in lieu thereof the word "injunction" has been substituted. Now it is admitted that the word "injunction" is not to be used in the narrow sense defined in the Specific Relief Act, but that under the order and rule cited it has a more extended meaning. The learned vakil who appears on behalf of the prosecution contends that the word is to be used in its ordinary general and popular sense as if meaning to "order" or "enjoin."

I do not think that the learned authors who revised the Code of 1908 used the word "injunction" without a very positive and express intention, or that they did not know that the word injunction had a specific legal meaning, and I think

(1) [1881] 7 Cal. 654.
(2) [1905] 27 All. 374.

that they intentionally used the word in order to remove the ambiguity which existed by the use of the general term "performance of or abstention from any other particular act." No doubt these words were held, in the decisions cited above, to have a very wide general meaning and if the words used in the old S. 260, Civil P. C., had been left unrepealed they might, having regard to the authorities cited, be considered to apply to this case, but I think that it was the intention of the authors of the Code of 1908 to restrict the meaning of the words as used in the old section to the legal term "injunction" as generally known and legally understood. In effect I think it was the intention of the framers of the Code of 1908 to amend the old S. 260 so as to overrule the effect of the decisions in *Degamber Mozumdar* v. *Kallynath Roy* (1) and *Raghunath* v. *Ganpati* (2), which seemed out of harmony with the general scope and intendment of that section.

It has been contended on behalf of the prosecution before us that every order of a Court requiring a person to do a certain act is an injunction. I cannot for one moment yield to that argument. An injunction has been recognized throughout legal history to have a defined meaning. It is in its essence, the grant of a mode of relief consequential upon an infringement of a legal right. Where a party has had a right invaded then the Court would interfere; and consequential to a declaration that the party injured has had his right infringed the Court grants relief by way of injunction restraining the invader from causing further injury. No better definition of the word injunction could be found than that given in Wharton's Law Lexicon, where it is stated that an injunction

"forms part of a decree made at a hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right or perpetually restrained from commission of an act contrary to equity and good concisence."

Now we are unable to hold that the order embodied in the decree of 10th June 1916 was an order by way of consequential relief following from any declaration of a right that the plaintiff was entitled to in the suit. It was mere order passed by the Court itself requiring the defendant to do an act to enable the Court to carry out its preliminary decree and do justice between the parties. In no sense was that an order consequential upon the right of the plaintiff to have an account rendered as between himself and the defendant, petitioner 3. We cannot give to the word "injunction" the very loose and general meaning which has been contended for by the learned vakil for the prosecution and which has been sanctioned by the lower Courts. Consequently it appears to us that there was no refusal by the petitioner to obey an injunction issued by the Court within the meaning of O. 21, R. 32, and no order could therefore legally have been passed by reason of the decree of 10th June to justify the arrest of petitioner 3. Consequently his arrest was unlawful and illegal and he was not liable to be prosecuted jointly with the other accused, petitioners 1 and 2, for offences under Ss. 186 and 225-B, I. P. C. I therefore consider we are bound to set aside the conviction and sentence passed upon the petitioners; and the petitioners being on bail are discharged from their bail.

Mullick, J.—I agree. In my opinion an injunction is a just and convenient remedy for the purpose of protecting or enforcing the legal rights of the parties either as enacted by law or allowed by equity. In the present case the preliminary decree for account was not an injunction in this view of the meaning of the word; and therefore the conviction and sentence in my opinion are unsustainable.

V.S./R.K. *Rule made absolute.*

A. I. R. 1918 Patna 452

MULLICK AND THORNHILL, JJ.

Nathuni Ram and *others*—Petitioners

v.

Mt. Sheo Koer and *others*—Opposite Parties.

Civil Revn. No. 306 of 1917, Decided on 17th May 1918, from order of Munsif, 3rd Court, Arrah, in T. S. No. 648 of 1916, D/-20th September1917.

(a) Civil P. C. (1908), O. 23, R. 1—Existence of material defect is condition precedent to exercise of jurisdiction under O. 23, R. 1.

In order to allow a plaintiff to withdraw a suit with liberty to bring a fresh suit it is not sufficient that the trial Court should say or suggest that there is a formal defect; the existence of such a defect is a condition precedent to the exercise of jurisdiction under O. 23, R. 1.

[P 453 C 2]

(b) Civil P. C. (1908), O. 23, R. 1—Order under O. 23, R. 1 improperly made and prejudicing defendant can be set aside.

The High Court has power to set aside in revision an order allowing a plaintiff to withdraw suit with permission to bring a fresh suit, if the order has been improperly made and would prejudice the defendant. [P 454 C 1]

Shiveshwar Dayal—for Petitioners.

Naresh Chandra Sinha—for Opposite Parties.

Thornhill, J.—The defendants were sued by the plaintiffs in the Court of the Munsif, 3rd Court, Arrah, seeking to recover Rs. 802, principal and interest, alleged to be due on a mortgage bond, dated 28th September 1909, said to have been executed by the defendants Ramphal Ram and Chattoo in their capacity of karta of their ijmal family in favour of Balgobind. The plaintiffs claimed through Balgobind and alleged that the mortgaged properties consisted of (1) a house and (2) an orchard. The petitioners are concerned with the house and allege that the same was sold to them in 1903, the vendors solemnly affirming that there was no mortgage or lien on the property. They further allege that after their purchase they spent Rs. 3,000 in rebuilding and repairing the house and it is now said that the mortgage bond is a bogus one. The suit was instituted on 31st of October 1916 and by 19th September 1917 all the plaintiff's witnesses had been examined and on the said date one of the defendants' witnesses was also examined and cross-examined. On the next day a further witness of the defendants was examined-in-chief, when the plaintiffs filed a petition asking to be allowed to withdraw from the suit with permission to bring a fresh suit on the ground that some legal defects occurred in the suit and that there was defect of parties. This application was granted. It would appear from the order made by the learned Munsif that the defendants did not raise any pleas of legal defect of parties or otherwise which would defeat the plaintiffs' case. It is urged on behalf of the present petitioners that there was no formal defect of any kind in the case but that the evidence on behalf of the plaintiffs was so full of contradictions and discrepancies that their suit was bound to fail and therefore the plaintiffs resorted to the device of applying for withdrawal of suit. The petitioners allege that in consequence of the Munsif's order they have been seriously prejudiced. It is to be noted that no legal defect has been set out in the plaintiffs' petition for withdrawal nor has the learned Munsif found as a fact that any specific defect existed. The learned vakil for the plaintiffs was unable to satisfy this Court that there was any real defect and certainly nothing that could not have been cured by amendment. In *Hira Lal Mitra* v. *Udey Chandra Dey* (1) it was held that the object of R. 1, O. 23, Civil P. C., is not to enable a plaintiff, after he has failed to conduct his suit with proper care and diligence, and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and prejudice the opposite party; and the order of the Munsif was set aside on the simple ground that his order failed to disclose any formal defects in the suit or other sufficient ground by reason of which it should have been granted. In the present case the learned Munsif, after reciting that the plaintiffs had filed a petition withdrawing the suit on the ground that some legal defects had occurred in the suit and that there was defect of parties, ordered that

"the plaintiffs are permitted to withdraw the suit with permission to bring a fresh suit, if not barred".

This order was passed on 20th September 1917. The petitioners within a week instructed their pleader to take steps to have the order set aside. The pleader directed them to get for him a certified copy of the evidence, and owing chiefly to the intervention of the holidays he was unable to obtain a rule from this Court before 4th December 1917. This was obtained before he had any notice that the plaintiffs had instituted a fresh suit, so it can hardly be said that there was any delay on the part of the petitioners. It appears clear that it is not sufficient that the trial Court should say or suggest that there is a formal defect, but that the existence of such a defect is a condition precedent to the exercise of jurisdiction under O. 23, R. 1. In *Bansi Singh* v. *Kishun Lal Thakur* (2) it was decided that S. 115, Civil P. C., did not apply where a case had been withdrawn with leave to bring a fresh

(1) [1912] 14 I. C. 33.

(2) A. I. R. 1915 Cal. 100=26 I. C. 203=41 Cal. 632.

suit, inasmuch as it could not be said that the case was one which had been "decided" by a Court subordinate to the High Court. It appears however that the Court admitted that it might have interfered in exercise of its extraordinary jurisdiction under the Charter, but it saw no sufficient reasons for doing so. The Court did not give any specific meaning to the word "case" as used in S. 115. It is nowhere defined. In *Motilal Koshibhai* v. *Nana* (3), which was decided under S. 622 of the old Code being equivalent to S. 115 of the present Code, the Court observed in relation to the word "case" that

"a word of such general import must be controlled by due regard to the purpose for which S. 622 was framed. This, it cannot be doubted, was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court when there would otherwise be no remedy : See also *Dinapi* v. *Ram Prasad* (4)".

Again in *Chattarpal Singh* v. *Raja Ram* (5) Mahmood, J., was of opinion that the word should be understood in its broadest and most ordinary sense, unless there were specific reasons for narrowing its meaning. At all events cases of the nature of the one now before us have undoubtedly been dealt with under the Code of Civil Procedure and can only be explained by giving a broad and generous interpretation to the section. In *Kharda Company Limited* v. *Durga Charan Chandra* (6), which is a case very similar to the present one, Mookerjee, J., says :

"If therefore the order was irregularly made, it ought not to be allowed to stand, for there can..... be no question that after an order under S. 373 of the Code of 1882 (similar to O. 23, R. 1 of the new Code) has been properly made, it is competent to this Court to interfere by way of revision".

We consider the petitioners have been seriously prejudiced by the order of the Munsif, and having regard to the number of authorities showing that our interference is justified, we set aside the order of the learned Munsif, dated 20th September 1917, and declare the newly instituted suit to be null and void, and direct that the learned Munsif do proceed to deal with the case against these petitioners from the stage at which it had reached when the order was made. The petitioners are entitled to their costs, which we assess at Rs. 16.

Mullick, J.—I agree.

V.S./R.K. *Order set aside.*

(3) [1894] 18 Bom. 35.
(4) [1887] 14 Cal. 768.
(5) [1885] 7 All. 661.
(6) [1910] 5 I. C. 187.

A. I. R. 1918 Patna 454

DAWSON-MILLER, C.J. AND MULLICK, J.

Mohammad Amirul Hasan — Appellant.

v.

Mt. Wazir Bibi and *others* — Respondents.

Misc. Appeals Nos. 286 and 287 of 1917, and Civil Revns. Nos. 333 and 334 of 1917, Decided on 31st October 1918, against order of Sub-Judge, First Court, Gaya, D/- 10th November 1917.

(a) Civil P. C. (1908), O. 21, R. 57—Decree attached in execution — Execution case dismissed for default—Judgment-debtor transferring decree—After attachment of decree executing Court has no jurisdiction to dismiss as nothing remains to be done — Attachment continues and transferee derives no title.

A decree-holder applied for the attachment of a decree belonging to his judgment-debtor. The executing Court ordered the decree to be attached, but on the date fixed for orders dismissed the execution case for default. After the order for dismissal the judgment-debtor sold the attached decree to one *A* :

Held: (1) that until the attached decree had been realised by the decree-holder there was nothing further to be done by him in the execution case, so that the executing Court had no jurisdiction to dismiss the case for default ; (2) that notwithstanding the order for dismissal of the case, the attachment of the decree continued to subsist ; (3) that therefore *A* acquired no title to the decree by his purchase as against the attaching decree-holder, and had no right to execute it. [P 456 C 2]

(b) Civil P. C. (1908), S. 64 — Decree attached — Decree-holder cannot deal with it in any way pending attachment.

So long as an attachment of a decree remains in force, any dealings by the original decree-holder or any transfer or delivery of property comprised in the decree is void as against the claims enforceable under the attachment. [P 456 C 2]

Lachmi Narain Sinha and *Panchanan Banerji*—for Appellant.

Abani Bhusan Mukherji and *Kailaspati*—for Respondents.

Dawson Miller, C. J.—This appeal raises the question of the rights of rival claimants to take out execution of a decree. One claims to execute the decree by reason of an attachment obtained by him in execution proceedings in another suit and the other claims to execute the decree as purchaser from the original decree-holders. The facts which are necessary to be stated in order to appreciate the

points which have been raised and argued are as follows:

On 2nd April 1910 Asfandiar Khan and Janoo Bibi, his mother, obtained a decree against Wazir Bibi and others in a contribution suit. That suit was entitled Contribution Suit No. 118 of 1910 and was tried before the Subordinate Judge of Gaya. The decree in that suit was apparently amended by inserting some costs on 27th June 1914. I merely mention this fact because I find in the evidence that that decree is on some occasions referred to as the decree of 27th June 1914. On 12th August 1911 one Bhawani Kuer obtained a decree in a Title Suit No. 76 of 1911 in the same Court against Asfandiar Khan, the first of the decree-holders, in the suit just mentioned. That was a suit for delivery of possession and mesne profits in a village. Between 1911 and the beginning of 1917 there were some attempts made by Bhawani Kuer to execute that decree, which proved infructuous. Then on 12th February 1917 Gauri Shanker, who is one of the respondents in the present appeal, purchased from Bhawani Kuer the decree which she had obtained against Asfandiar, and he thereupon made an application for execution of that decree and prayed for attachment of Asfandiar's decree against Wazir Bibi. His petition was dated 25th May 1917, and the mode in which he sought to get the assistance of the Court in execution of the decree he had purchased from Bhawani Kuer was by praying that Asfandiar's decree against Wazir Bibi might be attached and that he, Gauri Shanker, should be authorized to execute that decree and realise the decretal amount. In the course of that execution case taken out by Gauri Shanker an order was made on 9th July 1917, which was to this effect:

"Let Gauri Shanker, the present decree-holder, be substituted in the place of Mt. Bhawani Kuer. Process fee worth Rs. 2 filed. Issue attachment of decree fixing 19th July 1917 for orders."

The decree which is attached by that order is the decree obtained by Asfandiar Khan and Janoo Bibi against Wazir Bibi. Perhaps I ought to add that the only interest in that decree which Gauri Shanker could have was the interest of Asfandiar Khan. There was an interest of Janoo Bibi which had not passed to him under the attachment and no claim is made by him in so far as Janoo Bibi's interest is concerned. The order which I have just mentioned having been made, it would appear that in so far as Gauri Shanker was seeking the assistance of the Court for the execution of his decree, that is to say, the decree which he had purchased, he had got all he wanted except possibly some formal order which might have to be made later on. He had had his name substituted in place of the vendor of the decree. the original decree-holder, and he had got an order attaching the decree of 2nd April 1910, and the only thing to be done then was for him to take out execution proceedings under the earlier decree which had been attached and endeavour to realise the decretal sum. Then, for some reason which does not appear, on 19th July 1917, 10 days after the order which I have just referred to, there is an order in the order-sheet to this effect:

"Copy of orders for attaching decree of Money Suit No. 118 of 1909 disposed of on 27th June 1914 received. Ordered case dismissed for want of further prosecution."

That being so, it appears that on 26th August, that is rather more than a month later, the present appellant, Amirul Hasan, purchased from Asfandiar and Riayasat Bibi who had succeeded to the interest of Janoo Bibi the decree which they then had against Wazir Bibi, and on 9th September Gauri Shanker filed an application for execution of that decree in pursuance of the order of attachment which he had already received in the execution proceedings in the title suit. On 5th November 1917 Amirul Hasan also applied for substitution of his name and for execution of the same decree claiming that it had been purchased by him. When the matter came before the Subordinate Judge, who had to decide these two cases, they both being upon his file, it was obvious that he could not allow both the applicants to execute the same decree as they were claiming in different interests. It was contended on behalf of Amirul Hasan, who is the appellant in this case, that as there had been an order made in the execution proceedings in the title suit on 19th July 1917 dismissing that execution case for want of further prosecution, that O. 21. R. 57, Civil P. C., applied, which provides that where any property has been attached in execution but by reason of the decree-holder's default the Court is unable to

proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date and that upon the dismissal of such application the attachment shall cease. It was contended by Amirul Hasan that there had been a dismissal for default in this case and therefore after 19th July 1917 there was no attachment subsisting of the decree, which he had shortly after that date purchased from the original decree-holders. He claimed that he was entitled to maintain the execution case and that Gauri Shanker had no right or title to do so.

The learned Judge decided in favour of Gauri Shanker. The conclusion which he came to was that the dismissal of the original execution case, that is to say, the execution case in the title suit, did not have the effect of setting aside the attachment and in fact the view which the learned Judge has taken is that all that was necessary to be done in that execution case had been done. The attachment had been made and the applicant had been given leave to substitute his name in place of that of the original decree-holder and all that now remained to be done was to take out execution proceedings under the attached decree. It is quite clear that if in fact the execution proceedings are dismissed by reason of any default on the part of the person applying for execution that would undoubtedly have the effect of releasing any property that might have been attached in those execution proceedings, and the question we have to consider in this case is, what in fact was the effect of this order of 19th July dismissing the execution proceedings for want of further prosecution. It is impossible to say the exact reason which induced the learned Judge to make such an order on that occasion, but it seems to me that it is impossible to conceive that there was, 10 days after the attachment order had been made, any default on the part of Gauri Shanker, who was applying for execution, which would have enabled the learned Judge to dismiss the case by reason of that default. There is nothing under the rules, so far as I am aware, which provides that where a decree is attached in the manner in which this was, the execution proceedings should be taken out within ten days after the order was made nor can I find from the order sheet any order which compelled Gauri Shanker within ten days or any period to take out proceedings for executing the attached decree, and I have asked the learned vakil for the appellant whether he can tell me in what respect there was default. He says that the applicant ought to have seen that the execution case was kept alive until he took out execution proceedings under the attached decree.

It does not seem to me that there was any obligation upon the applicant to apply to the Court from time to time merely to see that the execution proceedings were kept alive, when in fact there was nothing further to be done in those proceedings until the attached decree had been realised by Gauri Shanker. That being so, it seems to me, whatever may be the wording of the order, that in truth and in fact there was no dismissal of the execution proceedings by reason of any default on the part of the applicant which brings it within O. 21, R. 57, Civil P. C., and if that is so, it follows that the attachment, which was made in order to enable the applicant to take out execution proceedings under the decree which was attached, remains in force notwithstanding the dismissal of the original execution proceedings which, as far as I can see, ought never to have been dismissed at all. It may be that the learned Judge, thinking that there was nothing further to be done in the execution taken out in the title suit, had wished to get rid of it from his file and accordingly made the order which he did, leaving the matter to proceed under the decree which had been attached, as it was by executing that decree that the applicant expected to get satisfaction. Having come to this conclusion upon the question of the effect of the order made dismissing the execution proceedings, it follows that if and so long as the attachment remained in force, any dealings by the original decree-holder or any transfer or delivery of property comprised in the decree attached would be void as against the claims enforceable under the attachment. That is clearly laid down in S. 64, Civil P. C., and therefore as between the two rival claimants to execute this decree there can be no doubt in my mind that the result arrived at by the learned Judge in the Court below was right and in so

far as he allowed the execution to proceed on behalf of Gauri Shanker this appeal ought to be dismissed.

I have assumed in dealing with this case that the applicant has a right to appeal. But as on the merits he fails, it is not necessary for us to determine the point raised by the respondent that in fact there was no right of appeal and that the only method of approaching this Court was by revision. This does not arise because, one way or the other, assuming we had been in favour of the applicant on the merits, we should have been entitled to go into the case either because he had a right of appeal or because he was entitled to come before us by way of revision, and he has taken both courses. But as I have already said, that question we leave undetermined because it does not seem to arise at the present moment. The judgment which I have just delivered will govern the two Appeals Nos. 286 and 287 of 1917 and the two Civil Revisions Nos. 333 and 334 of 1917, all of which are dismissed with costs. We assess the costs at Rs. 135 for all four cases.

Mullick, J.—I agree.

V.S./R.K. *Appeals dismissed.*

A. I. R. 1918 Patna 457 (1)

ROE AND IMAM, JJ.

Khoda Bukhsh — Decree-holder—Appellant.

v.

Bahdur Ali—Judgment-debtor — Respondent.

Appeal No. 181 of 1917, Decided on 26th February 1918.

Limitation Act (1908), Art. 182 (6)—"Date of issue of notice" means date on which notice actually issues from office of Court — Patna High Court is bound by view of Calcutta High Court in such cases.

The date of the issue of notice in Art. 182 (6) Lim. Act, means the date on which the notice actually issues from the office of the Court, that is to say, the date for which it is signed by the sheristadar in the name of the Court. In such cases the Patna High Court is bound to accept the view of the Calcutta High Court, inasmuch at it is on this view that pleaders have been calculating limitation in making applications for execution. It would not be fair to turn round suddenly and say that the view of the Calcutta High Court is wrong. [P 457 C 2]

Chandra Sekhar Banerji — for Appellant.

P. K. Sen, *B. N. Mitter* and *Lalit Mohan Ghosh*—for Respondent.

Roe, J.—This appeal arises from an order of the District Court of Bhagalpur setting aside an order of the Munsif of Madhipura directing that a decree be executed. The only point for consideration is, whether execution of the decree is barred by limitation. On this point the decision turns upon the question which was to some extent left open by this Court in the case of *Ram Kumar* v. *Kesho Prasad Singh* (1). That question is, in Cl. 6, Art. 182, Lim. Act, do the words, "the date of the issue of the notice" mean the date of the Court's order that notice issue or the date on which a ministerial officer of the Court actually issues the notice?

I have again considered the views quoted in the case of *Ram Kumar* v. *Kesho Prasad Singh* (1). It cannot be for a moment denied that there is much to be said in support of those held in Calcutta and Madras. Perhaps even more may be said in favour of those held in Bombay and Allahabad. But I am of opinion that in a case such as the one before us we are bound to accept the view of the Calcutta Court. It is on this view that pleaders have been calculating limitation in making applications for execution. It would not be fair to turn round suddenly and say that the decision of the Calcutta Court was wrong. For this reason I would hold as I held in the case of *Ram Kumar* v. *Kesho Prasad Singh* (1) that the date of the issue of notice means the date on which the notice actually issued from the office of the Court, that is to say, the date on which it is signed by the sheristadar in the name of the Court. In this view the application was within time. The appeal must therefore be decreed, the order of the District Court set aside and that of the Munsif's Court restored. The respondent will pay the appellant's costs throughout.

Imam, J.—I agree.

V.S./R.K. *Appeal allowed.*

(1) [1916] 36 I. C. 999.

A. I. R. 1918 Patna 457 (2)

ROE AND IMAM, JJ.

Jadubans Panday—Appellant.

v.

Ekram Rai and *others*—Respondents.

Misc. Appeal No. 151 of 1917, Decided on 22nd February 1918.

Civil P. C. (1908). S. 11—Execution—Objection raised and gone into — Same objection cannot be considered on subsequent application.

Where in execution an objection is raised and gone into, the same objection cannot be considered on any subsequent application in execution. If it is decided against the judgment-debtor it is decided for good and all against him, and if decided in his favour is equally binding. Where therefore a decision of the execution Court is that no property of a judgment-debtor can be attached, that decision is final.

[P 458 C 2]

Parmeshwar Dayal—for Appellant.

Panchanan Banerjee—for Respondents.

Judgment. — The facts of this case are that the appellants before us were members of a joint family of which the kartas were Ambica and Jamadar. Ambica and Jamadar were delcared insolvents and their property vested in a receiver. On 12th January 1917 the present opposite party made an application to execute a decree obtained against the joint family by the attachment and sale of the family dwelling house. Various objections to his execution were taken by the appellants and the following judgment thereon was written :

"The decree-holder wants to execute his decree against two houses belonging to the judgment-debtors Ragho Bans, Jadu Bans and others. They object on the ground that the managing members of the joint family named Ambica and Jamadar were declared insolvents and so the property belonging to the joint family cannot be seized in execution of the decree. On reference to the insolvency proceedings it is clear that Ambica and Jamadar were declared as insolvents in their personal capacity, so the objection cannot stand. It is also clear that the houses sought to be proceeded against did not vest in the receiver, but were released on the ground that they had been purchased by one Deo Narain; so the objections have no legs to stand upon. The insolvency proceedings came to an end on 15th July 1916. The present application for execution was put in on 13th January 1917. It is further contended that the present application for execution is barred. On reference to the copy of the order-sheet it appears that the previous proceeding came to an end on 2nd March 1914. So no bar of limitation applies. The previous objection was decided on 17th August 1912 against malicka, to which the present judgment-debtors were not parties. The objections are disallowed and execution is to proceed."

In this Court it is contended that this judgment must be set aside, on the ground that the point in issue had already been decided by a judgment written on 2nd March 1914, upon an application made to sell the houses of two other members of the joint family. It is conceded in argument that in these proceedings the whole joint family, including all the sons and grandsons of Ambica and Jamadar, were on the record. The existence of this judgment was apparently not brought to the notice of either of the Courts below. We have therefore to consider whether the judgment of 17th March 1917, decides issues which had already been decided. For it is settled law that where in execution an objection is raised and gone into, the same objection cannot be considered on any subsequent application in execution. If it was decided against the judgment-debtors it was decided for good and all against them, and if decided in their favour it is equally binding. The learned District Judge at the hearing of the appeal before him substantially adopts the Subordinate Judge's decision. He advances practically no new arguments of his own but merely elaborates the arguments of the first Court. We propose therefore to take the judgment of the first Court and compare it with the judgment which is said to be a bar to the execution.

The first half of the judgment deals with the question whether Ambica and Jamadar were declared insolvents in their personal capacity or by the insolvency the whole joint family had become insolvent. This fact was substantially in issue on the first application for execution. It was specifically found in the Court deciding the objection on 2nd March 1914, that the father as managing member of the joint undivided Hindu family represents the entire estate and in the insolvency Court represents the entire family. The issue therefore that the learned Judge set himself to decide in the first part of the case, that is to say, that part of the case which dealt with the effect of the insolvency of Ambica and Jamadar, had already been specifically decided in the previous proceedings. On the second part of the case the question was whether the particular property now pursued had been released by the receiver to Indra Narain. This question did not, in our view, arise. The release of the property to a third party by the receiver would not render it liable to pursuit.

It is urged before us that the houses now under attachment and sale were not the same houses as were previously pursued. Whether this is so or not, there is not sufficient material before us

to show ; but we hold that where a decision of the execution Court is that no property of a judgment-debtor can be attached that decision is final. It could not for instance be asserted that if on a decree made against *A*, *B* and *C*, *C's* cattle were attached, and on his plea that he could not be proceeded against under the decree the cattle be released, the decree-holder is entitled on the following day to seek to attach his ploughs and re-open the whole question of liability. Being of opinion that the order passed is res judcata, we must set aside the orders of the Courts below and direct the there be no further attempt to execute the decree by attachment and sale of the property of this joint family by this decree-holder. In view of the fact that the document upon which we have decided this case was not brought to the notice of the Courts below we make no order as to costs at any stage of this case.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 459

ROE AND IMAM, JJ.

Ram Charitra Singh and *others*—Petitioners.

v,

Emperor—Opposite Party.

Criminal Revn. No. 251 of 1917, Decided on 20th December 1917, against order of Sessions Judge, Patna, D/- 25th August 1917.

(a) Evidence Act (1872), S. 157— Statements to Police should not be ordinarily used as corroboration—Criminal P. C. (1898), S. 162.

Statements of witnesses made to the Police should not be used to corroborate them except in very special circumstances. [P 459 C 1]

(b) Evidence Act (1872), S. 155—Witness hostile to Crown can be impeached by reference to Police diary — Criminal P. C. (1898), S. 162.

The evidence of a witness who is hostile to the Crown may be impeached by reference to the Police diary. [P 459 C 2]

If in the course of a trial a witness is called upon to say that he saw the offence committed by the accused and when called upon says that the offence was committed by an entirely different person, it is only fair that the Crown should be allowed to use S. 155, to disabuse the jury of the effect made by a wilfully false statement. There is nothing in S. 162 to prevent this course being adopted. That section provides only for facilities to the accused to obtain copies of Police papers. [P 459 C 2]

S. Sinha and *H. L. Nandkiolyar*—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Roe, J.—In this case we are asked to set aside the conviction and sentences on two grounds, firstly, that the statements made before the Police in the course of the enquiry have been used as substantive evidence in the case, and secondly that the Police diaries have been used for the purpose of impeaching a Crown witness or rather one who should have been examined as a Crown witness but was examined by the Court and not by the Crown. The first argument seems to us to be based upon a misappreciation of the finding in the judgments of the Sub-Divisional Magistrate and the Sessions Judge. We are unable to find anywhere in the two judgments any use of the statements made as substantive evidence in the case. The second argument is based upon S. 162, Criminal P. C., and it is urged that that section overrides the provisions of the Evidence Act, Ss. 155 and 157. The case quoted in support of this contention is *Emperor* v. *Akbar Badu* (1). But even in that case Heaton J., said that

"it may be that what the witnesses said was admissible by way of corroboration within the terms of S. 157, Evidence Act."

All that he did protest against was the record being loaded with statements of this description and to that extent we are, if we may say so, in cordial agreement with him. Statements of witnesses made to the Police should not be used to corroborate them except in very special circumstances, but even in the case quoted there is no authority for the proposition that the evidence of a witness who is hostile to the Crown may not be impeached by reference to the police diary. If in the course of the trial a witness is called upon to say that he saw the offence committed by the accused and when called upon says that the offence was committed by an entirely different person it seems only fair that the Crown should be allowed to use the Evidence Act, S. 155, to disabuse the jury of the effect made by a wilfully false statement. There is certainly nothing in S. 162 to prevent this course being adopted, and as we understand it, the section provides only for facilities to the accused to obtain copies of Police papers. The legislature has not thought fit to make provision for equal facilities to the prosecution, for the

(1) [1910] 34 Bom. 599=7 I. C. 933=11 Cr. L. J. 542.

reason that the papers are always in the hands of the prosecution. I would reject this application and direct that the petitioners surrender to their bail and serve out the remainder of their sentences.

Imam, J.—I agree. I would only wish to add that the contention of the learned Counsel that the statement made by Dhuku Singh befor the Police was used in this case against the accused is not borne out by an examination of the judgments of the lower Courts. It appears that this man Dhuku Singh was called as a Court witness. The trying Magistrate called him as such, because it was alleged at a very early stage of the trial that Dhuku had been gained over by the defence. When examined in Court, he made statements that were inconsistent with the statements that he made before the Police in the course of the Police investigation. The subsequent appearance of the Sub Inspector for examination on the point was as to whether he had or had not made these statements. It appears that this was done, not with a view to substantiate the offence against the accused but to clear the doubt as to whether or not the prosecution was right in condemning this man Dukhu as a witness who had turned hostile since his examination by the Police. I have carefully considered the judgment of the trying Magistrate as also that of the learned Judge who heard the appeal, and I find that there is nothing in the two judgments to show that the statements made by Dhuku before the investigation officer have been used as evidence against the accused. On the contrary, I find in the judgment of the learned Judge who heard the appeal that these statements were used only for a certain purpose, and that was to ascertain the fact as to whether the allegation of the prosecution as to the hostility of Dhuku was established or not. In the circumstances the petition must be rejected.

V.S./R.K. *Petition rejected.*

A. I. R. 1918 Patna 460

ROE, J.

Bibi Kulsum —Plaintiff—Appellant.

v.

Muhammad Hamid and *others*—Defendants—Respondents.

Second Appeal No. 159 of 1918, Decided on 4th February 1918.

(a) Court-Fees Act (1870), S. 7 (5)—Suit for possession on basis of mokarrari lease is one for possession of immovable property.

A suit for possession of immovable property on the basis of a mokarrari lease is purely one for possession of immovable property within the meaning of S. 7, Cl. (5). [P 461 C 1]

(b) Court-Fees Act (1870), S. 7 (5)—Mokarrari lease of definite share in revenue paying estate is land.

A mokarrari lease of a definite share in a revenue-paying estate is land within the meaning of S. 7, Cl. 5. [P 461 C 1]

Muhammed Ishfaq—for Appellant.

Facts.—One Nurul Hasan was the proprietor of the entire 16-annas of mouza Badrabad. He was the husband of Mt. Walihan, the mother of the plaintiff and defendants 2 and 3. To satisfy a mortgage decree held by one Gouhar Ali against Badrabad, Nurul Hasan executed a perpetual mokurrari deed on 22nd August 1892 in favour of Mt. Walihan in respect of the entire 16 annas of Badrabad and a share in another village and put her in possession of the property. In execution of a money decree against Nurul Hasan, the village Badrabad was subsequently sold and was purchased by Gouhar Ali. Gouhar Ali in his own turn sold the village to defendant 2, who mortgaged it to defendant 1. Defendant 1 having obtained a decree on the basis of his mortgage put Badrabad to sale and purchased it and got delivery of possession on 22nd December 1914. The plaintiff, who was one of the heirs of Mt. Walihan, brought the present suit claiming the following reliefs: 1. It may be declared that out of the entire 16 annas of mouza Badrabad detailed at the foot of the plaint 5 annas 4 pies is the permanent mokurrari interest of the plaintiff and that her possession over the said mokurrari may be confirmed. 2. If in any way the plaintiff be considered or proved to be out of possession of the mokurrari and defendant 1 be proved or considered to be in possession or if the plaintiff be dispossessed after the institution of the suit the plaintiff may be put in possession of the subject-matter in dispute and defendant 1 or any other contesting defendant may be dispossessed and mesne profits may be awarded to the plaintiff.

The plaintiff valued the subject-matter in dispute at Rs. 1,025 for jurisdiction but paid Court-fees on ten times the Government Revenue. The trial Court as well as the District Judge dismissed the

suit. The plaintiff preferred a second appeal in the High Court and paid the Court-fees on ten times the Government Revenue as she had done in the Courts below. The Stamp Reporter submitted that the suit was for a declaratory decree with a consequential relief and therefore ad valorem Court-fee should have been paid under S. 7 (4) (c), Court Fees Act. He relied on *Dinobundhoo Chowdhry* v. *Raj Mohinee Chowdhrain* (1), *Bohuroonissa Bibee* v. *Kureemoonissa Khatoon* (2), *Pirya Das* v. *Vilayat Khan* (3). Besides he submitted that the suit was one for possession of lease-hold property. Lease-hold property was not an estate within the meaning of S. 7 (5). Therefore the Court-fee payable was on the value of the subject-matter and not on ten times the Government Revenue. He relied on *Ram Ekbal Singh* v. *Baldeo Singh* (4). The Taxing Officer agreed with the submission of the Stamp Reporter and referred the case to the Taxing Judge for decision.

Order.—I do not think any declaratory decree was necessary in this case. The suit is purely one for possession of immovable property. The mokurrari deed relied upon is merely the document of title on which the suit is based. With regard to the second part of the reference the decision in *Ram Ekbal Singh* v. *Baldeo Singh* (4) and the two cases quoted in that decision, *Furzand Ali* v. *Mohanth Lal Suri* (5) and *Ram Raj Tewari* v. *Girnandan Bhagat* (6), are authority for the proposition that suits for occupancy rights and rights of Raiyats holding at fixed rates do not come within the Cl. 1, of S. 7, Cl. (5), Court Fees Act. *Habibul Hossein* v. *Mahomed Reza* (7) is authority for the proposition that a mokurrari lease of a definite share in a revenue-paying estate is land within the meaning of this clause. With the latter decision I agree. The appeal may therefore be admitted as correctly stamped.

V.S./R.K. *Order accordingly.*

(1) [1872] 8 Ben. L. R. App. 32=16 W. R. 213.
(2) [1873] 19 W. R. 17.
(3) [1900] 22 All. 384.
(4) A. I. R. 1914 Cal. 791=25 I. C. 507.
(5) [1905] 32 Cal. 268.
(6) [1893] 15 All. 63.
(7) [1882] 8 Cal. 192.

A. I. R. 1918 Patna 461

IMAM, J.

Rambahal Rai and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Ref. No. 2 of 1918, Decided on 6th February 1918, from decision of Dist. Magistrate, Champaran.

Criminal P. C. (1898), S. 437—Further inquiry under S. 437—District Magistrate is not bound to issue notice to accused—But discretion should be exercised in favour of issuing notice.

A District Magistrate is not bound in law to issue any notice on the accused before ordering a further inquiry under S. 437 but the exercise of discretion in favour of issuing a notice is considered to be the right and proper action to take. [P 461 C 2]

Judgment.—Two points arise in this reference. The first is whether the District Magistrate of Champaran, while ordering a further inquiry under S. 437, Criminal P. C., in a case in which the accused is discharged under S. 253 of that Code, should have passed this order of inquiry without notice to the accused. The point is concluded by the authority to which reference has been made in the letter of Mr. Lewis, the Sub-Divisional Officer of Bettiah, attached to the letter of reference under consideration. It is true that the District Magistrate was not bound in law to issue any notice on the accused, but it was held in the Full Bench case of *Hari Das Sanyal* v. *Saritulla* (1) that the exercise of discretion in favour of issuing a notice like this would be considered the right and proper action to take. I therefore direct that the District Magistrate of Champaran should issue a notice to the accused before passing an order under S. 437 of the Code. The second point on which this reference is made must be left to the discretion of the Magistrate to be exercised on an appreciation of the facts and circumstances of the case. He would therefore be free to order a further inquiry or take such action as he may deem fit.

V.S./R.K. *Reference accepted.*

(1) [1888] 15 Cal. 608 (F. B.).

A. I. R. 1918 Patna 462

ROE AND COUTTS, JJ.

Keshobati Kumari—Defendant—Appellant.

v.

Satya Narayan Sinha and *another*—Plaintiff and Defendants—Respondents.

Appeal No. 38 of 1916, Decided ou 9th July 1918, from original decree of Sub-Judge, Bhagalpur, D/- 6th October 1915.

(a) Guardian and Ward—Rights and Liabilities—Contracts by guardian are binding on minor provided they are for his benefit.

A minor can only act through a guardian, and contracts entered into by a guardian on behalf of the minor are binding on the minor, provided they have been properly entered into and are for his benefit. [P 464 C 2]

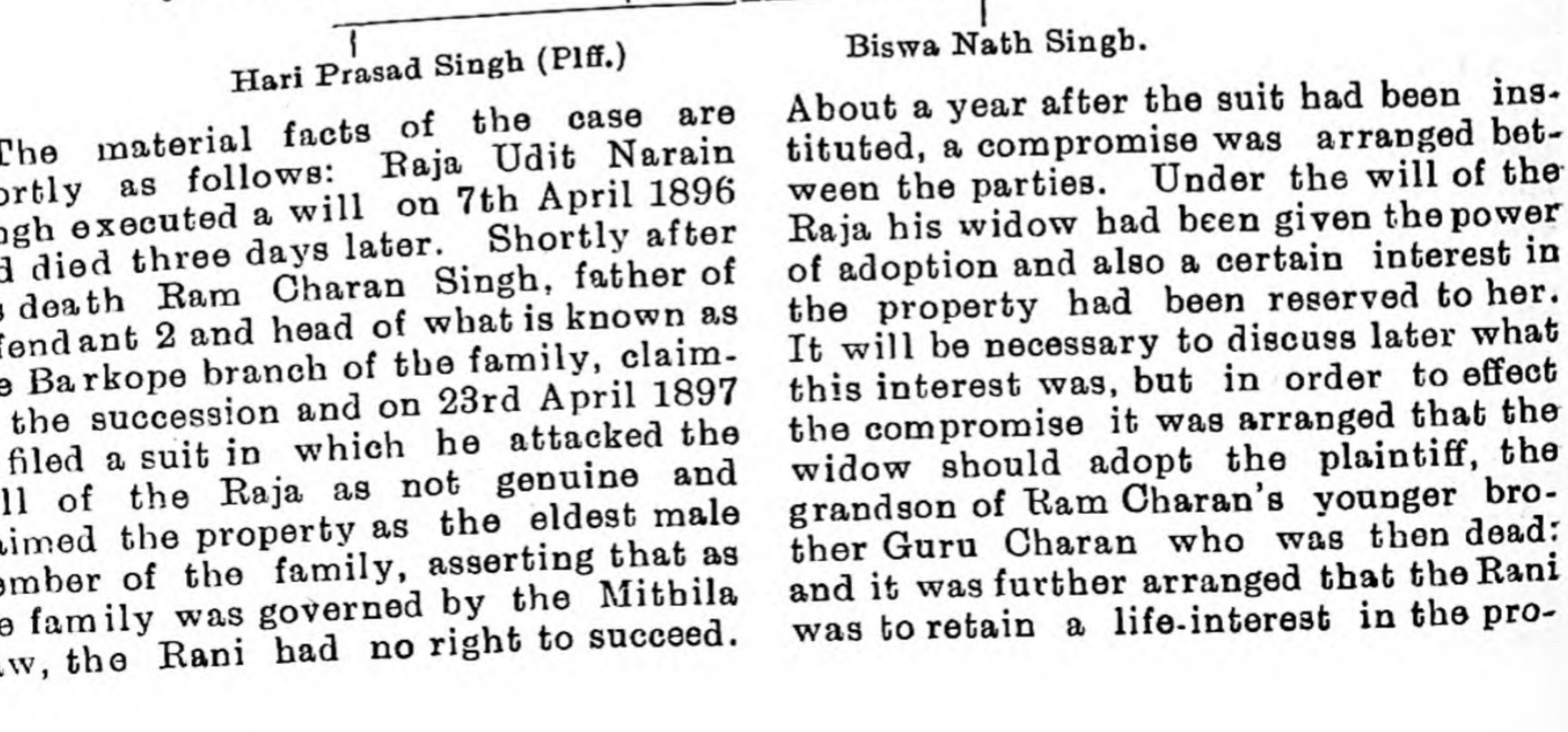
(b) Hindu Law—Adoption—Widow adopting minor—Agreement between widow and parents of adopted child reserving life estate to widow is binding on minor provided contract is for benefit of minor.

Where a Hindu widow adopts a minor son to her deceased husband and an agreement is entered into between her and the parents of the adopted child acting on the latter's behalf, whereby a life-interest in the estate of her deceased husband is reserved to the widow, the agreement is binding on the minor, provided at the time it was entered into it was a fair and reasonable agreement which to any reasonable man would have appeared for the benefit of the minor. [P 465 C 1,2]

Pugh, S. N. Sahay, Naresh Chandra Sinha, Dwarkanath Chackerbatty and *Rajendra Prasad*—for Appellant.

Hasan Imam, S. P. Sen, Sarat Chandra Mukherjee, Surendra Mohan Das. Satish Chandra Rai, Haribhushan Mukherji and *L. K. Jha*—for Respondents.

Coutts, J.—This was a suit brought by the guardian of a minor Kumar Satya Narain Singh for a declaration that he is the adopted son of Udit Narain Singh, called by courtesy Raja, the last male holder of a large estate about 600 square miles in area known as the Handwa Estate, and for immediate possession of the property. The suit was brought against the Raja's widow Rani Keshobati Kumari, who claims a life-interest in the property and who has been in possession since the Raja's death. This extract from the genealogy of the family is necessary to show the relationship of the parties:



The material facts of the case are shortly as follows: Raja Udit Narain Singh executed a will on 7th April 1896 and died three days later. Shortly after his death Ram Charan Singh, father of defendant 2 and head of what is known as the Barkope branch of the family, claimed the succession and on 23rd April 1897 he filed a suit in which he attacked the will of the Raja as not genuine and claimed the property as the eldest male member of the family, asserting that as the family was governed by the Mithila Law, the Rani had no right to succeed. About a year after the suit had been instituted, a compromise was arranged between the parties. Under the will of the Raja his widow had been given the power of adoption and also a certain interest in the property had been reserved to her. It will be necessary to discuss later what this interest was, but in order to effect the compromise it was arranged that the widow should adopt the plaintiff, the grandson of Ram Charan's younger brother Guru Charan who was then dead: and it was further arranged that the Rani was to retain a life-interest in the pro-

perty. The contest in regard to the genuineness of the will was dropped and the Rani took out probate.

On 8th March 1898 the plaintiff was actually adopted and the two deeds were drawn up embodying the agreement. To one of these deeds Ram Charan Singh, the Rani, the plaintiff's father Hari Prasad, Maha Prasad, the only surviving brother of Ram Charan, and Biswa Nath Singh, the brother of Hari Prasad were parties. The parties to the other deed were the plaintiff's father and mother, Ram Charan and the Rani. In December 1900 the settlement proceedings which had been going on for some time in the Handwa Estate, were completed, and after consideration of the will and the agreement which had been entered into, Mr. McPherson, the Settlement Officer, recorded the Rani as proprietor. Meanwhile the management of the estate was unsatisfactory, several managers and receivers were appointed and dismissed by the Rani, and finally in 1909 the Court of Wards took charge. They were only in charge for a short time however and in 1910 the estate was released. After this there were disputes between the Rani and the plaintiff and an attempt was made to settle these by giving the management to the plaintiff. This arrangement however was not a success; the disputes went on and this suit was eventually brought in 1912 on behalf of the plaintiff, who was then a minor by his guardian.

In the plaint he alleged that by his adoption he had become vested with all the rights of a son born of Raja Udit Narain Singh, that he was entitled to immediate possession and was not bound by the agreement of 8th March 1898. He also alleged that the tenure was a ghatwali tenure and that he as the adopted son took the property in his own right. There was an allegation that even if the Rani had a life-interest in the estate, she was liable to be removed for waste and mismanagement. The suit was contested by the Rani, who pleaded that she had been recorded as proprietor in the Record of Rights; that the suit was not maintainable; that under the terms of the will she had a life-interest and that even apart from the will under the agreement of 8th March 1898 she was entitled to a life-interest. She also contended that the plaintiff had no right as an adopted son, as the adoption was not valid. In regard to the claim as ghatwal she contended that if the tenure were a ghatwali tenure, the property had been vested in her as a ghatwal on the death of her husband and that having become possessed of the property in that right she could not be ousted by the plaintiff. The suit went to trial on the following issues:

1. Does the plaint disclose any cause of action and is the suit maintainable? 2. Is the suit barred under the special law of limitation provided in Regn. 3 of 1872? 3. Is it open to defendant 1 to plead that she adopted the plaintiff without power from her husband and is she estopped by her acts and conduct from denying that the plaintiff is the duly adopted son of Raja Udit Narain Singh? 4. If defendant 1 be not estopped as above is the plaintiff's adoption by her invalid on the ground of want of authority from her husband? 5. Was Udit Narain Singh competent to dispose of or to give any valid directions to the future management of the ghatwali properties mentioned as properties Nos. 1. 2 and 3 of the Sch. A annexed to the plaint by his will? 6. What are the respective rights of the plaintiff and defendant 1 in the property in suit upon a true construction of the will of Udit Narain Singh, dated 7th April 1896? 7. Whether the plaintiff's succession to the aforesaid ghatwali properties immediately on his adoption could be defeated by an agreement between his natural father and mother and defendant 1? 8. Are the agreements dated 8th March 1898 binding on the plaintiff in so far as they purport to curtail his rights in any of the properties in suit? 9. Was defendant 1 divested of all right to possession of the estate of her deceased husband either as a Hindu widow or as a legatee under her husband's will immediately upon the adoption of the plaintiff by the said defendant 1, Rani Keshobati Kumari? 10. What are the properties moveable and immovable belonging to the estate left by the said Udit Narain Singh including subsequent acquisitions. 11. Is defendant 1 wasting and mismanaging the said estate; if so whether such wasting and mismanaging are sufficient in law to render her liable to removal from its management even if the plaintiff's right be subject to her life interest in it? (12) Is defendant 1

liable to render accounts to the plaintiff of her management of the said estate from 8th March 1898? What sum of money, if any is due by defendant 1, or any of the defendants upon the taking of such accounts? (13) Is the plaintiff entitled to a decree for possession of the said estate by ousting defendant 1? (14) Is the plaintiff entitled to the appointment of a receiver or to a permanent injunction as prayed for by him? (15) To what relief or reliefs if any is the plaintiff entitled? The learned Subordinate Judge has found all the issues in favour of the plaintiff and has decreed the suit. The Rani has appealed. The first point argued before us is that under the agreement of 8th March 1898 the Rani was given a life-interest in the property and that the plaintiff is not entitled to resile from that agreement. The portions of the agreement which relate to the matter of life-interest are as follows:

"And whereas the said Srimati Rani Keshobati Koeri has applied to the parties hereto of the first party to give her their said son Babu Dwarka Nath Singh to be adopted by her in the Dattaka form as a son unto the said Raja Udit Narain Singh and herself, but on condition that she the said Srimati Rani Keshobati Koeri shall remain in the possession of the whole of the said property, moveable and immovable, with all their appurtenances of which the said Raja Udit Narain Singh died possessed as aforesaid and enjoy the rents, issues and profits thereof during the term of her natural life in accordance with the true meaning of the said will, whereby as the said parties hereto of the first and second parts believe and admit the said Raja Udit Narain Singh intended to give her such life-estate, but whether he so intended or not the said Srimati Rani Keshobati Koeri shall in any case be entitled to remain in possession and to enjoy the rents, issues and profits of the said immovable property during the term of her natural life . . . she shall remain in possession and enjoyment thereof during the term of her natural life in such manner and exercise such powers over the same as the Benares School of the Hindu law entitled a Hindu widow in the possession of her husband's moveable property to do . . . That during the lifetime of the said Srimati Rani Keshobati Koeri the said Babu Dwarka Nath Singh shall not, nor shall his male issue, have any sort of title or interest in the estate of the said Raja Udit Narain Singh, except a vested interest in the remainder subject to a life-estate therein of the said Srimati Rani Keshobati Koeri."

I may note here that the name of the plaintiff before adoption was Dwarka Nath Singh. By this agreement then the Rani was given a life-interest in the property. The question is whether the agreement is binding on the plaintiff. It was entered into on behalf of the plaintiff, who was then an infant, by his father as his guardian. A minor can only act through a guardian, and contracts entered into by a guardian are binding on a minor, provided they have been properly entered into and are for his benefit. Now it has been frankly admitted by Mr. Hasan Imam that at the time the agreement was entered into the arrangement must have appeared to the father a most attractive one, and that in entering into the agreement he honestly thought that he was doing the best possible for his son, and it cannot be doubted that any reasonable man would have thought the same, because from being a cosharer in a minor branch of the family the boy became entitled to this very large estate. It is contended however that the arrangement has not in fact turned out to be as advantageous to the minor as it at first sight must have appeared. Mr. Hasan Imam says that there is in the agreement no proper arrangement for maintenance allowance for the minor, and that if he had remained in his own family he could have demanded a partition and would have had an income of about Rs. 5,000 a year. It is exceedingly problematical whether the plaintiff would have got Rs. 5,000 a year because, even assuming that the income from the Barkope estate was as much as it is said to have been, there was, as the evidence shows, an encumbrance of three and a half lacs upon the property. As it is, the plaintiff is entitled by the agreement to an estate worth over 3 lacs a year subject to the life-interest of the Rani. Moreover in the agreement it is provided that

"the said Dwarka Nath Singh shall henceforth live with and under the guardianship of the said Srimati Rani Keshobati Koeri as his mother and be supported, maintained, educated and trained in every way befitting his position as the dattaka putra or adopted son of the said Raja Udit Narain Singh and of herself."

There is therefore no force in the argument that no proper arrangement was made for the maintenance of the minor and there is every reason to believe that even now the plaintiff is in a better position than he would have been if he had been in his own family. This however is not the question. The question is whether at the time the agreement was

entered into it was a fair and reasonable agreement which, to any reasonable man, would have appeared for the benefit of the minor; and that it was such an agreement is not only certain but is practically admitted. Nor was this agreement entered into without legal advice, for it was submitted to Mr. W. C. Bonnerjee in Calcutta and it is certainly binding on the plaintiff unless it is contrary to Hindu law that such an arrangement should be entered into or for some other reason. Now an adoption once made cannot be unmade and the question of the binding force of such agreement, has often been before the Courts in India. In Bombay such agreements have been held to be binding, *Ravji Vinayakraw Jaggannath Shankar Sett* v. *Lakshmibai* (1) and *Pirsab Kasimsab Itagi* v. *Gurappa Basappa Kadigi* (2), which is the last case in Bombay on this point. In the case reported as *Bhaiya Rabidat Singh* v. *Indar Kumar* (3) however Lord Macnaghten said:

"It is difficult to understand how a declaration by Guman Singh or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son which could only arise when his parental control and authority were determined. The ceremonies of adoption are unimpeached, the deed of adoption is open to no objection, and the second deed is admittedly inoperative. No conditions therefore were attached to the adoption. Had it been otherwise the analogy, such as is presented by the doctrines of the Court of equity in this country relating to the execution of powers of appointment, to which Mr. Arathoon appealed, would rather suggest that even in that case the adoption would have been valid and the condition void".

In that case however the agreement was previous to the adoption and was not embodied in the adoption deed or referred to at the time of the adoption, and the suit was not to enforce the agreement but to annul the adoption. This case was referred to in the Full Bench case reported as *Visalakshi Ammal* v. *Sivaramien* (4), where the whole matter was very fully discussed. In the judgment of Benson, J., he said:

"Then the question in each case would be whether the agreement so made by the natural father should or should not be upheld, and this I take it would depend on whether the agreement in regard to the property was in itself a fair and reasonable one and one which, taken as part of the contract for the adoption, was for the minor's benefit as being a condition on which alone the adoption would be made."

Again he says:

"But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu law, or the purposes for which the adoption is allowed and is nowhere forbidden by that law. Such dispositions are commonly made and are upheld by the authority of the caste and the consciousness of the people. In these circumstances I think that the Courts ought not to refuse to recognise them as binding on the minor, for whose benefit the adoption coupled with the agreement as to the disposition of the property was really made. It may be assumed that the natural father would not have agreed to the adoption coupled with the disposition of the property, unless it was for the benefit of his son to do so: nor would the adoptive father have taken the son in adoption except on the condition agreed to. The adoption, of course, cannot be set aside and to set aside the condition which was coupled with the adoption, while maintaining the adoption, would require the justification of strong grounds of legal necessity or public policy."

This, in spite of the doubt expressed by their Lordships of the Privy Council in the case of *Bhaiya Rabidat Singh* v. *Indar Kunwar* (3) which is clearly distinguishable from the other cases referred to, would appear to be the correct view of the law, and in this view the agreement in the present case is binding on the plaintiff. It is contended however by Mr. Hasan Imam that the agreement, in so far as it gives a life-interest to the Rani, is in contravention of the terms of the will and that this being so, it is not binding on the plaintiff. It is necessary to consider the question in some detail. The portion of the will which deals with the life-interest of the Rani is as follows:

"*Magar ta hin hayat Rani mausufa hakiat mokarrari istimrari wa kul mal mankula wa ghair mankula wa asasulbait wagairah ka intizam wa ikhtiyar kulli hasil rahega.*"

As I understand it the nearest translation of this is as follows :

"But as long as the said Rani is alive she shall enjoy the management and she shall have absolute right in the maliki istimrari right and in all moveable and immovable properties and goods, etc."

On the one hand it is contended by Mr. Dwarka Nath Chakrabarty that this is to be interpreted as giving a life-interest to the Rani. On the other hand it is argued by Mr. Hasan Imam that these words give nothing more than a perpetual power of management. My view of the meaning of the clause is that it gives the Rani a life-interest in the property, but I do not propose to elaborate the point because in my opinion whether this be so

(1) [1887] 11 Bom. 381.
(2) A. I. R. 1914 Bom. 47=24 I. C. 716=38 Bom. 227.
(3) [1889] 16 Cal. 556=16 I. A. 53 (P. C.).
(4) [1904] 27 Mad, 577 (F. B.).

or not, the plaintiff is bound by the terms of the agreement.

In the will there are two portions which are open to different constructions. One of these is this clause which I have quoted, and the other is that portion in which power is given to the Rani to "adopt a son, that is, a kartaputra according to her own decision and liking." I deal with this latter clause first. According to the strict interpretation of the word "kartaputra," the adoption which the Rani was allowed by the will was an adoption in the kritrima form. This is an adoption to herself. It is clear however from the rest of the will that the intention of the Raja was not that the Rani should adopt to herself, but that she should adopt to him, for in the preamble to the will he says that his object in making it is "to preserve the property and for preservation of the Raj Gaddi." What he intended then was certainly not an adoption in the kritrima form but an adoption in the dattaka form. Handwa is situated in the Santal Pargannas in a a very backward part of the country, and we find from the evidence that neither the Raja nor his priests knew the difference between a kartaputra and a dattakaputra, thus in the agreement kartaputra was very properly interpreted as meaning dattakaputra. This interpretation was given after consultation with counsel in Calcutta and the words of the agreement are :

"And whereas the said Raja Udit Narain Singh lived under and was governed by the Benares School of the Hindu law and the power of adoption hereinbefore mentioned was, as the parties to these presents believe, intended by him to be carried out in the dattaka form, the word kartaputra used in the said will meaning in the popular acceptance of that term in that part of the country the dattakaputra."

On this construction the adoption was actually made in the dattaka form. At the same time and by the same counsel the meaning of the clause in the will which gave an interest to the Rani was considered and in the agreement we find the following words :

"But on condition that she the said Rani Keshobati Koeri shall remain in the possession of the whole of the said property moveable and immovable with all the appurtenances of which the said Raja Udit Narain Singh died possessed as aforesaid and enjoy the rents, issues and profits thereof during the term of her natural life in accordance with the true meaning of the said will, whereby as the said parties hereto of the first and second parts believe and admit the said Raja Udit Narain Singh intended to give her such life estate, but whether he so intended or not the said Srimati Rani Keshobati Koeri shall in any case be entitled to remain in possession and to enjoy the rents, issues and profits of the said immovable properties during the term of her natural life."

It was on this construction of the will that the agreement was made and the plaintiff adopted in the Dattaka form. Mr. Hasan Imam contends that this construction is wrong. Even assuming that this is so and putting the case in its most favourable light for the plaintiff, it has to be admitted that there was, at least at the time of the execution of the agreement, a bona fide doubt as to the meaning of these clauses of the will. The will was construed by competent legal authority in Calcutta as giving a life-interest to the Rani, and this interpretation was accepted as a condition of the adoption and was incorporated in the agreement which was drawn up. It is not, in my opinion, now open to the plaintiff to contend that this construction was wrong. We have been told that parties cannot be allowed to read into a will a wrong construction which happens to suit themselves, and we are asked to interpret the will without reference to the agreement. I agree that parties cannot be allowed to import into a solemn document, such as a will a construction which it cannot bear, but I am not prepared to agree that the construction which was put on the will was wrong, and in any case where there has been a doubt as to the proper construction and where the parties have endeavoured to the best of their ability to discover the proper construction and have entered into an agreement of which this construction is the very basis, it is not open to either of them afterwards to repudiate this construction and ask that the agreement be set aside. What the plaintiff in fact wishes to do in this case is to be allowed to approbate that part of the agreement which construes the will in his favour and to reprobate that portion which construes the will as giving the Rani a life interest. He cannot be allowed to do this and he is, in my opinion, bound by the agreement. This being so, it is hardly necessary to consider the other pleas of the plaintiff. I need only remark that so far as the claim as ghatwal is concerned, if this is a ghatwali tenure, and if Raja Udit Narain

Singh was a ghatwal, his interest as a ghatwal became vested in his widow when she took possession of the property and she is not competent to divest herself of this status. It is unnecessary to discuss the question of limitation, though on this ground also the plaintiff's suit for possession must fail. The only question which remains to be considered is issue 11:

"Is defendant 1 wasting and mismanaging the said estate? If so, whether such wasting and mismanaging are sufficient in law to render her liable to removal from its management, even if the plaintiff's right be subject to her life-interest in it."

This issue is loosely worded and it is not quite clear whether the Subordinate Judge means legal waste, nor is it very clear what his finding as to waste is. He finds that the Rani has given dar mokarrari leases, has made rent-free Brahmottar grants and that she has caused an area of 309 bighas of khas kamat lands to be converted into raiyati lands. He also finds that she has contracted debts. None of these come into the category of legal waste. As to the first two the leases and grants are not binding on the reversioner, as to the conversion of the khas kamat lands into raiyati lands there is nothing to show that this is waste as rent will presumably be got from these lands; and in so far as the debts are concerned they are all personal. The learned Subordinate Judge however has clearly shown that she has mismanaged the property, and this is in fact not denied. She is a pardanashin lady evidently in the hands of dishonest servants and if the estate is to be preserved, a receiver must be appointed. To this extent only therefore I would uphold the Subordinate Judge's decree. In other respects the suit should be dismissed; each party should bear its own costs.

Roe, J.—I agree that the plaintiff is bound by the agreement which settled the dispute between the Rani and the Barkope branch of the Handwa family. The position was that if the will was valid, the Rani might have adopted any Kshetari boy and barred the Barkope succession for ever. In the Santal Pargannas the practice of the secular law is discouraged and the priests, in their cross-examination in the case before us, betray universal and complete ignorance of the scriptural law. The result of this was a will by which a son was to be adopted in a form which would defeat the testator's own intention and an interest reserved to the adopting mother by a condition, of which the exact interpretation gives rise to a difference of opinion between my learned brother and myself. It was clearly to the interest of the Handwa family as a whole that the will should be amicably interpreted. In Vol. 14 of Halsbury's Laws of England, S. 1223, are quoted many cases of good family settlements of disputes arising on the construction of ill-made wills. The dispute in this case was one between the Lagwan and at the Barkope branches of the Handwa family. The plaintiff was before his adoption and is still a member of the Handwa family. He cannot challenge the Handwa family settlement without showing that it was against his interest. Mr. Hasan Imam concedes that the terms of the settlement offered at the time most attractive prospects. Apart from any consideration of the Hindu law of adoption this concession ends in my view the question of the position of the plaintiff.

I also agree with the order proposed in regard to the appointment of a receiver. We are happily relieved of the task of entering in detail into the question of the plaintiff's right to the relief asked for in para. 27 (g) of the plaint. Mr. Dwarka Nath Chackerbatty consents to the granting of this relief. I would therefore make a decree for the appointment of a receiver for the preservation and management of the Handwa Estate and custody and control of the documents and moveable properties of that Estate. I would also direct that the Receiver be appointed under the decree of this Court, not under the decree of the Subordinate Judge, and that the Receiver be directly under the control of this Court. This Divisional Bench will consider in Chambers the question who shall be appointed as the Court's Receiver. In conclusion I would direct that in view of the substantial causes of doubt as to the rights of the parties, the costs both of the Rani and of the Kumar be met from the estate in the hands of the Receiver. I would further order that notice be issued to the Courts of the Santal Pargannas and Bhagalpur that the Handwa Estate is in the hands of a Receiver to be appointed by this Court,

and that no attachment of any asset of the estate be made without the sanction of this Court.

V.S./R.K. *Decree modified.*

A. I. R. 1918 Patna 468

ROE AND JWALA PRASAD, JJ.

Kailaspati Chowdhury and *another*—Defendants—Appellants.

v.

Muneshwar Chowdhury and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 641 of 1917, Decided on 15th January 1918, from appellate decree of Dist. Judge, Shahabad.

(a) Landlord and Tenant—Lease—Tenant recognised by superior landlord—Sub-tenant cannot criticise origin of tenancy.

Where a tenant has been recognised by his superior landlord, a sub-tenant is not entitled to criticise the origin of the tenancy. [P 468 C 2]

(b) Hindu Law—Joint family—Father—Family living by cultivation—Father entering into sub-lease—Presumption is that he does so for purpose of family—Landlord and Tenant—Tenancy.

It may be presumed that where the father of a joint family living by cultivation enters into a sublease he does so for the purpose of the family, whether the family actually makes a profit out of the contract being immaterial. [P 468 C 2]

(c) Transfer of Property Act (1882), S. 106—Contract not for specified time—Tenancy is from year to year.

Where a contract of tenancy is not for any specified number of years, it must be regarded as a lease from year to year. [P 468 C 2]

(d) Bengal Tenancy Act (1885), S. 48—"Holding at money rent" refers to under-raiyat.

The words "holding at a money rent" in S. 48 refer to the under-raiyat and not to the raiyat. [P 469 C 1]

Sushil Madho Mullick—for Appellant.

Siv Saran Lal—for Respondents.

Judgment.—In this case four points are taken by the learned vakil for the appellants. Firstly. that the title of the plaintiff is defective by reason of the fact that it is based upon a document that was not registered; secondly, that the liability of the defendants has not been proved for the reason that the contract was entered into by an individual member of the joint family and it has not been proved that it was made for the purposes of the joint family; thirdly, that the contract is to pay to a landlord holding at a money rent a produce rent greatly in excess of the statutory limit prescribed by S. 48, Ben. Ten. Act; and fourthly, that inasmuch as the contract is on the face of it a lease in perpetuity it was not capable of registration and therefore void.

With regard to the first ground, the finding of fact is that the plaintiff-respondent has been recognised as a tenant by his superior landlord. It is not for the appellant before us, his sub-tenant, to criticise the origin of the tenancy. Upon the second ground we may presume that where the father of a joint family living by cultivation enters into a sub-lease he is doing so for the purpose of the family, and it is not for us to inquire whether the contract was one by which the family actually made a profit. With regard to the fourth point there is no evidence on the record of any term of years contemplated in the contract, and as we understand the law, where a contract is not for any specified number of years it is to be regarded as a lease from year to year terminable upon notice by either side within the limits of the law regulating the eviction of under tenants.

The real point before us in this appeal is whether the words "holding at a money rent" in S. 48 apply to the landlord or to the under-raiyat. It is suggested that the point is one of some difficulty, for the reason that it was evaded in *Ananda Chandra Roy* v. *Makram Ali* (1). We venture to think that the learned Judges who decided that case would not have been deterred from a decision on the point by a consideration of its difficulty. The point seems to us on the face of it simple. It stands to reason that where a raiyat holding at a money rent leases his land to a produce rent dependent upon the productive power of the land in average years, the legislature could not have intended to limit the amount of rent which might be realisable in any particular year. The productive power of land varies according to the season from 0 per cent. to a 100 per cent. of the maximum productive power. It would be idle to suggest that a raiyat who has received from his under-raiyat during famine years less rent than he paid to his landlord for four or five years successively is prohibited from reaping the benefit of the five succeeding bumper years. Inasmuch therefore as it could not have been intended that an under raiyat holding at a produce rent based upon the annual crop realised

(7) [1909] 3 I. C. 204.

should be excused from paying more than 25 per cent. over the cash rent paid by the raiyat, it follows that the words money rent refer to the under-raiyat and not to the raiyat. The only point to be considered in this case is whether there was an intention to realise from the raiyat a money rent or a produce rent. It has been held that where a money value is set upon a mankhap rent, the rent is a money rent, not a produce rent. In the case before us there is no indication of any contract to pay any definite sum of money, if the paddy agreed upon was not delivered regularly. It would seem to us that the rent of the under-raiyat in the particular case before us is not a money rent, and that therefore the appellant before us is not an under-raiyat holding at a money rent, and that therefore he is not covered by the provisions of S. 48. The appeal must therefore fail on all grounds and is dismissed with costs.

V.S./R.K *Appeal dismissed.*

A. I. R. 1918 Patna 469

Special Bench

CHAPMAN, ATKINSON AND IMAM, JJ.

Ram Bahadur and *others*—Defendants—Appellants.

v.

Jagannath Prasad and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 123 of 1914, Decided on 1st March 1918 from Original Decree of Sub-Judge, Muzafferpur, D/- 31st July 1912.

(a) Will—Construction—Will by childless Hindu, construed.

The will of a childless Hindu provided that his moveable and immovable property should remain in the possession of his wife until her death, and that after her death it should pass into the possession of his niece, but that if on the death of his wife and niece there were living a son and a daughter born of the womb of the niece, then two-thirds of the moveable property should belong to the said son and one-third to the daughter. But as regards the immovable property none shall have the least right of alienation.

Held : (1) that the will purported to convey an absolute estate ultimately to the son and daughter of the niece and that the fact that the corpus was not expressly mentioned was not sufficient to justify the interpretation that the corpus did not pass. [P 471 C 1]

(2) that the recital in the will that there should be no right of alienation made no difference, so far at any rate as the niece's son and daughter were concerned, nor did it make any difference that the bequest in favour of the niece's son and daughter failed on the ground that they were unborn at the date of the testator's death. [P 471 C 2]

(3) that the disposition in favour of the niece's son and daughter was intended as a gift of the remainder, and not merely a statement of what the testator believed to be the rule of succession in case of his niece's intestacy. [P 473 C 1]

(4) that the will was not intended to and did not vest an absolute testate of inheritance in the niece, and that, therefore she did not in that capacity have an unfettered right of alienation. [P 473 C 1]

(5) that the estate created in favour of the niece was an estate such as a woman ordinarily acquires by inheritance under the Hindu law, which she holds in a completely representative character but is unable to alienate except in case of legal necessity. [P 475 C 1]

(6) that the words restricting alienation in respect of the niece's estate were of the nature of surplusage, that is say, to the testator had in his mind the ordinary recognized restriction upon alienation which would apply independently of any provision in the will, and that he had not in his mind the eventuality of an alienation becoming necessary either for the purposes of providing maintenance for the niece or for the preservation of his estate. [P 475 C 1]

(b) Hindu Law — Succession — Widow's estate can be created by will.

An estate of the kind that a Hindu widow inherits in the case of intestacy can be created by will. [P 473 C 2]

(c) Will— Construction— Mere contingent remainder created after woman's estate—It indicates that estate created was woman's estate in technical sense and not merely life estate.

Where a mere contingent remainder is created after a woman's estate and not a vested remainder, this is an indication in favour of the view that the estate created was a woman's estate in the technical sense and not merely a life-estate. [P 474 C 2]

(d)Hindu Law--Will—Construction—Effect under English law is not to be taken into consideration.

In construing a will made by a Hindu testator, it is not permissible to take into consideration what the effect of such a will would be under the English law. It is not permissible for instance to import the idea that where an estate is devised to enure only for life, the result is that an estate in fee in remainder, whether vested or contingent, must exist in some one. [P 474 C 1]

(e) Hindu Law—Will—Hindu law measures estates by use and not by duration unlike English law.

The English classification under which estates are projected along the plane of time and are measured by time alone, is foreign to the Hindu law, which measures estates not by duration but by use. [P 474 C 1]

(f) Hindu Law—Will— Hindu can create estate for life—Intention to do so must be clear.

A Hindu can by will create an estate for life in the English sense, but his intention to do so must be made clear by the terms of the will itself without any importation of English ideas. [P 476 C 1]

(g) Hindu Law —Alienation— Necessity— Actual proof of, is not essential—Representation as to necessity and purchaser acting honestly after proper inquiry, are sufficient

Actual proof of necessity which justifies an alienation under Hindu law is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper inquiry to satisfy himself of its truth.

[P 476 C 2]

(h) Hindu Law— Alienation— Necessity— Representation of—Recital in deed is clear evidence.

A recital in the deed is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed.

[P 476 C 2]

(i) Hindu Law—Construction—Will of uncertain construction—Whether absolute title by adverse possession can be acquired— (*Quaere*).

Quaere.—Whether where a person enters under a will of uncertain construction, an absolute title can be acquired by adverse possession in the absence of an express claim to hold an absolute title.

[P 471 C 1]

Sushil Madhav Mullick and Sivnarain Bose—for Appellant.

Pugh, Purnendu Narain Sinha, Murari Prasad and *Chandra Shekhar Banerji*—for Respondents.

Chapman, J.—This appeal arises out of a suit for a declaration that the title conveyed by one Sahodra Bibi to Ganpat Bhagat in a house and garden had ceased at her death, and for possession. The suit was instituted by Jagernath Prasad, the son of Sahodra Bibi, and by two other persons who had purchased a 7-annas interest from Jagernath Prasad. The deed of conveyance, which is dated the 10th January 1885 and is referred to as Ex. C, purported to convey an absolute interest in the property. The plaintiffs' case however was that Sahodra Bibi had no power to convey a title to enure beyond her lifetime. The suit has been decreed and the defendants, who are purchasers from the assignees of Sahodra Bibi, have appealed to this Court. Sahodra Bibi had held under a will executed by Fateh Chand, who died possessed of considerable immovable property more particularly specified in the schedule to his will in addition to a banking business which was carried on in the town of Muzaffarpur under the style and title of Fateh Chand Sakhi Chand. He died in 1848 or 1849, leaving a widow Sheudai Koer and Sahodra Bibi his brother's daughter. On 13th April 1848 he executed a will whereby he devised and bequeathed all his property in the first place to Sheudai Koer and after her death to Sahodra Bibi. The widow Sheudai died in 1853. In 1884 the banking business failed and on 5th August 1884 Sahodra Bibi executed three conveyances of the immovable property left by Fateh Chand to satisfy debts due by the banking business referred to as Exs. B, B-1, B-2. On 10th January 1885 she executed two further conveyances of the immovable property of the testator referred to as Exs. O and C. All these conveyances recited that they were executed in order to enable Sahodra to discharge debts due by the banking business which descended to her as assets of Fateh Chand deceased. The property, which is the subject of the present suit, was sold under one of the conveyances of 10th January 1885 to Ganpat Bhagat, viz., Ex. C. Ganpat sold the property to a Hindu joint family, the head of which was named Kunj Lal, on 29th May 1888. Thereafter this particular property fell by partition to the share of one Isri Prasad, whose successors are the principal defendants in this suit.

Sahodra Bibi died on 8th November 1899. The plaintiffs' case is that by the conveyance of 1885 Sahodra Bibi could and did only convey a title to enure until her death ; and that on her death in November 1899 the title to the property in suit together with all the other property of the testator, whether moveable or immovable, vested in her son Jagernath who was the sole heir to Fateh Chand's estate by reason of an intestacy as to the residue of his property. Jagernath and the other plaintiffs who have purchased an interest from him accordingly sued for possession. The decision of the case depends upon the interpretation of the will of Fateh Chand and as to the nature and character of the estate or interest which Sahodra acquired thereby.

The first contention in appeal is that this will is void so far as the immovable property is concerned, as it did not convey any beneficial interest in the corpus of the testator's estate either to Sheudai and Sahodra or to those designated to succeed on the death of Sahodra, and that in effect the gifts or bequests contained in the will were thereby bequests not of

the corpus of the immovable property but of the right to receive only the rents and profits accruing therefrom ; that Sahodra, when she entered in 1853 therefore entered as a trespasser ; and that by reason thereof she has acquired an absolute estate by adverse possession, and that she acquired an absolute title which she could and did convey to Ganpat Bhagat. It may be doubted whether in such a case where a person enters uuder a will of doubtful construction, an absolute title can be acquired by adverse possession in the absence of an express claim to hold an absolute title. The contention however in my opinion, fails ab initio. It is clear that the will did contain a devise of a beneficial interest in the corpus of the immovable property of the testator and that the limitations in respect thereof, so far as Sheudai and Sahodra are concerned, are not invalid. The will recites that if any daughter or son be born to the testator during his lifetime, such son or daughter will be the owner of all his property but if there be no son or daughter, his niece Sahodra is to take a bequest of a lakh of rupees and the rest of the moveable and immovable property has to remain in the possession of his wife until her death.

After her death it was to pass into the possession of his niece. But if on the death of his wife and niece there be living a son and a daughter born of the womb of the niece, then two-thirds of the cash and the furniture should belong to the son and one-third to the daughter absolutely and that as to the immovable property "they," meaning all these persons including the son and daughter, were to enjoy the balance left after the payment of rent and the expenses incurred in discharge of certain religious and charitable obligations charged upon the income of the testator's immovable property. This will clearly purported to convey an absolute estate ultimately to the son and daughter of his niece. The fact that the corpus is not expressly mentioned is not sufficient to justify the interpretation that the corpus did not pass; and the recitals from time to time in the will, that there should be no right of alienation would, make no difference, so far at any rate as the niece's son and daughter are concerned, nor does it make any difference that the bequest in favour of the niece's son and daughter failed on the ground that they were unborn at the date of the testator's death. The failure of the gift of the remainder to them would not make the will itself invalid. The appellant's vakil has relied upon the case of *Shookmoy Chandra Das* v. *Monoharri Dassi* (1), where it was held that the will which was the subject-matter of that case was invalid upon the ground that it was not the testator's intention to pass the corpus of the estate, but merely the rents and profits, and that thus the will offended against the rule of perpetuity and was void. This intention or absence of intention was inferred by their Lordships of the Privy Council from certain recitals and provisions in the will, none of which occur in the will which we have to construe. In the will in the case cited the testator began by saying that his estate was to remain intact; and that his heirs were to be entitled to enjoy the profits thereof. Their Lordships said that this created an impression that the intention of the will was to create a perpetuity as regards the estate and to limit the enjoyment of the profits for an indefinite period. This impression was confirmed by the subsequent clauses in the will, under which a 6 annas portion of the property was dedicated to the family worship and the maintenance of the family, leaving a 10 annas share which was not to be expended at all so long as the family remained joint and which was not disposed of in any way.

There was a further provision as to how the profits should be enjoyed in the event of disagreement. From the judgment of the High Court against which there was an appeal to the Privy Council, it appears that the will provided for a succession of trustees. The only provision in the present will which resembles the provisions in the will in that case is the prohibition against alienation; but as was pointed out by the Privy Council in the subsequent case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (2), the interpretation given to the will in *Shookmoy Chandra Das* v. *Monoharri Dassi* (1) was arrived at independently of the provisions against alienation. I have no doubt that the will was not invalid upon the ground that the testator did not intend to convey the corpus. The first contention pressed by the appellants therefore fails.

(1) [1885] 11 Cal. 684=12 I. A. 103 (P.C.).
(2) [1897] 24 Cal. 834=24 I. A. 76 (P.C.).

The next contention is that the will intended to create an absolute estate in Sahodra Bibi. This same will was so interpreted in the case of *Jagarnath Prasad* v. *Jaikishun Prasad* (3). The point therefore requires careful consideration, and it would only be with great hesitation that we would adopt the view that was not accepted by the learned Judges who decided that case. It will be remembered that the will created an estate in the first instance in the testator's widow Sheudai Koer. The estate in the widow is described in two passages of the will. In the first it is said that the moveable property and the shops will remain in the possession of his wife until her death; and in another passage it is said that the immovable property will remain in the possession of his wife during her life time without power to transfer them, and that his wife, after meeting certain charges recited in detail, shall bring the remainder to her own necessary expenses. The will then proceeds to say that after the death of his wife the properties will remain in the possession of his niece Sahodra Bibi without right of transfer, and that, after defraying certain charitable charges, she will bring the balance to her necessary expenses. It then goes on to say that if on the death of his wife and his niece there be living a son and daughter born of the womb of his niece, the son and daughter are to enjoy the properties. Now there are no words in the description in the will of the estate given to Sahodra, to suggest that the intention was that she should have an absolute estate. The expression "remain in possession," as contrasted with the expression "will be the owner" used in the earlier part of the will with reference to his own son and daughter if there should be one, militates against the idea of an absolute estate. The condition against alienation also points in the same direction. It is however contended that the provision for the ultimate benefit of Sahodra's son and daughter was a provision that they were eventually to succeed as heirs of Sahodra, and that this indicates that the intention was to create an estate of inheritance in Sahodra. The point therefore for our determination reduces itself to the question, whether the words referring to the ultimate succession of the niece's son and daughter can be treated as leading to the interpretation contended for. The alternative interpretation of course is, that there was an absolute gift of the remainder to the niece's son and daughter and that there was no idea of an estate of inheritance in the niece at all. Shortly the question is, do the words referring to the ultimate succession of the son and daughter indicate a gift of the remainder in their favour, or do these words mean a mere description of an estate of inheritance in Sahodra. It may be premised that if the words can be interpreted as a description of an estate of inheritance, it does not matter if the description is incorrect, although no doubt the incorrectness of the description is a point to be considered in adopting one or other of the two alternative constructions. The disposing words are :

> "If on the death of my wife and my niece there be living a son and a daughter born of the womb of my said brother's daughter, then two-thirds of the moveable property will belong to the said son and one-third to the daughter. But as regards the immovable property none shall have the least right of alienation. They will, of course, be entitled to enjoy the balance left after payment of rent, etc."

Now I am aware of no case in which where a son and daughter have alone been mentioned, the words have been interpreted to amount to a description of the course of the inheritance. The words also obviously do not provide for the case where there is no son or daughter, and it is hardly conceivable that the testator can have thought that in the absence of a son and daughter there would be no person entitled to succeed by inheritance. Moreover under the Mitakshara law to which the testator was subject, the son and daughter would not in any circumstances simultaneously succeed. It is true that under the Bengal law there are cases in which a son and daughter may succeed jointly to a mother. But there are no circumstances in which a son and daughter would succeed, one to two thirds and the other to one-third. The whole wording of the disposition appears to me to be also more favourable to the interpretation of a gift of the remainder than to a description of the course of succession. It is true that later on in the will, there is reference in one sentence to the niece's heirs born of her womb, and in the other to "the heirs of my niece." These references appear to relate back to the son

(3) [1916] 1 Pat. L. J. 16=34 I. C. 375.

and daughter in favour of whom there had been an express disposition.

They do not occur in the disposing portion of the will, but merely in sentences which are prefatory in character, and the expression "heirs born of the womb" relied on by Sharfuddin and Mullick, JJ., would, in any event, be descriptive only of an estate tail, which is unknown to Hindu law. They could not be held to be descriptive of an estate of ordinary inheritance. I am unable to infer from the use of these words that the testator meant to describe an estate of ordinary inheritance as having vested in his niece. The expression "her heirs born of her womb" excluded her husband who was then living; and it is impossible to conceive that the testator would not know that if his niece took an estate of inheritance the husband would be one of the principal heirs. On a careful consideration of the terms of the will, I am of opinion that the disposition in favour of the niece's son and daughter was intended as a gift of the remainder and not merely a statement of what the testator believed to be the rule of succession in case of his niece's intestacy. It is true that the gift of the remainder would contravene the rule against bequests in favour of unborn persons and would be bad, but this is not a point that can be taken into consideration when the question is merely the interpretation of the will: *Edwards* v. *Edwards* (4). We are of opinion therefore that the will was not intended to and did not vest an absolute estate of inheritance in Sahodra Bibi, and that therefore she did not in that capacity have an unfettered right of alienation.

It is then contended that the estate conferred on the niece, if not an absolute estate, was an estate of the kind that a Hindu widow inherits in the case of an intestacy, that is, that the niece had the power of alienation for legal necessity and that legal necessity was established in the present case so as to justify the particular alienation assailed in this suit. In the course of the argument a doubt was at one time suggested whether such an estate can be created by act of parties. It was expressly held in the case of *Meda Vengamma* v. *Mitta Chelamiah* (5), that such an estate can be created by act of parties. Their Lordships of the Privy Council assumed that it could be so created so far back as 1875 in the case of *Bhagbutty Devi* v. *Bholanath Thakoor* (6), and there has been a long series of cases in the Privy Council which have proceeded upon this assumption. We are of opinion that such an estate can be created by will.

The question we have to determine in the first place is whether the estate created in Sahodra Bibi was a mere estate for life in the English sense of the term or a woman's estate as known to Hindu law. The authorities which might assist in the determination of this question are somewhat perplexing, inasmuch as the term "estate for life" has been frequently used in Indian cases as synonymous with a widow's or a woman's estate. Thus in the case of *Lallu* v. *Jagmohan* (7) Farran, C. J., described an estate in which he held that the widow had wider powers of alienation than an ordinary Hindu widow has in a life estate. And in the case of *Radha Prasad Mullick* v. *Ranee Mani Dassee* (8) their Lordships of the Privy Council described the estate in one sentence as a woman's estate in the property and in another as an estate for life. Again in the case of *Gooroo Das Mustafi* v. *Sarat Chunder Mustafi* (9), Geidt, J., while concurring in the view that the estate was merely an estate for life went on to remark that the estate resembled that of a Hindu widow and in *Mahim Chandra* v. *Hara Kumari* (10) the expression "the life-estate of a Hindu widow" occurs. The only case in which it is possible to say that it was held that a pure estate for life in the English sense as distinguished from a woman's estate was created is the case of *Bhagabutti Devi* v. *Bholanath Thakoor* (6) decided by their Lordships of the Privy Council so far back as the year 1875 [*Bhagabutti Devi* v. *Bholanath Thakoor* (6)]. That however was a case of settlement made inter vivos

The question therefore we have to determine is practically res integra, but this at any rate can be laid down with certainty that in construing the will it is not permissible to take into consideration what the effect of such a will as this

(4) [1909] A. C. 275.
(5) [1913] 36 Mad. 484=15 I. C. 17.
(6) [1875-76] 1 Cal. 104=2 I. A. 256 (P. C.).
(7) [1898] 22 Bom. 409.
(8) [1908] 35 Cal. 896=35 I. A. 118 (P. C.).
(9) [1902] 29 Cal. 699.
(10) [1915] 42 Cal. 561=30 I. C. 798.

would have been under the English Law. It is not permissible for instance to import the idea that where an estate is devised to enure only for life the result is that an estate in fee in remainder whether vested or contingent must exist in some one. In the case of *Bhagabati Barmanya* v. *Kali Charan Singh* (11) their Lordships of the Privy Council desired emphatically to call attention to a passage in the judgment of the Chief Justice of the Calcutta High Court with which their Lordships were in entire concurrence. The passage is this (p. 474 of the Report.):

"English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing and the success of those rules in giving effect to the real intention of those whose language they are used to interpret depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowlege of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point think differently and speak differently from Englishmen, and who have never heard of the rules in question."

Again in the case of *Richard Ross Skinner* v. *Naunihal Singh* (12) their Lordships say that English rules of interpretation must not be allowed to govern the case but the matter must be determined by the principles of natural justice. It is clear therefore that in construing the will we must banish from our minds for the time being the very artificial legal notions connected with the English idea of an estate for life, and substitute therefor a notion familiar to Hindu law under which a person holding a restricted estate for life is yet regarded as representing the entire estate. The English classification under which estates are, as has been said, projected along the plane of time and are measured by time alone is foreign to the Hindu law which measures estates not by duration but by use (Mayne's Hindu law, Edn. 8, p. 847). Now the will contemplates that the estate should be held first by the widow and then by the niece and that if a son and daughter born of the womb of the niece are living at the death of the niece, then by the son and daughter. The will therefore does not contemplate the existence of any interest in the estate contemporaneously in the first place with the widow and thereafter with the niece. The bequest of the remainder to the niece's son and daughter was a bequest of a contingent and not a vested remainder. The condition is "if the son and daughter be living on the death of my wife and my niece" [*Denn* v. *Bagshaw* (13), Jarman on Wills, Edn. 6, p. 1385]; that is to say, under the will there was no interest vested in any person other than the widow in the first place and after her the niece. The will therefore contemplated that the estate should be completely represented first by the testator's widow and thereafter by his niece, and it is not permissible to import the English artificial idea that an estate in fee was outstanding anywhere else.

In the case of *Bhagabutti Devi* v. *Bholanath Thakoor* (6) their Lordships mentioned as one of the circumstances in favour of the view that a mere estate for life was intended and not a widow's estate that it would follow that if the estate was a widow's estate, the gift of the remainder would not in any sense be a gift of a vested remainder but merely a contingent one. It follows that where a mere contingent remainder is created after a woman's estate and not a vested remainder, this is an indication in favour of the view that the estate created was a woman's estate in the techinical sense and not merely a life-estate The Hindu law is, as I have said, familiar with estates which though restricted are fully representative. It is true that in describing the estate created in favour of the niece the words "without power of alienation" occur. It does not appear to us to be possible to read these words as more indicative of an estate for life in the English sense than of a widow or woman's estate. Read literally, the words would be as foreign to an estate for life as to a woman's estate. We must not forget that the testator was a Hindu and it is no easier to read into the words the power to convey a title for the remainder of the niece's life than it is to read into the words the power to alienate in the case of legal necessity. The fact is that in cases of this kind it is very easy to use the words "without power of alienation" in a loose sense, that is to

(11) [1911] 38 Cal. 468=10 I. C. 641 (P. C.)
(12) [1913] 35 All. 211=19 I. C. 267=40 I. A. 105 (P. C.).
(13) [1796] 6 T. R. 512.

say, to use them in the sense without power of alienation except in the case of recognized legal necessity. Thus the Offg. Chief Justice of Madras in the case of *Carlapatti Chinna Cunnian* v. *Cota Wammalivariah* (14) says:

"We are inclined, therefore to think he did not intend that his widow should have the power to alienate the estate,"

when manifestly the meaning was "to alienate otherwise than in the case of necessity." We are of opinion that a reasonable interpretation of the description of the estate created in favour of the niece is an estate such as a woman ordinarily acquires by inheritance under the Hindu law which she holds in a completely representative character but is unable to alienate except in case of legal necessity.

In the case of *Lala Ramjewan Lal* v. *Dal Koer* (15), where the terms of the will resembled the terms of the will with which we are dealing in the present case with this exception that the word malik was used to describe the estate conferred upon the woman in that case, the Judges had to consider the effect of an emphatic condition against alienation. The Judges held that an absolute estate had been conferred and that on that ground the condition against alienation was void. It is instructive however to notice that the Judges say that if a life-estate had been given there was no reason why there should be any provision restricting the beneficiary from selling or alienating. Thus in the present case the words "without power to alienate" in respect of the niece's estate were of the nature of surplusage; that is to say, the, testator had in his mind the ordinary recognized restriction upon alienation which would apply independently of any provision in the will and that he had not in his mind the eventuality of an alienation becoming necessary either for the purposes of providing manintenance for the niece or for the preservation of his estate.

At a later stage in the will there is a general expression to the effect that "none shall have the least right of alienation," but in the first place it is not certain that the testator meant by the word "none" in this sentence to refer to any person other than the son and daughter of the niece who had been mentioned in the immediately preceding sentence. Sd far as they are concerned the gift in their favour being obviously an absolute gift the condition was void. We are also not disposed to attach too much importance to the use of tha word "least" in this sentence. We are of opinion that the will must be read as a whole and if so read it is quite clear that the testator intended that his estate should be entirely represented in the first instance by his widow next by his niece and after the death of his niece by the niece's son and daughter. It is inconceivable that he should really have intended to have prevented any of these persons from alienating portions of the estate in the event of an occasion arising such as is described by the term "legal necessity." The principle of repugnancy has been applied in a large series of precedents which deal with the more simple cases in which an absolute estate had beeen created: but where a completely represntative estate has been created the principle, in our opinion should be applied. In the case of *Jatindra Mohan Tagore* v. *Genendra Mohan Tagore* (16) the Privy Council said that where a gift is in terms of an inheritable estate with superadded words restricting the power of transfer the restriction would be rejected as being an attempt to take away that which the law attaches to the estate which the giver has sufficiently shown his intention to create though he adds a qualification which the law does not recognize. Adopting the expressive words of the Court of Exchequer Chamber in a judgment which is the foundation of the rule of repugnancy *Perrin* v. *Blake* (17) the indelible landmarks of property irrevocably established by the well weighted policy of the law cannot be exceeded or transgressed by any intention of the testator be it ever so clear and manifest. Where a testator is found to have intended to create a woman's estate, an estate, that is to say, which is entirely representative though restricted an absolute prohibition of alienation even for the purposes of the preservation of the estate should be regarded as coming within the principle above laid down and rejected as being an attempt to take away that which the law

(14) [1910] 33 Mad. 91=3 I. C 475.
(15) [1897] 24 Cal. 406.
(16) [1872] 9 B. L. R. 377 =2 I. A. 47 (P. C.).
(17) [1770] 1 W. Bl. 672.

attaches to the estate which the giver has sufficiently shown his intention to create. It is however the fact that to so construe the will would not be to defeat the real intention of the testator which clearly was to provide simultaneously for the maintenance of his niece and for the perpetuation of his name. It is precisely with this in view that the power to alienate in the case of necessity has been grafted by judicial decision upon women's estates treated in the texts as inalienable except for religious purposes. The power has been grafted with a view either to secure the maintenance and other objects desired cr to preserve the estate and the name of the last male holder. In the case of *Bradon* v. *Robinsone* (18) Lord Eldon said:

"It is clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate".

There is, therefore, nothing in the bare fact that the estate is to last only for life to bar the application of the rule of repugnancy. We hold that the estate created in favour of the niece was a woman's estate with power to alienate in the case of legal necessity. We do not doubt that a Hindu can by will create an estate for life in the English sense, but his intention to do so must be made clear by the terms of the will itself without any importation of English ideas. We proceed to consider whether this particular alienation was justified upon the ground of legal necessity. The difficulty in the way of finding in favour of legal necessity is that Ganpat Bhagat, the vendee of the conveyance of 1885, through alive at the time of the suit, was not examined as a witness to testify as to whether he made inquiry or not. On the other hand, there is nothing to indicate that Ganpat would have proved anything more than that he made inquiry. The plaintiff Jagernath in his application for insolvency, made in September 1884, stated that the money lending business was insolvent and that the two debts which were discharged by the conveyances made by Sahodra Bibi in the following year were debts due by the money lending business. We have regard also to the fact that Jagernath's father signed this conveyance of 1885 for Sahodra Bibi as well as three other conveyances in August in the previous year and another conveyance on the same date as the conveyance which is the subject of the suit; and in all these conveyances the urgent necessity for alienation is recited. Jagernath himself is a witness to the three conveyances made in August 1884, in each of which the urgent necessity is recited. We would not be disposed to give undue weight to the fact that the business appears to have declined from the prosperous condition in which Fateh Chand left it in 1848, for the evidence is, and this evidence is not denied, that the plaintiff's father, and after him the plaintiff himself managed the business, and if any blame is attached to the management for the insolvency the blame was theirs. The alienation was made at a time when Jagernath's application in insolvency was about to fail. Twenty-five years had passed since the conveyance of 1885 when the suit was instituted. It is permissible, therefore, to apply the principles laid down in the case of *Nauda Lal* v. *Jagat Kishore Acharjya* (19) on the subject of the weight which may, in such a case as the present, be given to recitals made at or about the time of the conveyance. Their Lordships say (p. 229 of the report):

"If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper inquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honeest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time".

(18) [1811] 18 Ves. Jun. 429.

(19) A. I. R. 1916 P. C 110=44 Cal. 186=43 I. A. 249=36 I. C. 420 (P. C.)

We find that the alienation was justified by necessity. A point was taken, which we have not hitherto mentioned, that the plaintiffs failed to prove that Jagernath was the heir to the estate. He is the son of Fateh Chand's niece and would therefore, be a bandhu and would not probably inherit until after many other relations. His evidence however is to the effect that except himself there is no other heir to Fateh Chand. This is supported by the recitals in Fateh Chand's will that he had at that time no other heir. There is no evidence to the contrary and no suggestion that there is any heir other than Jagernath. In these circumstances we are of opinion that the plaintiffs made out sufficiently that Jagernath was the heir of the estate and that the suit cannot be defeated upon the ground of any failure of prcof in that connection. We would accordingly allow the appeal and dismiss the suit with costs in both Courts.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 477

ROE AND JWALA PRASAD, JJ.

Ram Sumran Prosad and *another*—Plaintiffs—Appellants.

v.

Mt. Shyam Kumari and *others*—Defendants—Respondents.

First Appeal No. 78 of 1915, Decided on 9th August 1918, from a decision of Sub-Judge, Darbhanga.

Hindu Law — Widow — Compromise of bona fide claim to avoid litigation expenses —Compromise, if for benefit of estate, is binding on reversioners—Burden of proving that compromise is collusive is on reversioners.

A Hindu widow is entitled to avoid the expenses of litigation by compromising a bona fide claim subject to the qualification that the compromise is made for the benefit of the estate and not for the personal advantage of the widow. [P 480 C 1]

Where however the reversioners seek to set aside such a compromise, the burden is on them to show that the compromise was entered into by the widow collusively for the purpose of conferring upon herself a benefit at the expense of the estate. [P 480 C 2]

S. M. Mullick, Harihar Prasad Sinha, P. N. Sinha and *Naresh Chandra Sinha*—for Appellants.

Pugh, Sultan Ahmed, Chandra Sekhar Banerji, Saroshi Chandra Mitter, B. N. Mitter, Tahir and *Murari Prasad*—for Respondents.

Roe, J.—The plaintiffs in this case are aggrieved by a decree of the Subordinate Judge of Darbhanga, dismissing their suit for a declaration that certain agreements entered into by a Hindu widow with regard to the estate to which they are reversioners, be set aside as fraudulent and collusive. The facts of the case and pleadings thereon have been clearly set forth in the judgment of the learned Subordinate Judge. On 18th July 1895 the former holder of the estate, Brij Mohan Lal, brought a suit against the defendants Brij Bihari Lal and Gobind Lal to recover Rs. 44,893 with interest upon two mortgage bonds, dated 23rd June and 30th December 1894. During the pendency of the suit Brij Mohan Lal died and his widow, the present defendant 1 Mt. Shyam Kumari, was substituted as plaintiff. The suit was not defended by Brij Bihari Lal and Gobind Lal, but a claim was made by the Maharajah Bahadur of Darbhanga upon a prior mortgage. The learned Subordinate Judge in decreeing the suit against the mortgagors made an order that the prior mortgage of the Maharajah should be redeemed by deposit of nearly Rs. 25,000 before the mortgaged property could be brought to sale on the mortgage of Brij Mohan Lal. The matter was taken to the Judicial Committee and in 1904 the decree made by the learned Subordinate Judge was upheld. The widow Mt. Shyam Kumari made the necessary deposit and proceeded to take steps to bring the mortgaged property to sale. Finally on 20th June 1912, all the mortgaged properties, ten in number, were put to auction and purchased by the decree-holder Mt. Shyam Kumari herself for Rs. 65,075. At this stage the sum due under the mortgage amounted to Rs. 1,41,959-2-6. the mortgagors Brij Bihari Lal and Gobind Lal were connexions of the late Brij Mohan Lal. They approached the widow for a lenient treatment of their case. They had put in an application for the setting aside of the sale on the ground of fraud and irregularity and had also put up a minor member of their family to bring a suit contesting the mortgage decree. The widow apparently was tired of the litigation which had been going on for eighteen years, but her main idea in compromising the matter was to spare as far as possible Brij Bihari Lal, her husband's relative. She says in her

evidence, that her main reason for compromising the suit was to avoid further expenses in litigation; but this statement seems to have been put into her mouth by her own pleader. The arrangements for the settlement of the dispute were as follows:

The widow was to allow the sale to be set aside, and private purchasers, one of whom was the widow's own brother, were to purchase eight of the mortgaged properties for some Rs. 69,000. Of this Rs. 66,000 was to be paid to the widow in cash and the balance of Rs. 3,000 was to remain with Brij Bihari Lal. On receipt of the Rs. 66,000 in cash the widow was to certify full satisfaction of the decree. The two properties not sold to private parties, were to remain in possession of Brij Bihari subject to a mortgage lien to the widow to the extent of Rs. 5,000. When these negotiations came to the ears of the present plaintiffs, the reversioners to the estate, they put in a petition praying that the widow be restrained from settling the matter on these terms and asking permission to contest the judgment-debtors' application to set aside the sale. This petition was refused. The arrangements made with the widow were carried into effect. The sale was set aside and full satisfaction certified. On the following day, the reversioners put in the present suit asking for a declaration that all the defendants, that is to say, the widow, the judgment-debtors and the purchasers of the property, have in collusion and concert with one another, with a view to make wrongful gain and to deprive the plaintiffs of their reversionary rights quite improperly and without any right and lawful necessity, caused the sale of the properties mentioned to be set aside by means of collusive and fraudulent proceedings and that the plaintiffs are not bound thereby. To this plaint there was a note or postcript added, that in case the defendant first party, that is, the widow intentionally fails to take out execution of the decree on the mortgage, the plaintiffs will bring a suit for the appointment of a Receiver and get the said decree executed through the Receiver. The learned Subordinate Judge devoted his attention to two main issues in the case. Firstly, whether the parties were governed by the Mitakshara or Mithila law and secondly, whether the compromise made by the widow was fraudulent and collusive. He decided the first of these issues in favour of the plaintiffs, and it is admitted at the Bar on behalf of the respondents that he could not on the evidence have arrived at any other decision. Upon the question of fraud and collusion, he was of opinion that the plaintiffs had not made out their case. He summarises his conclusions on the evidence as follows:

"I therefore find that in compromising the case her intention was far from injuring the plaintiffs' reversionary rights in any way, but she was moved by pity towards the condition of Lala Babu and while she was so moved, she did not forget the interest of the estate which was duly protected."

If we could agree with the learned Subordinate Judge that this was the logical conclusion to be drawn from the evidence, the case would of course be at an end. For my own part I entirely fail to see what benefit the reversioners got out of this arrangement. The difficulty that confronts us is that there is on the record no tangible evidence upon which we can satisfy ourselves as to the actual value of the property that had been sold in execution of the decree. There is a great deal of evidence to show that in the circumstances of the case no one was prepared to give more for it than was obtained. But this unwillingness to buy the property at a higher figure was due less to considerations of the value of the property than to considerations of the somewhat complicated legal position that would arise from the setting aside of the sale and the disposal of the properties by private treaty. It would have been easy for either side to have produced the papers of the recently completed Record of Rights as the basis for an accurate computation of the value of the property. But neither side took this step We must assume that if it had been possible for the plaintiffs to have proved that the sale by private treaty was at prices grossly inadquate, they would have produced these papers. On the other hand it may be equally said that if the prices paid actually represented the value of the thing sold, the defendants would have put these papers upon the record. The whole question therefore seems to me to be one of the burden of proof.

That it was accepted in the Court below that the burden of proof lay upon the plaintiff is clear from the frame of

the issues 6 and 8. Are the applications or setting aside the sale and also the applications dated 19th August 1912, filed in Execution Case No. 179 of 1910, certifying satisfaction of the decree under execution and agreeing to the sale being set aside fraudulent, collusive and illegal? If not whether the order setting aside the sale will stand good? Whether the sale of the properties by defendants second party to defendants third party was fraudulent and invalid? Have the purchasers acquired a valid title to them against the reversioners?

In dealing with the decisions of the Judicial Commitee upon the right of a Hindu widow to compromise litigation which is in her charge as representing the estate, the Courts in Calcutta have taken two broad lines, the one based on the decision in *Imrit Konwar* v. *Roop Narain Singh* (1), the other on *Katama Natchier* v, *Rajah of Shivagunga* (2), And the broad line of decisions has been that a widow has no right to bar the succession of the reversioners to the estate as a whole but is entitled to release a part of the estate by compromise of a bona fide claim, provided that the compromise is not shown to be unfair or made solely for her own benefit to the prejudice of the interests of the reversioners. The whole case law was reviewed in the arguments in *Khunni Lal* v. *Gobind Krishna Narain* (3). The standpoint from which compromises such as the compromise before us, have been attacked, has invariably been that the release of a part of the estate by the widow is in fact an alienation, and the conclusion of their Lordships was upon a review of the case law:

"That the true test to apply to a transaction which is challenged by reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life-tenant. In the present case," they say at p. 367, of 33 *All.* "Khairati Lal acquired no right from the daughters of Daulat, for 'the compromise,' to use their Lordships' language in *Rani Mewa kuwar* v. *Rani Hulas Kuwar* (4), 'is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is.'"

The parties in the case before us whose purchase is challenged, derived their title not from the widow but from the owners Brij Bihari Lal and Gobind Lal. Their rights to hold it free of all encumbrances was not derived from the widow, but from the right of the mortgagor judgment-debtor to set the property free from the mortgage by a deposit of the whole decretal amount at any time prior to the confirmation of the sale. This right was established in the Calcutta High Court by the decision in *Bibijan Bibi* v. *Sachi Bewah* (5). A right to redeem is not extinguished until the sale has been actually completed and the proceeds of the sale dealt with. The learned Chief Justice at paragraph 868 quotes the views of the Courts of Madras, Bombay and Allahabad as consistent with his own.

The question before us therefore is whether the widow was competent to compound with the mortgagor judgment debtor upon his right to redeem by accepting in full satisfaction of her claim less than half of the amount actully due upon it. It is immaterial in my view whether we regard the subsisting mortgage decree as moveable or immovable property. If by the composition made, she was wasting it to the detriment of the reversioners her action would not be binding upon them. But I hold that the burden of proof is on the reversioners to show that this composition entailed waste of the property. A widow's power to compromise has frequently been compared with the powers of a guardian to compromise and the power of the Karta of a Mitakshara family to effect a settlement. In *Baboo Lekraj Roy* v. *Baboo Mahtab Chand* (6) it was said that the interest of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud, and *General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramapot Singh* at p. 615 of 14 *M. I. A.* of the same Volume dealing with an order treating the widow as the sole representative of an estate it was said:

"From the above statement it is clear, that unless there be some fatal irregularity in the

(1) [1880] 6 C. L. R. 76 (P. C.).
(2) [1861-63] 9 M. I. A. 539=2 W. R. 31, (P. C.)
(3) [1911] 33 All. 356=10 I. C. 477.=38 I. A. 87 (P. C.).
(4) [1873-74] 1 I. A. 157=3 Sar. 314 (P. C.)
(5) [904] 31 Cal. 863.
(6) [1870-72] 14 M. I. A.993=17 W. R. 117.

mode in which the decree of the appellant was obtained or drawn up, or some fatal irregularity in the mode in which that decree has been prosecuted, the estates have been regularly sold, and that the suit of the respondent, seeking to set aside the order for sale must fail."

These cases however do not deal directly with the power of the widow to settle disputes. The basis of all decisions upon the effect of a contested decree against a widow is to be found in *Katama Natchier* v. *Rajah of Shivagunga* (2):

"The same principle which has prevailed in the Courts of this Country as to tenants-in-tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

In *Tarinee Churn Gangooly* v. *Watson & Co.* (7) Markby, J., said at p. 417, Col. 2:

"It seems to us much more reasonable to hold that, as representative of the entire estate in the litigation, she has the same control with respect to compromise as she has with respect to the assertion of rights and with respect to appeal against an adverse decision. It is of course possible that the trust thus reposed in the widow may be abused without detection, as may the very large discretion which, as the law now stands, she undoubtedly possesses in other matters. But, on the whole, we think it will be found most favourable for the heirs that she should have the power of compromise at every stage of the proceedings."

And in *Karimuddin* v. *Gobind Krishna Narain* (8) it was said that the preservation of the estate and the costs of litigation for that purpose, are objects which justify a widow incurring debt and alienating a sufficient amount of property to discharge it. It seems to me clear that if a widow is entitled to encumber the estate for the purpose of carrying on a litigation, she is equally entitled to avoid the expenses of litigation by compromising a bona fide claim. Mookerjee, J., in *Mohendra Nath* v. *Shamsunnessa* (9), referring apparently with approval to the decision of Markby, J., above quoted, lays down the rule that the principle in *Katama Natchier's case* (2) is not limited to decrees in suits contested to the end and is subject to the qualification that the compromise was made for the benefit of the estate, and not for the personal advantage of the limited owner. Upon consideration of this point he held that:

"the decree which has not been successfully impeached on the ground of fraud, coercion, collusion or any like reason, operates as res judicata between the parties to the present suit."

I hold that in the case before us that burden of proof was on the plaintiffs to show that the compromise entered into by the widow Mt. Shyam Kumari was entered into collusively for the purpose of conferring upon herself a benefit at the expense of the estate. All that has been shown, is that instead of stripping the judgment-debtors, near connexions of the family, of every item of property which they possessed, they were allowed to retain a sum of Rs. 3,000. The litigation had already lasted 18 years; there were cases pending which might prolong it for many years further. It is our common experience that though there may be nothing valid in the objections taken to an auction sale, the judgment-debtors will almost invariably carry on their objections to the sale from Court to Court merely for the purpose of holding on to the property for a few more years. The widow would no doubt have succeeded in the end, but she would have spent perhaps Rs. 3,000, perhaps Rs. 10,000 in the ensuing litigation. The compromise of the claim whereby she avoided this expense, seems to me to have been a fair and reasonable settlement. The whole facts of the case were clearly before the Court. The Court was aware from the petition of the present plaintiffs that there were reversioners to be considered. There was no fraud upon the Court. There is nothing to indicate that the widow proposes to waste the money that has gone into her hands or to give it away. If it remains in the estate, or if it remains in her hands, it will come to the reversioners in due course, and in the absence of proof that the sum obtained by the compromise was grossly inadequate, it cannot be said that it has been proved that there was a fraud on the reversioners. The relief which the reversioners might and should have applied for, was a declaration that the widow be required to pay into Court the sum received upon the compromise in order that it might be invested for their own benefit. This relief they have not asked for. Instead they seek to make the property, which purchasers have taken in good faith, free of all encumbrances on payment of Rs. 69,000

(7) [1869] 12 W. R. 413.
(8) [1909] 31 All. 497 = 3 I. C. 795=36 I. A. 138 (P. C.)
(9) [1915] 27 I. C. 954.

(as far as we know its full value) subject to the residue of the mortgage debt, another Rs. 75,000. In asking that this compromise be set aside, the reversioners are seeking to impose upon the purchasers of this property a loss of Rs. 75,000 to which they should not be held legally liable and a gain to themselves of Rs. 75,000 to which they are certainly not in equity entitled. The compromise made by the widow was at least a far fairer arrangement than that by which the reversioners seek to set it aside. In my view the learned Subordinate Judge was right in refusing to the reversioners the declaration which they sought. I would dismiss these appeals with costs.

Jwala Prasad, J.—I agree to the order proposed by my learned brother.

V.S./R.K. *Appeals dismissed.*

A. I. R. 1918 Patna 481

IMAM, J.

Chadhari Ahir and *another* — Petitioners.

v.

Raja Ram Singh—Opposite Party.

Criminal Revn. No. 34 of 1918, Decided on 8th February 1918, from order of First Class Magistrate, Arrah, D/- 18th December 1917.

(a) Criminal P. C. (1898), Ss. 144 and 145 —Proceedings under S 144—Court intimating to parties intention to draw proceedings under S. 145 and subsequently drawing up proceedings in presence of parties—Parties adducing evidence — Proceedings are not vitiated by want of formal notice.

During the course of proceedings under S. 144, Criminal P. C., the Magistrate intimated to the parties his intention to draw up proceedings under S. 145 of the Code. On the following day he drew up proceedings under the latter section in the presence of the parties, who thereafter filed their written statements and adduced evidence in support of their respective cases:

Held: that the Magistrate was not guilty of any irregularity in proceeding with the case as he did and that the proceedings were not vitiated by want of formal notice to the parties.

[P 482 C 1]

(b) Criminal P. C. (1898), S. 148 (3)— Order for costs passed after delay is not illegal.

An order for costs under S. 148 (3), made 10 days after an order under S. 145 (6) of the Code, is not illegal by reason of the delay in passing it.

[P 482 C 2]

Akbari and *S. N. Palit* — for Petitioners.

Parmeshwar Dayal and *Shiveswar Dayal*—for Opposite Party.

1918 P/61 & 62

Judgment.—The petitioners, who are the second party in this case, assail the jurisdiction exercised by the Magistrate who dealt with this case on three grounds. The first ground is that the proceedings were void because the provisions of sub-Cl. 3, S. 145, Criminal P. C., were not complied with. The second ground is that it was not open to the trying Magistrate to rely upon the delivery of possession given to the first party two years before he passed his order. The third ground refers only to costs, the objection taken with reference to this being that the order as to costs was not passed at the time that the decisions regarding possession was given in this case, but that on a subsequent date the order for costs having been passed was an illegal one. In regard to the first point it appears that the proceedings were originally initiated in this case under S. 144 of the Code and that after the matter under this section had proceeded for a time, the learned Magistrate on 19th September 1917 intimated to the parties his intention to draw up proceedings under S. 145 of the Code. On 20th, that is the day following, the Magistrate drew up proceedings in the presence of the parties.

It is contended by the learned counsel appearing on behalf of the petitioners that this was not sufficient; that the Magistrate should have served the proceedings upon his clients in the manner provided for in Ch. 6, Criminal P. C. Ss. 68 and 69 of that Code are germane to this point raised by the learned counsel. There is nothing in these two sections to show that the action taken by the learned Magistrate in drawing up proceedings under S. 145 in the presence of the parties was ultra vires of the provisions contained in them. I am therefore of opinion that no legal ground exists for the contention that the service of the proceedings on the parties was not effected in a legal manner. Moreover, the parties had due and sufficient cognizance of the contents of the proceedings, not only because they were present before the Magistrate, but also because on the next day when the case was taken up they were present and because on the date subsequent to that they actually filed their written statements in the case. In fact they were present right through and had hotly contested the case before

the Magistrate. On the authority therefore of *Sukh Lal Sheikh* v. *Tara Chand Ta* (1), as well as other rulings that have been referred to before me, the irregularity, even if it was so, would be regarded not as an illegality committed by the Magistrate; but I hold in this case that in fact the Magistrate was not guilty of any irregularity in proceeding with the case as he did. The next question regarding the value of the delivery of possession requires an examination of some dates. It appears that one Sureba Kuer was the registered tenant of the holding which is the subject of this case. Her landlord proceeded against her and obtained a rent-decree. The first party are the auction purchasers in the execution of the decree that was passed on 21st February 1908. The delivery of possession took place in 1915.

It appears that after the passing of the decree Mt. Sureba Kuer, the registered tenant, apprehended the sale of the holding and the consequent dispossession. In 1912 the Record-of-Rights was published and it appears that the name of her grandson was entered as a tenant. Mr. Akbari appearing on behalf of the second party contends that the presumption arising out of the Record-of-Rights should have been sufficient for the Magistrate to hold that the possession of the grandson continued. I find from the order of the learned Magistrate that the question had engaged his attention. He rightly holds in his judgment that with a view to avoid the rent-decree Sureba Kuer got the name of her grandson entered in the survey papers. The presumption on which the learned counsel relies is a presumption which must be considerably negatived by the delivery of possession, which took place subsequent to the publication of the Record-of-Rights; but it is contended that this delivery of possession was only a symbolical delivery of possession. Regard being had to the fact that the sale was in execution of a rent-decree, regard being had to the fact that nothing has been shown before me as to how I am to hold that that delivery of possession was a mere symbolical possession and not actual and regard being had to the fact that there is a distinct finding by the Magistrate that it was through the civil Court that the first party got possession of the land in dispute, I am unable to hold that the presumption arising from the Record of Rights has not been completely disestablished. The Magistrate has come to a distinct finding that the delivery of possession was not a paper transaction as has been contended by the second party. I am therefore unable to accept the proposition that it has been proved that this delivery of possession was a symbolical one.

On the question of costs the point seems to be concluded by authority. In the present instance the order for costs was passed only 10 days after the order recording possession was given. This delay is not by any means a delay which is not permitted by the provisions of the Criminal Procedure Code. This view has received acceptance in various cases. Among them are *Doulat Koer* v. *Siva Pershad* (2) and *Vythinada Tambiran* v. *Mayandi Chetty* (3). In the circumstances of the case nothing has been placed before me to show that the exercise of jurisdiction by the Magistrate in this case was not a proper one. The petition is rejected.

V. S./R.K. *Petition rejected.*

(1) [1906] 33 Cal. 68=2 Cr. L. J. 618 (F. B.).

(2) [1911] 12 Cr. L. J. 319=10 I. C. 615.

(3) [1906] 29 Mad. 373.

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* A. I. R. 1918 Patna 482

ROE, J.

Noowooagar Ojain —Plaintiff—Appellant.

v.

Shidhar Jha — Defendant — Respondent.

First Appeal; Decided on 28th January 1918.

(a) Specific Relief Act (1877), S. 39—Suit for cancellation of document—Plaintiff cannot reduce court-fee by assertion that suit falls under Ch. 6—Court-fees Act (1870), S. 7 (4) (c).

A plaintiff suinc for the cancellation of a document under S. 39 is not entitled to reduce the Court-fee payable on his plaint by an assertion that the suit falls under Ch. 6 of the Act.

[P 483 C 1]

*** (b) Specific Relief Act (1877), S. 39—Adjudication that deed is void—Instrument if registered, copy of decree is to be sent to Registrar—Forwarding of copy of decree is consequential relief—Ad-valorem court-fee is necessary — Court-fees Act (1870), S. 7 (4) (c).**

On an adjudication under S. 39 that a deed is void the Court is required by law, if the instrument has been registered, to send a copy of its decree to the officer in whose office the instrument has been registered, and this forwarding of the copy of the decree to the Regis-

trar is a consequential relief upon which an ad valorem Court-fee must be paid. [P 483 C 2]

Lachmi Narain Sinha and *L. K. Jha* —for Appellant.

Facts.—The plaintiff brought a suit to avoid a registered deed of gift executed by her in 1917 in respect of 23 bighas of land. The plaintiff stated in her plaint that the defendant had got her to execute the deed by falsely giving her to understand that it was a bond for Rs. 50, the money being required for a pilgrimage to Benares which was suggested by the defendant and which he afterwards got her to abandon by representing that cholera was rife at Benares. The plaintiff valued her relief at Rs. 6,000, but paid a court-fee of Rs. 10 only. The suit having been dismissed on other grounds, the plaintiff appealed to the High Court and again paid a court-fee of Rs. 10 only on the memorandum of appeal. The Stamp reporter, relying on the decisions in *Parathayi* v. *Sankumani* (1), *Samiya Mavali* v. *Minammal* (2), *Arunachalam Chetty* v. *Rangasamy Pillai* (3), *Parvatibai* v. *Vishvanath* (4) and *Nanak Chand* v. *Jiwan Mal* (5), submitted that an ad valorem court-fee on the value of the relief sought in the plaint and in the memorandum of appeal should have been paid under S 7, Cl. (4), sub S. (c), Court-fees Act. The report of the Stamp reporter was contested before the Taxing Officer and reliance was placed on *Karam Khan* v. *Daryai Singh* (6) and S. 39, Specific Relief Act. The Taxing Officer, agreeing with the decisions of the Madras and Bombay High Courts, was of opinion that the case came under S. 7, Cl. (4) (c), Court-fees Act. The matter was referred to the Taxing Judge.

Judgment.—This is clearly a suit under Ch. 5, Specific Relief Act. I am of opinion that the plaintiff is not entitled to reduce the court-fees payable thereon by an assertion that it falls under Ch. 6. In coming to this conclusion I have considered the cases of *Tacoordin Tewarry* v. *Nawab Syed Ali Hossein Khan* (7), *Karam Khan* v. *Daryai Singh* (6), *Parathayi* v. *Sankumani* (1), *Samiya Mavali* v. *Minammal* (2), *Shrimant Sagajirao* v. *Smith* (8) and *Parvatibai* v. *Vishvanath* (4). The latter decision, if I may say so, is clearly a correct decision. On the adjudication that a deed is void the Court is required by law, if the instrument has been registered, to send a copy of its decree to the officer in whose office the instrument has been so registered, and as held in the cases of *Parathayi* v. *Sankumani* (1) and *Parvatibai* v. *Vishvanath* (4), this forwarding of the copy of the decree to the Registrar is a consequential relief upon which an ad valorem Court fee must be paid. The plaintiff cannot avoid payment of this court-fee by omitting to ask for this necessary consequence of the decree sought.

V.S./R.K. *Appeal dismissed.*

(1) [1892] 15 Mad. 294.
(2) [1900] 23 Mad. 490.
(3) [1915] 38 Mad. 922=28 I. C. 79.
(4) [1905] 29 Bom. 207.
(5) A. I. R. 1914 Lah. 268=35 P. R. 1914=25 I. C. 435
(6) [1883] 5 All 331.
(7) [1874] 21 W. R. 340=13 Ben. L. R. 427=1 I. A. 192 (P. C).
(8) [1896] 20 Bom. 736.

A. I. R. 1918 Patna 483

ROE AND JWALA PRASAD, JJ.

Panchratan Koeri and *another* — Applicants.

v.

Ram Sahay Singh and *another* — Opposite Parties.

Civil Revn. No. 193 of 1917, Decided on 23rd January 1918, from order of Munsif, Beguserai.

Civil P. C. (1908), S. 47, and O. 21, R. 100 —Purchaser of non-transferable holding is representative of judgment-debtor—He is not entitled to object to sale under O. 21 R. 100.

A purchaser of the whole or part of a non-transferable occupancy holding is a representative of the judgment-debtor and is entitled to object to the sale under S. 47. He is not therefore entitled to maintain proceedings under O. 21, R 100. [P 484 C 1]

Sushil Madho Mullick and *Shivanandan Rai*—for Applicants

L. N. Sinha for *Fakhruddin* — for Opposite Parties.

Judgment.—The applicants in this case are sixteen-anna proprietors of mauza Sakra and as sixteen-anna proprietors obtained a decree for rent against the recorded tenant, the opposite party No 2. The opposite party No. 1 claimed possession of the land under O. 21, R. 100, by virtue of a purchase from the recorded tenant. The learned Munsif has found that he is in possession by virtue of his purchase. He has therefore made an order directing that the sale held in execution of the decree does not pass the holding and that the opposite party No. 1 be

put in possession of the disputed property. We have been through the evidence in this case. There is nothing to suggest that the occupancy holding was transferable by custom and nothing to show that the landlord gave his consent to a transfer. In these circumstances the case is covered by the reference to the Full Bench in the case of Dumori Dasi. The purchaser of the whole or part of an occupancy holding not transferable by custom is a representative of the judgment-debtor and entitled to object to the sale under S. 47. It follows that he is not entitled to maintain proceedings under O. 21, R. 100. The decision of the Court below must therefore be set aside and the order restoring possession of the disputed property to the opposite party discharged. The opposite party No. 1 will pay the costs of the case; hearing fee two gold mohurs.

V.S./R.K. *Decision set aside.*

A. I. R. 1918 Patna 484

JWALA PRASAD, J.

Janakidar and *others*—Petitioners.

v.

Raghunath Lal—Opposite Party.

Criminal Revn. No. 194 of 1918, Decided on 21st May 1918, from an order of Magistrate Dinapore.

(a) Criminal P. C (1898), S. 263 (h)—Summary trial—Finding should contain sufficient material to support conviction.

The finding and the reasons required to be recorded under S. 263 (h) should be so stated that the High Court in revision may judge whether there was sufficient material before the Magistrate to support the conviction. [P 485 C 1]

(b) Penal Code (1860), S. 323—Complainant's story disbelieved—Conviction on evidence of constable on different story—Conviction is bad.

Complainant charged the accused under S. 323 with specific acts of assault. The Magistrate disbelieved the complainant's story but nevertheless convicted the accused under S. 323 upon the evidence of a constable, who deposed that when he arrived at the scene he saw the complainant and the accused fighting in the street:

Held: that the conviction was bad. [P 485 C 1]

Manuk and *Krishna Sahai* — for Petitioners.

Assistant Government Advocate — for Opposite Party.

Judgment.—The petitioners in this case have been convicted on a summary trial under S. 323, I. P. C., for causing hurt to the complainant Raghunath Lal on 5th March 1918. The petitioners were summoned under S. 323, I. P. C., for a charge of assault laid against them by the complainant Raghunath Lal in his following statement on oath made at the time when he lodged the complaint:

> "I complain against Janaki Das, Chandi Prasad and Jhauri to-day 8—30. I went to Janaki Das' gola, having been called. He asked for Rs. 18-13-0 due. I said I had paid it; then he said he had not got it We abused and Janaki and Chandi hit me with shoes. Jhauri slapped and fisted me. I had bought cloth from them."

But the Magistrate does not appear to have convicted the accused upon the above case of the complainant. He has clearly disbelieved the complainant as to his allegation that he had paid the sum of Rs. 18-13-0 to the accused, and does not appear to have accepted the account of the assault given by the complainant and his witnesses. The Magistrate has apparently convicted the accused upon the statement of constable Pardip Singh: which the Magistrate has recorded thus,

> "Constable Pardip Singh states that on order of Sub-Inspector he went from thana close by to see what the halla was. He saw all four fighting in the street and reported accordingly. The fighting stopped when the witness and two other constables arrived."

According to the complainant he was assaulted suddenly at the accused's gola on his (complainant's) refusal to pay the money due from him, while the constable came there at a later stage after having been deputed by the Sub-Inspector and saw the three accused and the complainant "all four fighting in the street." The constable does not prove any assault by the accused upon the complainant, nor does he say that the complainant was injured in that affray, but only proves a row or an affray in the street which would be an offence under Ss. 160 and 323. All that the Magistrate finds is that "complainant was assaulted with some violence and there was disgraceful row in the street". This is not a finding for conviction under S. 323, under which it must be found that each of the accused voluntarily caused hurt to the camplainant. The Magistrate convicted the accused under S. 323, because as stated by him in the explanation submitted to this Court he thought that "hurt was caused jointly by the accused to the complainant." The Magistrate is probably thinking of S. 34, I. P. C. But there is no finding that the particular hurt on the complainant was caused in furtherance of the common intention of all, which is necessary under S. 34, I. P. C.

The result is that the accused have been convicted, not upon the case of the complainant who attributed specific acts of assault to each of the accused in the accused's gola, but upon the evidence of the constable of a subsequent fight in the street. This appears to me to be wrong. The record of the evidence of the constable made by the Magistrate does not at all disclose any offence against the accused under S. 323 standing by itself, or read with S. 34 I. P. C. Upon the statement of the constable the accused could at best be charged with an affray in the public street under S. 160, I. P. C., but they have not been convicted under that section. It has been pointed out repeatedly in a series of cases that the finding and the reasons required to be recorded under S. 263 (h), Criminal P. C., should be so stated as that the High Court in revision may judge whether there was sufficient material before the Magistrate to support the conviction. It is needless to quote all the authorities. A reference to *Kash Mahomed* v. *Empress* (1) will suffice. In this case on the record as shown above there is neither any material nor any finding for the conviction of the accused under S 323. The conviction is therefore set aside. As in this case the complainant has been disbelieved as regards the story about payment of the dues to the accused and as it is not shown on the record as to who provoked the affray, I am not prepared to direct a trial of the accused for an affray in the public street under S. 160, I. P. C.

The fines, if already paid, should be refunded to the petitioners.

V.S./R.K. *Conviction set aside.*

(1) [1906] 10 C. W. N. 79=3 Cr. L. J. 178.

A. I. R. 1918 Patna 485

ROE AND JWALA PRASAD, JJ.

Bisheswar Ahir and *others*—Defendants—Applicants.

v.

Brijra Misser and *others*—Plaintiffs—Opposite Parties.

Civil Revn. No. 192 of 1917, Decided on 31st January 1918, from order of Dist. Judge, Shahabad, D/- 24-3 1917.

(a) Civil P. C. (1908), O. 23, R. 1—High Court can interfere with order allowing withdrawal.

The High Court has power to interfere in revision with an order of a lower Court allowing the plaintiff to withdraw his suit with permission to bring a fresh suit. [P 486 C 1]

(b) Civil P. C. (1908), O. 23, R. 1—Plea of formal defect set up—Order under O. 23, R. 1 can be passed.

Where the defendant sets up a plea that there is a formal defect in the plaint, the Court has jurisdiction to pass an order under O. 23, R. 1. [P 486 C 1]

Jagarnath Prasad—for Applicants.

Parmeshwar Dayal—for Opposite Parties.

Judgment.—The facts of this case are that the opposite party before us were plaintiffs in an action framed so as to include relief sought against mortgagees from whom redemption was claimed by the plaintiffs and also against tenants who it was alleged, had been inducted on to the lands by the mortgagees. The Court of first instance found that the tenant defendants were in fact ancient cultivators who did not derive their tenancies from the mortgagees. He dismissed the suit against the tenant defendants and made a decree as against the mortgagees giving a right to redeem on certain terms; he also awarded costs against the mortgagees. From this decree the opposite party appealed to the District Court. The mortgagee defendants put in a cross-objection to the costs allowed in the Court below. The tenant defendants put in a cross-appeal on the ground that the whole action should have been dismissed for misjoinder of causes. Upon this the opposite party filed an application to withdraw his suit on the ground that there were "some formal defects." We must admit that we gather generally from the petition for leave to withdraw from the suit that it was made rather on the ground that there had been an omission to put upon the record in the Court of first instance certain important documents which were in his possession than on the ground that the suit must fail by reason of a formal defect in the plaint. Leave was given to withdraw with permission to bring a fresh suit upon the same cause of action subject to payment of the full costs of the suit and of the appeal to the tenant defendants before the institution of the fresh suit.

By the opposite party before us it is contended that we have no power to revise the order made, on the ground that leave given to withdraw the suit is not a case within the meaning of that section. A solitary decision *Bansi Singh*

v. *Kishun Lall Thakur* (1), is quoted in support of this contention. With great respect to the learned Judges who decided that case we are of opinion that it is not in accordance with the established practice of every Court in India including the Calcutta High Court itself. There are innumerable cases in which the High Court has interfered in cases precisely similar to the one before us. It is sufficient to quote in this connexion *Kharda Co. Ltd.* v. *Durga Charan Chandra* (2) and the cases referred to therein. On the merits however we are of opinion that the application has failed. It is not for us to say whether the Court below did really give leave to withdraw because the case had not been proved in the lower Court, or whether at the back of its mind there was a feeling that there had been a formal defect in the suit. From the moment that the defendants 2 and 3 alleged in their cross-appeal that the suit must fail in appeal owing to a formal defect in the pleadings, the Court had jurisdiction to pass any order it pleased under O. 23, R. 1. We therefore dismiss this application with costs: hearing fee two gold mohurs

V.S./R.K *Appeal dismissed.*

(1) A.I.R. 1915 Cal. 100=41 Cal. 632=26 I. C. 203.
(2) [1910] 5 I. C. 187.

A. I. R. 1918 Patna 486

ROE AND JWALA PRASAD, JJ.

Satya Narayan Lal—Petitioner.

v.

Gobind Sahay—Opposite Party.

Civil Revn. No. 169 of 1917, Decided on 11th January 1918.

(a) Civil P. C. (1908), O 21, R. 100—**Application under O. 21, R, 100 is in nature of summary suit.**

An application under O. 21, R. 100, is in the nature of a summary suit and the provisions of the Code relating to suits apply thereto.

[P 487 C 1]

(b) Civil P. C. (1903), O. 9. R. 9 and O. 21, R. 100—**Claim under O. 21, R. 100, dismissed for default—Party not bound by decree can obtain rehearing under O. 9, R. 9.**

A party not bound by a decree can under O. 9, R. 9, obtain a rehearing of a claim made by him under O. 21, R. 100, which has been dismissed for default: 29 *I. C.* 395, *Foll.*

[P 486 C 2]

Sant Prasad—for Petitioner.

Atul Krishan Roy for *Shoroshi Charan Mitter*, *Baidya Nath Narain Singh* and *Sudhansu Kumar Mitter*—for Opposite Party.

Roe, J.—In this case the petitioner before us is a decree-holder. The opposite party is a claimant to property attached in execution of a decree to which he was not a party. Proceedings were instituted by the latter under O. 21, R. 100. On the day fixed for trial the opposite party was not present in Court. His claim was therefore rejected for default. Against the order rejecting his claim he made an application for re hearing under O. 9, R. 9. The learned Munsif upon going into the merits of the case considered that good cause had been shown for his absence at the time of the hearing. He therefore ordered the case to be restored to the file. Against that order an application has been made for the exercise of the powers of this Court under S. 115, Civil P. C.

We do not consider it necessary to consider the whole trend of case law as affecting generally the provisions of O. 21. The only point with which we are concerned is whether a party not bound by a decree can under O. 9, R. 9, obtain a rehearing of a claim made by him under O. 21, R. 100. In the case of *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (1) this point was directly decided in favour of the opposite party now before us. In *Bharat Chandra Nath* v. *Yasin Sarkar* (2) the point was not directly decided by the Court but the general conclusion of their Lordships was that if such a claimant has no redress under O. 9, R. 9, he has it under S. 151 of the Code. These decisions were subsequent to the decision in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3), and in both of them the effect of the decision in *Hari Charan's* case (3) was discussed. The decision in the case of Hari Charan would seem to us to be conclusively against the opposite party before us, and we are not in sympathy with the attempt of the learned Subordinate Judge to distinguish it on the ground that that case dealt with O. 9, R. 13, and not with O. 9, R. 9. The point which we have to consider is whether the decision of the Judicial Committee in the case of *Thakur Prasad* v. *Fakir Ullah* (4) precludes an application of the ordinary procedure in suits to proceed-

(1) [1915] 29 I. C. 395.
(2) [1917] 41 I. C. 586.
(3) A. I. R. 1914 Cal. 126=41 Cal. 1= 19 I. C. 683.
(4) [1895] 17 All. 106=22 I. A. 44 (P.C.).

ings to which a party not bound by the decree has instituted a proceeding for release of property attached in execution of the decree. We can find nothing in that decision to support the view that such a limitation exists. The decision was merely that the provisions of S 647, of the old Code did not apply to applications for execution. It does not appear to us that the case now before us can be in any sense regarded as an application for execution. A claimant under R. 100 is in no way affected by the execution of the decree. The decree might and should be executed without infringing the claimant's rights.

In my view an application under R. 100 is in the nature of a summary suit, and in that view the provisions of the Civil Procedure Code should apply. I am therefore of opinion that the decision in *Diljan Mihna Bibi* v *Hemanta Kumar Roy* (1) supported by the decision in *Subbiah Naicker* v. *Ramanathan Chettiar* (5), is a correct interpretation of the law. I would reject this application for revision with costs, hearing fee two gold mohurs. We are indebted to Mr. Atul Krishna Roy for very careful analysis of the cases dealing with the point before us.

Jwala Prasad, J.—I agree to the order proposed in this case.

V.S./R.K. *Application rejected.*

(5) A. I. R. 1914 Mad. 162=37 Mad. 462=22 I. C. 899.

A. I. R. 1918 Patna 487

ROE AND JWALA PRASAD, JJ.

Dhakeswar Prasad Singh—Plaintiff—Appellant.

v.

Jioo Choudhury—Defendant—Respondent.

First Appeal; Decided on 8th May 1918.

Court-fees Act (7 of 1370), S. 7 (4) (c)—Suit for declaration of invalidity of revenue sale or restoration of possession—Court-fee payable is ad valorem.

A suit for a declaration that a revenue sale is invalid and for confirmation or restoration of possession falls under S. 7, (4) (c), and an ad valorem court-fee must be paid in respect thereof. [P 487 C 2]

Gangadhar Das—for Appellant.

Government Advocate — for Respondent.

Roe, J.—I see no reason to depart from my views expressed as taxing Judge. It is clear from a perusal of the plaint that the plaintiff was of opinion that he could not succeed in his suit without declaration that the revenue sale was invalid by reason of fraud and irregularity in its conduct. The declaratory relief sought was therefore a necessary part of the suit. It is clear also that consequential relief was asked for in the shape either of confirmation or restoration to possession. The court-fee payable was ad valorem on the property as valued for the purposes of jurisdiction. It is contended however that inasmuch as the mukarrari of the plaintiff extended to only half of the properties sold, the court-fee payable would be upon that half only. That is not a view which I can accept. The relief asked for was that the whole sale should be set aside and the estate was valued at Rs. 20,000. It is clear that the plaintiff himself was of opinion that the whole value of the suit was rupees 20,000. If that statement of value was not made for the purposes of jurisdiction the statement was without meaning. I am of opinion that the Registrar's views upon the court-fees payable was correct and I would direct that the appeal be stayed under S. 10, Cl. (2), until the deficit court fee on the plaint has been paid on the plaint and if it is not paid within fourteen days the appeal will stand dismissed. The appellant will pay the costs to Government in this application, hearing fee two gold mohurs.

Jwala Prasad, J.—I agree. This is a suit for declaration that the revenue sale is invalid and for confirmation or restoration of possession. On reading the reliefs in the plaint it is obvious that it comes clearly under S. 7, Cl. (4), (c), Court-fees Act, whereunder the plaintiff is to pay ad valorem court-fee as he has prayed for a declaration and for consequential relief. I have read the decision of my learned brother as taxing Judge and I entirely agree with him. In a similar case, *Mohamed Takibuddin Buddi* v. *Colllector of District of the 24 Parganas* (1), where the plaintiff prayed to set aside a revenue sale and for possession, it was held that the suit was to obtain a declaratory decree and for consequential relief. The principle of the decision in the case of *Arunachalam Chetty* v. *Rangaswami Pillai* (2) can well apply to this

(1) [1902] 6. C. W. N. 157.
(2) [1915] 38 Mad. 922=28 I. C. 79.

case, though that was a suit for declaration that a mortgage-decree is not binding on the plaintiff and for an injunction staying defendants from executing the sale. It was held that the suit came within S. 7, Cl. (4), (c). The learned vakil for the plaintiff has failed to distinguish the principle of that decision. The present suit was valued at Rupees 20,000 and so was the appeal, as would appear from the memorandum valued at Rs 20,000. The plaintiff should therefore pay ad valorem court-fee on that amount.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 488

MULLICK AND THORNHILL, JJ.

Abdul Haque—Plaintiff—Appellant.

v,

Muhammad Yahya Khan and *others*—Defendants—Respondents.

Appeal No. 293 of 1917 and Civil Revn. No. 4 of 1918, Decided on 4th July 1918, from original order of Sub-Judge, Second Court, Saran, D/- 8th September 1917.

Civil P. C. (1908), O 1, R. 10—Application for adding certain person as defendant rejected—No appeal lies against order—Discretion wrongly exercised—High Court can interfere in revision under Government of India Act (1915), S. 107.

Where an application under O. 1, R. 10, asking that a certain person be added as a party defendant to the suit and praying for permission to amend the plaint accordingly is rejected, no appeal lies against the order rejecting the application. Where however it appears that the Court has exercised wrong discretion in rejecting the application, the High Court can interfere in revision under S. 107. [P 488 C 2]

Muhammad Hasan Jan—for Appellant.

Fakhruddin and *Panchanan Banerjee*—for Respondents.

Mullick, J.—The plaintiff brought a suit against the defendants for specific performance of a contract of sale in respect of some immovable property and the defendants filed written statements between 4th June and 12th June 1917, although the plaint was filed very nearly seven months before. When the written statements were filed, the plaintiff discovered that the property was alleged to have been sold by the defendants to a lady named Bibi Batul and on 3rd July 1917, the plaintiff applied to the Court for leave to add Bibi Batul as a party defendant and to amend the plaint by adding a prayer to the Court to declare that the alleged sale in favour of Bibi Batul was fraudulent and not binding upon the plaintiff. On the 25th July the learned Subordinate Judge declined both prayers observing:

"the plaintiff wants to kill two birds with one shot, which he cannot be allowed to do."

It is to be observed that the plaintiff purported to make this application for amendment and addition of parties under O. 22, R. 10, Civil P. C., but as a matter of fact, the assignment of the property having been made previous to the institution of the suit, this rule had no application and the proper provision under which the plaintiff should have applied was O. 1, R. 10, Civil P. C. On 27th August 1917, the plaintiff again repeated his prayer asking substantially for the same reliefs. That second request also was refused. The plaintiff has accordingly filed first of all an appeal against the order of 27th August 1917, refusing for the second time leave to add Bibi Batul and has also by way of precaution filed an application for revision.

Now it is quite clear that the application having been made under O. 1, R. 10, no appeal lies. Appeal No. 293 of 1917 will therefore be dismissed with costs.

Let us turn next to the application for revision. Now I fail to see what prejudice would have been caused to the defendants by the addition of Bibi Batul. On the contrary it is in every way desirable that the litigation should finally end and finality can only be reached by investigating the rights of Bibi Batul in this matter. The learned Subordinate Judge has exercised a wrong discretion in refusing leave to amend as well as in refusing to allow Bibi Batul to be made a defendant. The Courts have always reserved to themselves a residual power of superintendence under the provisions of the Charter Act which are now reproduced in S. 107, Government of India Act, to interfere in cases of this sort, and in exercise of that power I think we should direct the learned Subordinate Judge to make the additions in the plaint which the plaintiff asked for in his petition of 3rd July 1917, and to dispose of the case according to law. We also direct the Court to fix an early date for the filing of a written statement by Bibi Batul and to see that the trial is prosecuted more expeditiously than it has hitherto been.

As these alterations in the plaint are indulgences, which the plaintiff is obtaining, he will have to pay to the defendants the costs of this hearing which will be assessed at one gold mohur. It appears that in the matter of the appeal the learned vakil for the plaintiff has already paid the costs for the appointment of a guardian to the minor defendants. This item will be excluded from the costs which will be payable by the plaintiff to the defendants in the appeal.

Thornhill, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 489 (1)

MULLICK AND THORNHILL, JJ.

Kuber Nath Singh and *another*—Defendants—Appellants.

v.

Gopal Narain Ram and *others*—Plaintiffs—Respondents.

Appeal No. 185 of 1917, Decided on 14th May 1918, from appellate order of Sub-Judge, Shahabad.

Landlord and Tenant—Burden of proof — Suit for arrears of rent and for ejectment on ground of determination of tenancy—Title set up in third person—Existence of tenancy must be proved by landlord.

Where a plaintiff brings a suit for recovery of arrears of rent and for ejectment on the ground of determination of tenancy and the defendant denies the plaintiff's title and pleads that a third person is the landlord, the plaintiff in order to succeed must prove the existence of the relationship of landlord and tenant between himself and the defendant. [P 489 C 2]

Parmeshwar Dayal—for Appellants.

Shoroshi Lal Mitter and *Baikuntha Nath Mitter*—for Respondents.

Mullick, J.—The plaintiffs instituted the present suit for recovery of rent and for ejectment after service of notice determining the tenancy. The suit, therefore is a mixed suit, partly for rent and and partly for ejectment on determination of tenancy. The plaintiffs said that their grandmother dedicated the house, which is the subjectmatter of the suit, for the service of an idol, but did not create a trust. She merely created a charge upon the property to the extent of Rs. 8 per month and that the allegation of the defendants that Damodar, the Pujari of the idol, is their landlord is not well founded. The Court of first instance found that the relationship of landlord and tenant had not been established. On appeal the learned Subordinate Judge was of opinion that although the relationship of landlord and tenant may not have been established, it was competent to the plaintiffs to prove their title to the property as reversioners of Lakhmi Narain, the husband of the grandmother of the plaintiffs.

Now in the form in which the suit has been brought it is quite clear that the relationship of landlord and tenant must be established before the plaintiffs can succeed. So far as the suit is for rent, it is quite clear that this is so and indeed this is admitted; but it is contended by the learned vakil for the respondents that this is also a title suit in so far as it is a suit for ejectment and in this view it is competent for the trial Court to go into the question of the rights of the reversioners to the property in question. The plaintiffs desire to show that the dedication was not a perfect dedication and that Damodar Das, although he may have realised the rent of the property for some years, is not now competent to realize the same against the will of the plaintiffs. Now it is necessary to see what is the cause of action so far as ejectment is concerned. The cause of action is determination of tenancy. It is not a general cause of action based upon title against a trespasser, but it is a cause of action against a tenant and therefore unless and until the plaintiffs prove the relationship of landlord and tenant, the cause of action on which this suit has been brought cannot be maintained. Therefore the decree of the Munsif is right and the decree of the learned Subordinate Judge remanding the case for trial on this issue is wrong and must be set aside. The appeal succeeds and the suit is dismissed with costs. This judgment will govern appeal from appellate O. No. 186 of 1917 (*Mathura Ram* and *others* v. *Gopal Narayan Ram* and *others*).

Thornhill, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 489 (2)

JWALA PRASAD, J.

Ram Byas Rai—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 268 of 1918, Decided on 23rd July 1918, from a decision of Magistrate, Shahabad.

(a) Penal Code (1860), S. 403—Misappropriation is chief element.

The chief element for a conviction under S. 403, is the dishonest misappropriation of the property or conversion to one's own use.

[P 492 C 1]

(b) Penal Code (1860), S. 403—Misappropriation—There must be overt act of dishonesty—Mere retention of documents is not enough.

In the absence of any overt act on the part of the accused no inference of dishonest motives can be imputed to him simply because he has retained certain documents in his custody.

[P 492 C 1]

Sushil Madhab Mullick—for Petitioner.

Judgment.—This is an application against the conviction of the petitioner under S. 403, I, P. C. The petitioner has been sentenced to an imprisonment of 25 days with a fine of Rs. 20. The facts and circumstances relating to this case are shortly as follows:

A sale-deed was executed in favour of one Gulzar Rai on 26th July 1917, whereby some land of the vendor was conveyed to the petitioner. That land was in the possession of the opposite party Inder Rai by virtue of a mortgage deed executed for Rs. 165. Under the terms of the sale-deed the petitioner was entitled to redeem the said mortgage in favour of the opposite party. Gulzar Rai, the executant of the sale-deed, did not register it, and therefore the petitioner had to apply to the Sub-Registrar of Koilwar for having a compulsory registration of the deed. The Sub-Registrar refused to register the sale-deed. The petitioner therefore appealed to the District Sub-Registrar of Arrah. In support of his case the petitioner filed before the District Sub-Registrar certain documents amongst which were the said rehan-deed in favour of Inder Rai and a bahi belonging to him. We are concerned only with these documents in this case. The petitions whereby the documents were filed before the District Sub-Registrar are Exs. 5 and 6, dated 5th September and 13th October 1917 respectively. Among other witnesses Inder Rai, the opposite party, was also examined as a witness on behalf of the petitioner in the registration appeal. He is witness 7, and was examined on the 5th September. The District Sub-Registrar allowed the appeal of the petitioner and compulsorily registered the sale-deed. Shortly after on the 24th November a petition was filed before the Sub-Registrar for the return of the documents. This petition purports to be on behalf of both the petitioner and Inder Rai, the opposite party, through a mukhtear named Bhagwat Prasad. On 27th November 1917 the papers were returned to the petitioner in the presence of the said mukhtear. Four months after, on the 1st March, the opposite party, Inder Rai, made an application for the return of the documents.

He was then told by the clerk in the registration department that the documents were already returned to the petitioner. A slip was also written by the clerk to the petitioner requiring him to see him at once. This slip is Ex. 12. On the 6th March, Inder Rai the opposite party, made another application before the Sub-Registrar asking for the return of the documents. In this application he has referred to the previous application made by him: this is Ex. 9. The Sub-Registrar then called both the parties. The parties then took time to settle their differnces out of Court. This was not done. The opposite party again appeared before the Sub-Registrar complaining to him that the papers which were taken away by the petitioners were not returned to him. The Sub-Registrar then passed an order that the opposite party might take any step he liked in the criminal Court and that the Registrar could not help him. Inder Rai therefore instituted proceedings out of which this matter has arisen. The Courts below have convicted the petitioner holding that he did not return the documents to the complainant, Inder Rai, but retained them with a view to misappropriate the money due on the mortgage bond by setting up a redemption of the mortgage and that he thereby committed a criminal misappropriation under S. 403, I. P. C.

The Courts below have held that the petitioner took back the documents from the registration department but did not return them to the opposite party. There can, of course, be no doubt that the parties were both on friendly terms prior to the filing of the documents before the Sub-Registrar and also that Inder Rai gave evidence before the Registrar not long before the documents were returned to the petitioner. Gulzar Rai, the vendor of the petitioner, after the execution of the sale-deed resiled from it and would not register the deed and

hence the proceedings in the registration department arose. The money due under the mortgage bond to Inder Rai, the opposite party, was not paid and could not be paid because the time for the payment, namely, the end of Jeth stipulated for in the mortgage bond had not arrived. This was admitted by the petitioner. Inder Rai was ready to give every assistance that lay in his power in order to support the case of the petitioner, so much so that although the money was not paid to him he handed over the documents without any demur and the documents were accordingly filed on behalf of the petitioner. He further supported the petitioner's case by giving his evidence on 5th September 1917. The registration case being over, one would naturally expect that the parties would apply for the return of the documents soon after the order of the Registrar was passed. The petition therefore of the 24th November, which purports to have been filed on behalf of both the parties, is only natural.

It is also clear that both the parties joined in the petition for the return of the documents. Some of the documents filed belonged only to the petitioner and others belonged to Inder Rai, the opposite party. This is supported by the evidence of Bhagwat Prasad Mukhtear, who says that both of them appeared before him and joined in the application filed by him for the return of the documents. This is a very important fact which bears upon the motive in this case, but unfortunately the Courts below have not considered it and perhaps their attention was not drawn to it. As the documents were filed only on behalf of the petitioner, the registration department returned the documents to him in the presence of Bhagwat Prasad.

The Courts below have made much of the fact that the registration department clerk ought not to have returned the documents to Ram Byas Rai, the petitioner, but ought to have returned them to both the parties, as the application for the return of the documents was made by both of them. I do not appreciate this, I would rather think that the documents could not be returned to Inder Rai as they were not filed on his behalf. No Court or office can take the responsibility of returning documents to a person on whose behalf they are not filed simply because the documents might belong to that person: For the purpose of returning a document the Court recognizes only the person on whose behalf the document is filed. The fact remains that the petition of 24th November was filed on behalf of both the parties, and Inder Rai therefore knew that the documents were going to be returned. The petitioner, when he appeared before the Sub-Registrar, stoutly denied having retained the documents with him at that time and boldly asserted that the documents were made over soon after they were taken back from the registration department, to the opposite party. It appears to me that there is a good deal of substance in the plea of the accused, inasmuch as if the documents were not returned to the opposite party for four months he would surely have come to Court and repeated his grievance long before 1st March, the date on which he made his first appearance before the registration department and complained in respect of the documents. This throws a great suspicion on the complainant's case. The present course adopted by the complainant, opposite party four months after the documents were returned to the petitioner, is probably due to some unfourtunate dispute which has since cropped up between the parties.

There is an indication of this in the report of the Sub-Registrar to the Sub-Divisional Officer, in which he says that there was something else in the hearts of both the parties and that he therefore advised them to have their grievances settled by arbitration. They took time to do it but could not make up their differences. The evidence in the case is too meagre for a sure and certain finding that the petitioner did not make over the documents to the opposite party. Even if it be admitted that the documents were not returned, there is nothing to show that there was a criminal motive on the part of the petitioner. The Courts below have said that the object of the petitioner was to misappropriate the mortgage money and to set up the redemption of the mortgage. The opposite party is in possession of the land mortgaged to him. The petitioner's case has all along been that no money was paid to the opposite party and that the mortgage has not been redeemed. This was his case when he applied for the compulsory

registration of the sale-deed and has been so throughout the proceedings in the registration department. Even when he appeared before the District Sub-Registrar four months after the documents were returned to him, he said that the mortgage of Inder Rai was not redeemed. This was his case in the trying Court and as well as in this Court (vide the sworn petition of motion). There is nothing to show that there has been any attempt thereto on his part to deprive Inder Rai of his money or to use the documents for his own purposes. In the absence of any overt act on his part, no inference of dishonest motive can be imputed to him simply by the retention of the documents *Queen* v. *Abdool* (1). The chief element for a conviction under S. 403 is the dishonest misappropriation of the property or conversion to one's own use : *Crown* v. *Muhammada* (2), *Bhuban Mohan Banerjee* v. *Tansuk Roy Seraogi* (3). The petitioner's avowedly honest statement all through that the mortgage has not been redeeemed has not been at all considered by the Courts below in imputing a dishonest motive to him. I therefore set aside the conviction and sentence of the petitioner and direct that he be discharged from his bail bond. The fine if paid should be refunded.

V.S /R.K. *Conviction set aside.*

(1) [1868] 10 W. R. Cr. 23-4.
(2) [1906] 28 P L. R. 1906=3 Cr. L. J. 299.
(3) [1902] 6 C. W. N. 34.

A. I. R. 1918 Patna 492

CHAPMAN AND ROE, JJ.

Bhaiga Parida—Plaintiff—Appellant.

v.

Gannath Khandai—Defendant—Respondent.

Appeal No. 71 of 1917, Decided on 18th April 1918, from appellate decree of Dist. Judge, Cuttack, D/- 30th June 1917.

(a) Decree—Setting aside—Suit to set aside decree on ground that it was obtained after expiry of period of limitation or that mortgage-decree was made absolute without notice does not lie—Failure to give notice does not affect Court's jurisdiction.

A suit will not lie to set aside a decree absolute for sale in a mortgage suit merely upon the ground that the decree was obtained after the period provided by the law of limitation nor can such a suit succeed merely upon the ground that no notice was given to the mortgagor of the mortgagee's application for decree absolute. Such a notice is not required expressly by the provision of any statute and the failure to give the notice does not therefore affect the jurisdiction of the Court. [P 493 C 1]

(b) Decree—Setting aside—Mortgage decree made absolute—Application to set aside decree within 30 days of knowledge of sale—Court has inherent power to set aside decree—Civil P. C. (1908), S. 151.

If however an application is made to set aside the decree absolute within 30 days of the date upon which the mortgagor comes to know of the sale on the ground that he had no notice of the application for a decree absolute, the Court has inherent power te set aside the decree. [P 493 C 1]

(c) Limitation Act (1908), S. 4—S. 4 does not say that time-barred applications should not be entertained—Question of limitation is not question of jurisdiction.

Section 4 does not say that the Court shall not entertain applications or suits filed after the period provided by the law of limitation; what it says is that such suits and applications shall be dismissed. A question of limitation therefore is not a question of jurisdiction. [P 493 C 1]

(d) Limitation Act (1908), S. 28—S. 28 provides extinction of rights upon termination of period of limitation for suit and not for application.

Section 28 provides only the extinction of rights upon the termination of the period of limitation for a suit; it does not say that at the termination of the period of limitation for an application any right shall be extinguished. [P 493 C 2]

Satyendra Nath Roy—for Appellant.

G. C. Roy—for Respondent.

Chapman, J.—In this case the mortgagee obtained a decree nisi for sale on 18th December 1908. He applied for a decree absolute for sale supported by the necessary affidavit on 30th November 1914. The sale was thereafter held and confirmed. The suit out of which this appeal arises, is a suit by the mortgagor to set aside the sale upon the ground that the application for a decree absolute for sale was barred by limitation and upon the ground of fraud, and incidentally upon the ground that before the granting of the application for decree absolute, the Court had given no notice to the judgment-debtor. So far as the question of fraud is concerned, the learned District Judge in the first appeal has held that there was no fraud. He has held that a suit will not lie to set aside a decree absolute in a mortgage case, merely upon the ground that the decree absolute was obtained after the period provided by the law of limitation, and that a suit to set aside a decree absolute for sale cannot succeed merely upon the ground that the mortgagor had received no notice before the sale. Prior to 1908, it was

ordinarily held by the Calcutta High Court that a mortgagee had 12 years within which he could apply for a decree absolute. As a result of the enactment of the Code of Civil Procedure and the Limitation Act, 1908, the 12 years' limitation was reduced to three years. It will be remembered that this preliminary decree was obtained on 18th December 1908 shortly after the change in the law upon the subject. The application for decree absolute was barred in 1914. I am of opinion, quite apart from any question as to whether a decree-holder was justified or the Court was justified in making a mistake on the question of limitation, that a suit will not lie to set aside a decree absolute for sale merely upon the ground that the application for such a decree was barred by limitation. The Limitation Act of 1908 has been drafted in a manner as to make it quite clear that a question of limitation is not a question of jurisdiction. S. 4 of that Act does not say that the Court shall not entertain applications or suits filed after the period provided by the law of limitation ; what it says, is that such suits and applications shall be dismissed. In *Mahomed Hossein* v. *Purundur Mahto* (1) it was held that a suit will not lie to set aside a decree merely upon the ground that the decree was barred by limitation and that view has been subsequently consistently followed in the Calcutta High Court. I am of opinion that the learned Judge was also right in holding that the suit could not succeed merely upon the ground that no notice was given to the mortgagor of the mortgagee's application for a decree absolute. Such a notice is not required expressly by the provision of any Statute. It is impossible therefore to say that the failure to give notice affected the jurisdiction of the Court. At the same time I am of opinion that if an application had been made to set aside the decree absolute upon the ground of want of notice, the Court would have had inherent power to allow that application, and if this suit had been filed within 30 days of the date upon which the mortgagor came to know of the sale, I would have been disposed to treat the suit as an application and to have set aside the sale merely upon the ground that the mortgagor had no notice of the application for a decree absolute The suit however was filed considerably more than three months after the mortgagor came to know of the sale. It is therefore impossible to treat it as an application which the Court had an inherent power to allow. It has been somewhat faintly contended that after the period provided by the law of limitation, a mortgagee's rights to a decree absolute become absolutely extinguished. We have been referred to the English case of *Kibble* v. *Fairthorne* (2). That decision was governed by the interpretation of a section of an English Statute relating to the period in which an action should be brought in respect of the right of a mortgagee against mortgage in possession. We have to deal in the present case not with the case of an action, but with the case of an application. The mortgagee has already commenced his remedy and his action in the matter was not barred by the Limitation Act. So far as the application for a decree absolute is concerned, S. 28, Lim. Act, provides only the extinction of rights upon the termination of the period of limitation for a suit, it does not say that at the termination of the period of limitation for an application, any right shall be extinguished. We are of opinion that this appeal fails and it is accordingly dismissed with costs.

Roe, J.—I agree.

V. S./R.K. *Appeal dismissed.*

(1) [1885] 11 Cal. 287.

(2) [1895] 1 Ch. 219.

A. I. R. 1918 Patna 493

IMAM, J.

Mahabir Sahu and *others*—Defendants—Appellants.

v.

Ram Saran Sahu and *others*—Plaintiffs—Respondents.

Second Appeal No. 205 of 1917, Decided on 18th January 1918, from decision of Sub-Judge, Ranchi, D/- 22nd November 1916.

Riparian Rights—Lower owners acquiring prescriptive right to exclusive use of water of stream for irrigation—Higher owner cannot interfere with rights of lower owner.

Riparian owners have a natural right to use the water of a natural streamlet for purposes of irrigation so long as that use is reasonable.

Where however a lower riparian owner has acquired a prescriptive right to the exclusive use of the water of a rivulet for irrigation purposes. a higher owner cannot use the water of the streamlet so as to interfere with the rights of the lower owner. [P 494 C 2]

Parmeshwar Dyal—for Appellants.

Kulwant Sahai—for Respondents.

Judgment.—The appellants are aggrieved by an order of the learned Subordinate Judge of Ranchi, who has reversed the order of the Munsif of Daltongunge. The plaintiffs' suit was for declaration that they have acquired by right of easement an absolute right to the entire water of a certain rivulet, that the principal defendants in the case have no right to take any water from this rivulet to irrigate their lands and that the plaintiffs should be awarded Rs. 200 as damages and that there should be a perpetual injunction against the defendants prohibiting them from putting up a bund across the said rivulet. It appears that a small stream rises from the Ulgarah hills and falls into the river Amanat. The defendants' village Taliderih and the plaintiffs' village Nuru are contiguous standing on the right bank of this rivulet. Taliderih is the higher village and Nuru is the lower one. The learned Subordinate Judge has come to the distinct finding that the plaintiffs who are the proprietors of Nuru have for more than 40 years erected a pucca dam across this rivulet and that thereby they have been irrigating about 100 bighas of their lands situated in Nuru. It has also been held that this use that they have made of the water by putting up a bund has been an uninterrupted one. The learned Subordinate Judge has also come to the distinct finding that the defendants who were the proprietors of Taliderih have failed to prove that they have any right whatsoever to put a bund across this rivulet. The principal point taken up in argument by the learned vakil appearing on behalf of the appellants is that even if these findings are against the defendants, the judgment of the learned Subordinate Judge contains one declaration which is in excess of these findings and that he ought not to have allowed this additional burden to be placed upon the shoulders of the defendants. The passage in question in the judgment of the learned Subordinate Judge runs as follows :

"It is further declared that defendants have no right to use the water of this streamlet for the purpose of irrigation."

It is contended on behalf of the appellants that this order trenches upon their rights as riparian owners to make use of the water of this rivulet for the purpose of irrigation so long as that use is reasonable and natural. My attention is drawn to various authorities on the point and it may be conceded that so far as the proposition goes in relation to the rights of one riparian owner with reference to the rights of another riparian owner it is a sound one, but the case before me stands on a different footing altogether. The proprietors of Nuru are the plaintiffs in this case. Their right is not only of riparian owners, but as a matter of fact they have got a higher right in respect of the water of this rivulet by their having constructed the pucca dam across the stream so long as 40 years ago and by their making use of the water all these years without any interruption. The learned Subordinate Judge has also come to the distinct finding that this streamlet as a matter of fact has a small supply of water and this is so little that the water of this streamlet is barely sufficient for the purposes of irrigating the plaintiffs' lands. It is evident, therefore that there is no such abundance of water coming through this streamlet as to irrigate the lands of the defendants without the lands of the plaintiffs suffering from want of water and as the right of the plaintiffs is established by prescription to the exclusive use of this water for the propose of irrigating their 100 bighas of land, the ordinary incidents of riparian rights cannot be applied to their case. In the circumstances the appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 494

JWALA PRASAD, J.

Upendra Chandra Singh—Appellant.

v.

A. B. Chioditti—Respondent.

Appeal No. 1161 of 1916, Decided on 28th May 1918, from appellate decree of Dist. Judge, Bhagalpur.

(a) Contract Act (1872), S. 70—Money not due paid under legal process—Suit to recover is not maintainable.

Money paid under a compulsion of legal process, which is afterwards found not to have been, due, cannot be recovered back as money had and received [P 495 C 2]

(b) Decree—Setting aside—Fresh suit to recover money paid under decree is not maintainable—Decree must be set aside.

Money paid under a decree or judgment cannot be recovered back in a fresh suit so long as the decree or judgment under which it is paid remains in force. The decree or judgment must be taken

as subsisting until it is reversed or superseded by some ulterior proceeding. [P 496 C 1]

(c) Decree—Setting aside—Suit to set aside decree barred by limitation—Money paid in exces of sum due in pursuance of decree cannot be recovered.

Where the decree sought to be set aside by the plaintiff, remains intact and cannot be set aside on account of the suit being barred by limitation, the money paid by the plaintiff to the defendant in excess of the sum due in prusuance of the decree cannot be recovered. [P 495 C 2]

Sushil Madho Mullick—for Appellant.

Naresh Chandra Sinha—for Respondent.

Judgment.—The finding of facts now arrived at on remand by the District Judge of Bhagalpur disposes of this appeal. It has been found that the summonses were properly served by the plaintiff on 30th September 1911 and that the plaintiff was not kept out of the knowledge of the decree of November 1911 by fraud on the part of the defendant. Further that the plaintiff did not come to know of the sale for the first time on 8th March 1913 as alleged by him. The plaintiff's suit therefore to set aside the decree, is barred by limitation. It has been contended by Mr. Mullick on behalf of the appellant that notwithstanding this finding, the suit is not barred under Art. 95, Lim. Act; and in support of that authority the case of *Rahimbhoy Habibbhoy* v. *C. A. Turner* (1) has been quoted. It is contended that on the strength of that authority it was for the defendant to show that the plaintiff had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought, that is, beyond three years. In the present case the suit was to set aside the decree obtained in November 1911. It has been proved by the defendant that the summons in the suit was served upon the plaintiff on 30th September 1911. It is therefore a sufficient proof that the facts alleged by the defendant in the plaint, the basis of his claim, were perfectly known to the plaintiff and therefor he was also fully aware of the decree sought to be set aside. I therefore do not agree with the view of Mr. Mullick and hold that the suit on the findings of the Court below is barred by limitation.

The next question raised by Mr. Mullick is one of some interest. It was not raised at the time when the appeal was originally heard but that does not to my mind disentitle him from raising the question if there be any substance in it. This contention is based upon relief No. 3 in the plaint relating to the claim for the refund of the money paid under the decree said to be fraudulent. It is again founded upon the fact that the Munsif held that the rent for the holding was only Rs. 24 odd and that though the finding was set aside by the learned District Judge, it was re-affirmed by this Court in second appeal. It is contended on behalf of the appellant that the real rent being Rs. 24 and that the decree obtained for Rs. 42 odd being fraudulent in execution of which a much larger sum than what was due from the plaintiff was realized by force of process of law the plaintiff is entitled to a refund of the excess amount although the decree cannot be set aside on account of the claim having been barred by limitation. In support of this contention the Full Bench case of *Kalichurn Dutt* v. *Jogesh Caunder Dutt* (2) has been cited. In that case a decree at an enhanced rate was obtained by the landlord and an appeal against that decree was pending in the Privy Council. In the interim the landlord obtained several rent decrees on the basis of the first decree which was in appeal in the Privy Council. The first decree was reversed ultimately by their Lordships of the Privy Council and the suit was brought for a refund of the money realized under the subsequent decrees at an enhanced rate. It was held that in the setting aside of the first decree all the subsequent decree were also affected and virtually set aside and that the plaintiff was entitled to a refund of the excess amount realized from him.

It was also held that the suit for such a claim should have been brought within six years under the general article of the then Limitation Act. There can be no doubt that the general principle on the point is laid down in *Marriot* v. *Hampton* (3), namely, that money recovered which has been paid by the plaintiff to the defendant under a compulsion of legal process which was afterwards found not to have been due, cannot be recovered back as money had and received. This principle was re-affirmed by their Lordships of the Privy Council in the case of *Shama Purshad Roy Chowdury* v. *Hurro*

(1) [1893] 17 Bom. 341=20 I. A. 1 (P. C.).

(2) [1878] 2 C. L. R. 354.

(3) [1797] 2 Sm. L. C. 421.

Purshad Roy Chowdery (4) and it was distinctly laid down as a principle of law that in this country as well as in England, money recovered under a decree or judgment cannot be recovered back in a fresh suit so long as the decree or judgment under which it was recovered, remained in force. The decree or judgment must be taken as subsisting until it has been reversed or superseded by some ulterior proceeding. The Full Bench case referred to above, *Kalichurn Dutt* v. *Jogesh Chunder Dutt* (2), does not depart from the aforesaid principle and affirms it inasmuch as it is held that in that particular case the effect of the Privy Council decree was to modify and set aside the subsequent decree obtained on the basis of the first decree. All the authorities appear to have been considered in the recent case of *Dwarka Nath Kundu* v. *Mohendra Nath Roy* (5) and the true test as deduced from all the authorities, appears to be whether the decree or judgment under which money was recovered, has been reversed or superseded. In the present case the decree sought to be set aside by the plaintiff, remains intact and cannot be set aside on account of the suit of the plaintiff, having been barred by limitation. Whatever be the view of the Munsif or of this Court as to the claim of the defendant against the present plaintiff in the former rent suit being in excess of the real rent, it cannot be said that the rent decree obtained against the plaintiff has been vacated which must be a condition precedent for a refund of the money recovered under that decree. There is no ulterior proceeding as in the cases noticed above where the decree in execution of which the plaintiff was obliged to pay a higher sum than what was due from him on account of rent, has, in any way, been modified or set aside. The relief sought by the plaintiff therefore on the basis of the money had and received on account of rent, cannot be granted to him. The result is that the plaintiff's contention is overruled and the appeal is dismissed with costs throughout. In the circumstances of the case I do not allow costs to the plaintiff for the second hearing after remand.

V.S./R.K. *Appeal dismissed.*

(4) [1863-66] 10 M. I. A. 203=3 W. R. 11(P. C.)
(5) [1912] 16 I. C. 131.

A. I. R. 1918 Patna 496

DAWSON-MILLER, C. J. AND IMAM, J.

Chaudra Hari Singh and *others*—Defendants—Appellants.

v.

Tipan Prosad Singh and *others* — Plaintiffs—Respondents.

First Appeal No. 56 of 1917, Decided on 13th May 1918, from a decision of Sub-Judge, Patna.

Civil P. C (1908), S. 151 — Excess court-fees paid by mistake—Court can order refund.

Under S. 151, Civil P. C., Courts have inherent power to pass orders refunding court-fees paid by mistake. [P 496 C 2]

Ganesh Dutt Singh—for Appellants.

Dawson-Miller, C. J—In this case the defendant appealed and in his memorandum of appeal paid a court-fee of rupees 295, which was the amount paid by the plaintiff in the Court below as court-fee. On the attention of the Taxing Officer being drawn to this by the Stamp Reporter the matter came before the Taxing Officer, the contention on behalf of the Stamp Reporter being that a fee in excess of Rs. 295 ought to have been paid on the memorandum of appeal. Thereupon the matter was considered by the appellant, and he came to the conclusion that in fact the stamp fee which he had paid on his memorandum of appeal was more than that which he was under any legal necessity to pay, because it appeared that as he was only claiming a declaration the proper stamp fee payable was really Rupees 10. This matter having been brought to the notice of the Taxing Judge, the learned Judge decided that on this point the appellant was right and found as a matter of fact that the proper fee payable was only Rs. 10. The appellant having paid a stamp fee of Rs, 295 now petitions the Court to issue a certificate to the Revenue Authorities to enable him to obtain a refund of the excess court-fee. There is no provision, so far as I am aware, in the Court-fees Act itself which provides for such a contingency but under S. 151, Civil P. C. the Court undoubtedly has inherent powers to do whatever may be necessary for the ends of justice. This question of refunding court-fees paid by mistake has on more than one occasion been the subject of judicial decisions of the High Court and in particular in the case of *Hari Har Guru* v. *Anada Mahanty* (1), an order

(1) [1913] 40 Cal. 365=20 I. C. 498.

similar to that which we are now asked to make was made. It appeared that in that case as in the present case the appellant, who was also defendant, paid a court-fee which was the same as that paid by the plaintiff in the Court below. In fact having regard to the nature of his appeal which sought relief against a part only of the decree, he paid a sum of Rupees 285 in excess of that which he was legally bound to pay and after considering the matter the Court, consisting of Mookerjee J. and Beachcroft J. made an order directing theT axing Officer to issue the necessary certificate to enable the appellant to apply to the revenue authorities to obatain a refund of the excess court-fee. In the present case although one cannot lay down a general rule which would be applicable to all cases, I think there is sufficient reason for making a similar order. This court-fee was paid perhaps in a hurry and without considering carefully the exact amount which the appellant was legally liable to pay, but the matter having been brought to his notice he did from that time contend that he had paid more than he need have done. In these circumstances I think he is entitled to get back the excess court-fee and the Taxing Officer is accordingly directed to issue the necessary certificate to enable the appellant to apply to the revenue authorities to obtain a refund of the sum of Rs. 285, the amount of the excess court-fee.

Imam, J.—I agree,

V.S./R.K. *Application granted.*

A. I. R. 1918 Patna 497

ROE AND JWALA PRASAD, JJ.

Brijnandan Singh—Plaintiff —Appellant.

v.

Rameshwar Singh — Defendant— Respondent.

Appeals Nos 21 and 68 of 1915 Decided on 8th May 1918, from original decree of Sub-Judge, Darbhanga, D / 17th September 1914

(a) Landlord and tenant — Land leased to proprietor of factory— Factory sold to stranger—Fresh lease of land by purchaser—Occupancy rights could not pass by virtue of purchase — Purchaser having acquired status of non-occupancy raiyat by virtue of lease, suit for ejectment filed more than six months after expiry of lease is barred by limitation — Bengal Tenancy Act (1885), Sch. 3 Part (1) (a).

The lands in dispute had been held for a considerable time by the proprietor of an Indigo Factory by virtue of leases renewed from time to time. After the expiry of the lease the factory was sold to the defendant, who obtained a fresh lease of the lands for nine years. More than six months after the expiry of this lease the plaintiffs sued to eject the defendant:

Held: (1) that even if the proprietors of the factory had acquired occupancy rights in the land, those rights could not pass to the defendant by virtue of his purchase; (2) that the defendant having acquired the status of a non-occupancy raiyat by virtue of his lease, and the suit having been brought more than six months after the expiry of the lease, it was barred by limitation. [P 499 C 1, 2]

(b) Lease—Renewal —Option to— Failure to come to terms amounts to failure to avail of option.

There is a limit to the exercise of an option to renew and a tenant's failure to come to terms within three years of the expiry of the old lease amounts to a failure to avail himself of the option. [P 500 C 1]

Hasan Imam, Shorashi Churn Mitter and *Manmohan Bose*—for Appellant.

Pugh, Purnendu Narain Sinha and *Murari Prasad*—for Respondent.

Roe, J.—These two appeals arise from two suits brought by two brothers, the sons of Ganesh Dutt Singh, in respect of land situated in village Ramnagar and now in the possession of the Maharaja of Darbhanga as proprietor of Pandowl factory. The case of the plaintiffs was that they had leased 170 bighas of land, admitted to be zerait land for the years 1308 to 1317 to Mr. Faulkner, the Maharaja's manager, and that the present manager Mr. Henry having failed to make fresh arrangements, the Maharaja is now a trespasser and liable to eviction. The defence was that Pandwol factory had prior to its purchase by the Maharaja acquired occupancy rights in these lands and that the transfer of these occupancy rights to the Maharaja had been completed by the plaintiffs' recognition of the tenancy by the acceptance of a kabuliyat of 1308. The learned Subordinate Judge found as a fact that the land is not proved to be zerait land. He held that the defendant's tenancy commenced in 1308; that the interest then given to him was a raiyat's interest; that the defendant was a non-occupancy raiyat and could not be ejected. The defendant had also urged that Faulkner had no right to pledge the Maharaja to give up the land in 1317 and that the admission made by him that the lands were zerait lands was not binding upon the Maharaja. The issue was decided against

the defendant. The defendant also urged that they had not been given a fair opportunity of executing a fresh kabuliyat, that they were perfectly willing to do so and that therefore under the terms of the lease to Faulkner they were entitled to renew the lease and remain in possession. On this point the learned Judge found in the defendant's favour. On these findings the suits were dismissed.

The question to which we propose first to devote our attention is whether these lands are zerait lands or not. The plaintiff has called 24 witnesses to prove that the lands were prior to their acquisition by the factory in 1879 in the direct possession of the plaintiff's father Ganesh Dutt Singh. It is sufficient to read that evidence to realize that it is typical evidence given by raiyats deposing in favour of their maliks. The first witness says that he knows the land to have been under cultivation by the plaintiff's ploughs, and in cross-examination admits that he has never seen them at all. Witness after witness makes some damaging admission, and in each case an attempt is made to smooth these admissions away either later in the day or on a later day. For instance witness 4 limited his knowledge of the plaintiff's cultivation to four or five years, which was, of course, insufficient for the purposes of S. 120. Witness 7 has only seen two bighas out of the whole. Witness 6 says that the lands lay on all sides of the village, which is inconsistant with the statement of witness 5 that it lay in two plots one of 100 bighas and the other of 17 bighas. It is not necessary to go further into deails. It is sufficient to say that the evidence generally is conflicting and unreliable. It is moreover as the Commissioners' report shows, in conflict with the thakbast papers of 1848. These Commissioners have been able to locate the majority of the lands in suit as specified plots stated in the thakbast survey papers to have been in the possession of John Gale, in 1848. We hold that the plaintiff has failed to show that for 12 years prior to 1883 the land was cultivated by his own ploughs and seeing that his own evidence is that it was cultivated by the ploughs of the factory from the year 1879 to 1883, we fail to see why it was necessary to bring in evidence at all to show what happened to them prior to 1879. The only ground upon which the plaintiff could succeed in his plea that the lands were zerait lands would be that by village usage the lands have always been known as zerait. There is no definite evidence at all in the mouth of any of the witnesses to this effect. We are asked however to say that they have always been called zerait lands in all the plaintiff's documents of title and therefore they must be regarded as zerait lands by village usage. With this suggestion we are not in sympathy.

It is our experience that every zamindar throughout Bihar on leasing land temporarily in his khas possession always describes it as khudkasht. It is idle to suggest that a description contained in documents such as this would be sufficient evidence to establish village usage. We agree therefore with the learned Subordinate Judge that these lands are not zerait lands. With regard to the question of the status of the defendant we have to examine, firstly, the status of the Gales and secondly, the effect of Gale's status upon the Maharaja's status. In giving evidence upon this point the plaintiff attempted to make out a case that the inception of the tenancy must be dated 1879. As indicated in our decision upon the question whether the lands are zerait lands or not, we are of opinion that so far as the Gales were concerned, tenancy in the greater part of the lands in suit commenced from before the year 1848 and probably from 1828, when the factory was started upon the lands for which the mukarrari lease of that year was given. The lands held in 1848 by the factory, in excess of the land covered by the mukarrari, consisted of 125 bighas for which the defendants have been classed as raiyats in the survey papers, and of about 150 bighas which form part of the present 170 bighas. The Survey Record shows that at the time of the survey the factory accepted the status of hikadars in these 170 bighas. The lands were recorded as bakasht lands. The area is more than 150 bighas. There is therefore a double presumption upon the defendant to show that at the time when he took the lands it was Gale's intention to cultivate them by his own plough. We are asked to presume that that must have been his intention because he was cultivating them by his own ploughs in 1848. We are not prepared to accept this. It may well be that there were

tenants on the land in 1828 who had by 1848 been turned out. If there were tenants on the land in 1848 the object of the lease was, we hope, that the factory should take rent from the tenants and observe their rights, not destroy them. To rebut the presumption arising from the Record-of-Rights, the defendants were required to show that when the Gales first went on to the land there were no tenants on it. We note that in the thakbast papers, the zamindars are recorded as in possession of 160 bighas of zerait lands in addition to the lands held by the factory. If the factory land was in 1828 also free of tenants, no less than 470 bighas of the village were free of tenants. The whole village is only a thousand bighas in extent. It seems to us extremely improbable that 470 bighas of these should have been at the direct disposal of the malik. We are of opinion therefore that the presumption arising from the area and from the settlement record that the tenancy of the Gales was that of tenure-holders has not been rebutted. The Gales were tenure-holders. Their last lease expired in 1307. The Maharaja purchassd sometime in 1901. The finally published Record-of-Rights dated 16th September shows him to be then in possession of the factory, and the lands in suit to be in his possession, bakasht thikadar.

The argument set forth in the written statement was that the Gales had occupancy rights, and that the Maharaja acquired these rights. Even if the Gales had had occupancy rights they would not have passed to the Maharaja by virtue of his purchase of the factory, as is clear from the decision of the Judicial Committee in the case of *Chandrabati Koeri* v. *Harrington* (1), accepting the previous law as set out in *Laidley* v. *Gour Gabind Sarkar* (2). Mr. Pugh upon this point bases his case upon the fact that the Maharaja's tenancy was a new tenancy altogether independent of that of the Gales. The lease is in different terms. For instance, whereas the Gales had power to let out the lands covered by the lease provided they did not let them at less than a specified rate, the Maharaja had no power to sublet the lands at all. When the Maharaja took over the factory the Gales' tenure had just expired. As far as we know, they were not holding over. When they went out they left nothing tangible in the way of occupancy rights or even tenancy rights. The possession of the Maharaja from the date of his purchase up to the date of his recognition by the plaintiffs was that of a trespasser. Recognition took the form of the registered kabuliyat of 1308. In that kabuliyat there were special provisions precluding the lessee from subleasing the land at all. There were no tenants upon the land. Clearly the intention of both parties to the lease of 1308 was that the Maharaja should cultivate the land by his own ploughs. We are of opinion that he entered upon the land as a raiyat. His status on the date of the expiry of the lease of 1308 was that of a non-occupancy raiyat. The plea of limitation is a sufficient answer to the case. The lease by which the land was let to the plaintiffs as a raiyat for a term of years expired in 1317 and no suit was brought within six months of the expiry of the lease. On this point the plaintiff's suit must fail.

We are asked, however to come to findings of fact with regard to two other points. The first is whether Faulkner had power to execute this lease and whether the Maharaja is bound by the admissions in it. If it is suggested that Faulkner had power to bind the Maharaja to conditions repugnant to the Bengal Tenancy Act, he certainly could not do so, whether he had the power to take the lease or not. The Maharaja is as much protected by that Act, as a raiyat holding one bigha of land. If it is suggested that his admission that the lands are khudkasht lands binds the Maharaja, we have only to say that such an admission has been always held not to bind the lessee though it may be evidence of the fact that the lands were khudkasht. We see no great reason to decide what Faulkner's powers may have been. It is however brought to our notice that Henry in making arrangements to renew the lease in 1910 had offered to do so on precisely the same terms as before. We presume that both Henry and Faulkner had the ordinary powers of managers of agricultural businesses to make suitable and reasonable arrangements for the leasing of lands required for agriculture. Until the contrary is proved, we would presume that Faulkner had power to ac-

(1) [1891] 18 Cal. 349=18 I. A. 27=(P.C.).
(2) [1885] 11 Cal. 501.

cept the lease from the plaintiffs on reasonable conditions.

The last point that was considered by the Judge was whether the defendant's suit was premature on the ground that the defendants having an option to renew were not given a fair chance of doing so. All that the learned Subordinate Judge says on this point is:

"There is clearly evidence that there was an offer on the part of the defendants first party to renew the lease and it was the plaintiffs who threw obstacles in the way of their lease: I think the defendants could not be blamed for non-execution of their lease."

We have considered the evidence upon this point. We find that Henry offered to execute a fresh lease on 21st May 1910. In spite of the plaintiffs' protest on 27th November 1911 against the delay in carrying out this promise nothing had been done up to the filing of the suit on 9th April 1913. The difficulty appears to have been that while the plaintiffs were anxious to have a consolidated kabuliyat both for the 170 bighas covered by the old lease and the 125 bighas covered by the raiyati khatian of the factory, the defendants were unwilling to risk their assured status as raiyats in 125 bighas by mixing them up with lands in which their status was not assured. There is a time limit for an option to renew. The plaintiff's protest against the defendant's delay was fully justified. We do not understand Faulkners's kabuliyat to bind the plaintiffs to accept a fresh kabuliyat on precisely the same terms as the old kabuliyat. We are of opinion that the failure of the defendant to come to terms within three years of the expiry of the lease amounted to failure to avail himself of the option to renew. However on the findings on the main issues involved the appeal is dismissed with costs.

Jwala Prasad, J.— I agree to the orders proposed.

V.S./R K. *Appeals dismissed.*

A. I. R. 1918 Patna 500

JWALA PRASAD, J.

Himmat Mian and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 154 of 1918, Decided on 14th May 1918, from an order of Dy. Magistrate, Dhanbad, D/- 2nd February 1916.

(a) Criminal P. C. (5 of 1898), Ss. 107, 144 and 145—Proceedings under S. 107—Magistrate has jurisdiction to drop proceedings under S. 107 and to proceed under S. 145—Ss. 107, 144, 145 give summary jurisdiction to Magistrates—Clear dispute regarding possession of land—Proper procedure is under S. 145.

It is competent for a Magistrate taking cognizance of a case under S. 107, Criminal P. C. or holding an inquiry under that section to drop the proceedings under that section and to proceed under S. 145. Ss. 107, 144 and 145 all give summary jurisdiction to Magistrates to take action in order to prevent a breach of the peace when such a breach is imminent There is a very thin line of demarcation between these sections. When there is a clear dispute regarding the possession of land the proper section to proceed under is S. 145, which not only is more effective in order to prevent a breach of the peace but also is one that causes the least prejudice to the contending parties. [P 501 C 2]

(b) Criminal P. C. (5 of 1898), S. 145 Cl. (4)- Proceedings under S. 145—Proceedings can only be terminated under Cl. (4).

Where proceedings under S. 145 are started and evidence is recorded the proceedings can only be terminated by a decision upon the evidence as to the possession of the contending parties under Cl. (4), S. 145. [P 501 C 2]

(c) Criminal P. C (5 of 1898), S. 145, Cl. (5)—Proceedings can be dropped on ground of no existence of imminent dangar of breach of peace.

Under Cl. 5, S. 145 a Magistrate can drop proceedings upon the only ground mentioned therein, that viz, there no longer exists any imminent danger of a breach of the peace. [P 501 C 2]

G. C. Pal—for Petitioners.

Sishir Kumar Mitter—for the Crown.

Judgment.—This application is directed against an order of the Deputy Magistrate of Dhanbaid, dated 2nd February 1918, directing an inquiry under S. 107, Criminal P. C. and dropping proceedings then pending under S. 145, Criminal P. C. On 23rd July 1917 upon a Police report the Deputy Commissioner drew up proceedings under S. 107, Criminal P. C. against the second party petitioner in this Court. On 4th August 1917 he transferred the case to the file of Mr. S. N. Chatterjee, Deputy Magistrate for disposal. The case was taken up after some adjournments on 17th August 1917. On that date Mr Chatterji, on a perusal of the written statements and the Police report thought that the proceeding under S. 107 was not necessary and was not an effective measure to decide the dispute between the parties and permanently prevent a breach of the peace. He therefore dropped the proceeding under S 107, and instituted one under S. 145, Criminal P.C. The case remained on the file of Mr. Chatterji up to 19th November 1917

when it was transferred to the file of another Deputy Magistrate Mr. Sen. Mr. Sen examined a number of witnesses on behalf of the first party and before he could finish the case hs was transferred from the station. On 2nd February 1918 the case was then placed on the file of the Deputy Commissioner. The Deputy Commissioner by his order of that date revived the proceedings under S. 107 which had been stopped by Mr. Chatterji on 17th August 1917, and he further dropped the proceedings under S. 145, initiated by Mr. Chatterjee. The case was then transferred to Mr. Chatterji again for trial.

The petitioner 2nd party has now moved this Court against this order of the Deputy Commissioner. Before moving this Court the petitioner had also made an application to the Sessions Judge of Purulia who by his order of 19th March 1918 rejected that application. The ground upon which the Deputy Commissioner set aside the order of Mr. Chatterji dropping the proceedings under S. 107 and initiating proceedings under S. 145 is that Mr. Chatterji had no jurisdiction to drop the proceedings under S. 107 which were initiated by the Deputy Commissioner on 23rd July 1917. The Deputy Commissioner was of opinion that Mr. Chatterji should have finished his inquiry under S. 107 and passed orders under Ss. 118 and 119, Criminal P. C. The case was made over to Mr. Chatterji by the order of the Deputy Commissioner of 4th August. This order is in the following terms: "To Babu Srinath, Chatterji Deputy Magistrate for disposal." The order is apparently under S. 192, Criminal P. C., for there is no other section in the Code whereby the Deputy Commissioner was empowered to transfer the case to any Magistrate subordinate to him. It was not the offence that was transferred but the whole case, as the terms of that section as well as the order of the Deputy Commissioner himself would indicate. Mr. Chatterji had therefore seisin of the entire case and it was competent for him at any stage of the case to drop the proceedings under S. 107 and to institute another proceeding under S. 145. In his order of 17th August Mr. Chatterji has set forth in detail the reasons upon which the order was passed. He has come to a definite conclusion upon reading the police report and the statements of the parties "that there was a definite land dispute", and that the 2nd party against whom tbe order under S. 107 was in the first instance passed "laid claim to be in possession of the land to which the 1st party attributes the enmity." It is competent for a Magistrate taking cognizance of a case under S. 107 or holding an inquiry under that section to drop the proceedings under that section and to proceed nnder S. 145. Ss. 107, 144 and 145 all give summary jurisdiction to Magistrates to take action in order to prevent a breach of the peace when such a breach is imminent. There is a very thin line of demarcation between these sections.

When there is a clear dispute regarding the possession of land, it has been held more than once that the proper section is 145, which not only is more effective in order to prevent a breach of the peace but also is one that causes the least prejudice to the contending parties. Mr. Chatterji who had seisin of the case came to the conclusion that the proper section to proceed under was S. 145. It is impossible to hold that the discretion used by him was improper, nor is it within the province of the Court to come to any decision upon the point. It is sufficient to say that Mr. Chatterji had jurisdiction to take proceedings under S. 145. It is admitted on all hands that there was an imminent danger of a breach of the peace and that some measure under the Code was necessary either under S. 107 or S. 145. Proceedings under S. 145 having been instituted they could only be concluded by the procedure laid down in the Code. The Magistrate to whom the case was made over for inquiry and disposal was Mr. Sen. He went into evidence; the proceedings could only be terminated by a decision upon the evidence as to the possession of the contending parties under Cl. 4, S. 145. Under Cl. 5 of that section the Magistrate could drop proceedings upon the only ground mentioned therein that there no longer existed any imminent danger of a breach of the peace. This ground does not at all exist in this case. The Deputy Commissioner had no jurisdiction to revise the order of Mr. Chatterji or that of Mr. Sen under S. 145; such a jurisdiction has been taken away by S. 435 of the present Code of Criminal Procedure. Suppose he had the seisin of the case after the transfer

of Mr. Sen, he could not drop the proceedings as the condition laid down in Cl. 5, S. 145, that there was no longer any danger of the breach of the peace, was not fulfiled. In fact in his order the Deputy Commissioner does not say that there no longer existed the necessity of proceedings under S. 145. It was distinctly held in *Tara Charan Sarkar* v. *Bengal Coal Co. Ltd.* (1) that the District Magistrate could only quash the proceedings in accordance with the provisions of Cl. 5, S. 145, Criminal P. C., on facts being brought to his notice which were sufficient to satisfy him that no dispute likely to cause a breach of the peace existed. The learned Sessions Judge tried to distinguish that case on the strength of the observation made by their Lordships:

"that if their Lordships were satisfied that the Deputy Commissioner had passed the order on a full consideration of all the facts and after hearing the objections of all the parties, they should not have been prepared to interfere with the order of the Deputy Commissioner quashing the proceedings."

This remark would only apply to a well-considered order under Cl. 5 that there did not exist any longer the necessity of proceedings under S. 145 and could not vest any general power in the Deputy Commissioner or District Magistrate of quashing proceedings under S. 145 on any other ground. The Deputy Commissioner in his order has admitted that there was an imminent danger of a breach of the peace so much so that he himself drew up proceedings under S. 107 and transferred the case to another Magistrate for trial. The order of the Magistrate dropping the proceedings under S. 145 is therefore set aside. The Deputy Commissioner has referred to the long duration, of the case namely six months. That should have been a good reason for directing the expeditious termination of the inqury under S 145 which had already proceeded a long way instead of quashing it and directing a fresh inquiry under S. 107. There then remains the order reviving the proceedings under S. 107. It is undesirable that the two proceedings in respect of the same dispute, one under S. 107 and the other under S. 145, should simultaneously proceed [*Abinash Chandra Mandal* v. *Lokenath Gani* (2)]. I venture to think that the final order passed under S. 145 will make it unnecessary to proceed under S. 107 any more. The result is that the order of the Deputy Commissioner, dated 2nd February 1918, is set aside and it is directed that the inquiry under S. 145 do proceed from the point it had reached before the order of the Deputy Commissinoer, dated 2nd Febuary 1918, was passed and be concluded as quickly as possible.

V.S./R.K. *Order set aside.*

(1) [1909] 10 Cr. L. J, 560=4 I. C. 354.
(2) [1918] 19 Cr. L. J. 367=44 I. C. 591.

A. I. R. 1918 Patna 502

ROE AND IMAM, JJ.

Bhattu Ram—Defendant—Appellant.

v.

Ganga Prasad Gope—Paintiff—Respondent.

Second Appeal No. 4038 of 1913, Decided on 27th February 1918, from decision of Sub-Judge, Bhagalpur, D/- 18th September 1913.

Vendor and Purchaser—Purchaser's title impeached in suit to which vendor is party—Vendor making admission, resulting in decision adverse to purchaser—Purchaser allowing suit to go against him—Suit by purchaser for refund of purchase money—Vendor is liable to refund the same.

Where a purchaser's title is impeached in a suit to which the vendor is a party and the latter makes an admission which renders a decision adverse to the purchaser inevitable, and the purchaser thereupon allows the suit to go against him, the vendor cannot subsequently, in a suit by the purchaser to recover the purchase-money from him, turn round and say that the abandonment of the defence by the purchaser which was brought about by his own admission was improvident. In such a case there is a failure of the consideration for the contract of sale without any fault on the part of the purchaser, and the vendor is therefore liable to refund the purchase-money. [P 503 C 2]

S. N. Dutt for *Ram Lal Dutt*—for Appellant.

P. K. Sen and *Haribhusan Mukherji*—for Respondent.

Roe, J.—The facts of this case being somewhat peculiar need to be set forth in full. A holding of about 16 bighas belonged to one Karu Ram who died leaving a widow and a mother named Sampat; he had also a kept woman of the name of Bechni. The widow, as is common in the caste to which Karu Ram belonged, married again and left the village, with the result that her title to the property as Karu's heir was extinguished. That title passed to Sampat the mother. Sampat had a daughter who was married to the defendant Bhattu

Ram. Bhattu Ram purchased the property in dispute from Sampat for Rupees 800. He sold it to the plaintiff for Rs. 935, and delivered possession of the property to him. Bechni was brought forward three years later and instituted a suit for recovery of the property on the allegation that she was lawfully married to Karu. In his written statement Bhattu Ram urged that this was entirely untrue and that she was a kept woman. When the parties actually came to trial Bhattu Ram, as the judgment of the learned Subordinate Judge shows, admitted in Court that Bechni was the lawfully married wife of Karu. On this admission being made, the plaintiff felt that it was impossible to go on with the case. He therefore allowed a decree to be passed against him for restoration of the property to Bechni. The plaintiff then sued Bhattu Ram to recover the amount of the purchase money. The learned Munsif decided that this being a case in which the doctrine of caveat emptor applied, the plaintiff should have been more careful in his investigation as to title. He also held that the suit was barred by limitation, inasmuch as the date on which the defendant's liability would run would be the date of the passing of the consideration. In appeal the learned Subordinate Judge held that though the decree in the title suit was not res judicata, it was certainly a weighty piece of evidence against the defendant and

"besides it served no useful purpose to adduce any evidence to prove that Mt. Bechni was not the widow of Karu Ram"

He held further that as the consideration had failed, the contract was void and that the plaintiff was entitled to recover all his money, provided that he brought a suit within three years from the date of the failure of the consideration, which might be said to be the date of the decree by which he was ousted from possession. The case came on appeal before a Divisional Bench of this Court and an order was made that there being no finding of fact as to Bechni's title, it was necessary to remand the case for an investigation of that title. A finding of fact has been returned to this Court that Bechni was in fact a concubine and not the wife of Karu Ram and that the suit by which the plaintiff lost possession was wrongly decided. On this finding of fact it is contended on behalf of the defendant appellant that he had done all that was necessary for him to do. He had put the plaintiff into possession of the property, and that if thereafter the plaintiff had been so foolish as to lose that possession by allowing a suit to be decreed against him on an absolutely false claim that was no business of the defendant, and the plaintiff could not recover.

This is not the point of view from which the case should be regarded. There has been a failure of the consideration for the contract and that without any fault on the part of the purchaser. The only possible defence to a claim for damages for this failure of consideration would be that the vender had no notice of the claim of Bechni or of the intention to admit it, and could have, had he known of it, made better terms than the purchaser. The position of the vendor becomes impossible if, with notice of the adverse claim, he declines or fails to remove or contest it himself. As Mookerjee, J., said in *Digambar Das* v. *Nishibala Debi* (1), the case before us is really much stronger than any to be found in the books. Here the vendor was a party to the suit and not only jointly acquiesced in the adverse decision by the original Court but even made in the original Cuurt the admission which rendered that decision inevitable. He cannot successfully now turn round and say that the abandonment of the defence, which took place in his presence in the original Court, was improvident. I was a party to the remand of the case for a finding on the issue whether the title set up by Bechni was a good title, but on further consideration am of opinion that the suit might have been decreed on the pleadings without the taking of any evidence at all. I would dismiss the appeal with costs.

Imam, J.—I am in complete agreement with the decision given by my learned brother. The defendant-appellant conveyed the property to the plaintiff-respondent with assurances of good title. He represented himself to be the exclusive owner and declared it to be pak saf, which is a common expression in vernacular conveyancing meaning the title to be flawless. His change of front in Bechni's suit clearly shows his collusion with her. Instead of defending the title which he had conveyed to his ven-

(1) [1910] 8 I. C. 91.

dee, he did all that was in his power to destroy it. It will be against the equities of the case to allow him to take advantage of his own fraud. In the circumstances this appeal should be dismissed with costs.

V.S./R K. *Appeal dismissed.*

A. I. R. 1918 Patna 504

ROE AND JWALA PRASAD, JJ.

Lachman Singh and *others*—Defendants—Appellants.

v.

Diljan Ali and *others*—Plaintiffs—Respondents.

Second Appeal No. 102 of 1917, Decided on 7th January 1918, from the decision of Dist. Judge, Saran.

(a) Limitation Act (1908), Art. 47—Order under Criminal P. C., S. 145—Period of limitation runs from date of final order by Magistrate and not from date of refusal by High Court to interfere—Criminal P. C. (1898), S. 145.

Under Art 47, Limitation Act the period of limitation begins to run from the date of the final order of the Magistrate under S, 145, Criminal P. C. and not from the date of the refusal of the High Court to interfere with the order. [P 505 C 1]

(b) Criminal P. C. (1898), S. 145—Proceeding under S. 145 in respect of right in land belonging to community—One member representing entire community—All members are bound by order passed.

Where in a proceeding under S. 145, in respect of certain rights in land belonging to a community one member of the community is selected to represent the entire community, all the members of the community are bound by the order passed in the proceeding. [P 504 C 2]

Kulwant Sahay and *Nirsu Narayan Sinna*—for Appellants.

Khurshed Hasnain—for Respondents.

Judgment.—The plaintiffs in this case claim to represent the whole body of Mahomedans resident in Sonepur village. The defendants are landlords of the village. The dispute between the parties relates to the right claimed by the plaintiffs to collect rents from shopkeepers who during the Sonepur Mela erect their stalls on a plot of land which the plaintiffs claim to be the Mahomedan burial ground of the village. The Courts below have found on the facts that this right to collect rents from this land vests in the plaintiffs and have therefore given them a decree. In second appeal to this Court it is urged that the suit is barred by limitation, for the reason that it was instituted more than three years after an order under S. 145, Criminal P. C. by which the plaintiffs are bound. The first objection taken to this argument is that it was never placed in this form before the Courts below. The question of limitation was there fought on the basis of twelve years' adverse possession. This appears to us to be a correct statement of the position in the lower Court, but the parties in the Courts below seem to have imagined that as all the parties to the suit were not parties to the S. 145 case, the provisions of Art. 47, Limitation Act might be ignored. We should have declined to allow the case to be argued upon this basis if indeed there was any question of fact to be investigated, requiring a fresh decision apon an issue not pressed before the Courts below, but on the face of the plaint it appears to us that the plaintiffs held themselves bound by the proceedings under S. 145, for in para 14 of the plaint they say that the cause of action arose on 20th April 1910, the date of the High Court decision. It is clear upon a perusal of the decisions of the Magistrate and of the High Court that the case was a case as between factions.

The judgments in both Courts speak not of the actual party named as the second party of those proceedings, but of the Mahomedans as being the claimants to the property. It is not necessary to investigate any new facts upon the argument now adduced before us. The documents on the record afford sufficient material for a consideration whether by the order under S. 145 the plaintiffs as a body were bound. The second party to this S. 145 case was Diljan Ali. He was so named because he had been selected from among the Mahomedans themselves to be their manager. In paras 5 and 6 of the plaint it is stated that it was the duty of Diljan Ali to make the necessary settlements for the erection of shops upon the land in dispute and that it was Diljan Ali who was interfered with in the making of these settlements. Upon these allegations of fact it would clearly have been open to the Court under O. 1, R. 8, Civil P. C. to have permitted Diljan Ali to appear as the sole plaintiff in the case. Diljan Ali was accepted in the proceedings under S. 145 as a sufficient representative of the whole Mahomedan commuuity. The fact that he has not in the present proceedings been accepted as the representative of that community for the purpose of enforcing

its rights in the civil Court does not alter the fact that as a community the plaintiffs are bound by the proceedings under S. 145.

It is further urged by the learned vakil for the respondents that the three years' rule of limitation would run not from the order itself but from the date upon which the High Court refused to interfere with the order. For the contrary proposition the case of *Jagannath Marwari* v. *Ondal Coal Co. Ltd.* (1) is direct authority. The order of the Magistrate is itself the final order. It is not subject to appeal. It can only be set aside under the power of superintendence vested in the High Court if made without jurisdiction. The decision of the High Court confirming the jurisdiction of the Court passing the order cannot affect the date from which it came into force. We are of opinion that the suit was barred by Art. 47 of Sch. 1 to the Limitation Act. The decrees of the Court below are discharged, The appeal is decreed with costs. The suit is dismissed with costs in all the Courts below.

V.S./R.K. *Suit dismissed.*

(1) [1908] 12 C. W. N. 840.

A. I. R. 1918 Patna 505 (1)

ROE AND JWALA PRASAD, JJ.

Raghunandan Singh and *another*—Defendants—Appellants.

v.

Jadunandan Singh and *others*—Plaintiffs—Respondents.

Misc. Civil Appeal No. 202 of 1917. Decided on 16th January 1918, from an order of Addl. Sub. Judge, Muzafferpore, D/ 30th May 1917.

Civil P. C. (1908), S. 151 and O. 41, Rr. 23 and 25—Appellate Court can also remand case for trial under S. 151—No appeal lies against suchorder—Power should be exercised withcaution.

An appellate Court has apart from Rr. 23 and 25, O. 41, inherent power under S. 151, of the Code to remand a case for re-trial. No appeal lies against such an order. This power of remand should however be exercised with the very greatest caution. [P 505 C 2]

Lakshmi Narain Singh and *L. K. Jha*—for Appellants.

Rajendra Parsad—for Respondents.

Judgment.—In this case the appellants are aggrieved by an order in the following terms:

"Let the appeal be allowed and the judgment of the Court below be discharged. The suit be remanded to the Original Court for a fresh trial in view of the above remarks. Parties be allowed to call fresh avidence no order as to costs."

It is suggested by the learned vakil for the appellants that inasmuch as this order was clearly not made under O. 41, R. 25, it must be held to have been made under O. 41, R. 23, and that therefore an appeal lies against it. This argument in our view seems to lose sight of the decision in the case of *Abdul Karim Abu Ahmed Khan* v. *Allahabad Bank Ltd.* (1) by a Full Bench of the Calcutta High Court consisting of Sir Lancelot Sanderson, Sir John Woodroffe, Sir Asutosh Mookerjee, Sir Charles Chitty and Teunon, J. We do not propose to go outside the terms of the decision in that case for it is clear to us that there may occasionally arise a case in which the provisions of S. 151 must be invoked to secure a proper decision of an appeal. The order in the case before us was clearly not an order under O. 41, R. 23. It must be regarded as an order made under the inherent power of the Court conferred by S. 151 to remand a case for re trial. Against such an order no appeal would lie. The appeal must therefore be dismissed with costs. We wish to add however that it is explicitly stated in Ghaznavi's case that this power of remand should be exercised with the very greatest caution. With this view we are in entire agreement. Had it been shown that there was reason to believe that the Court had remanded the case for retrial to avoid deciding a complicated point or reduce a heavy pending file we should have felt bound to interfere under S. 115 of the Code. This has not been suggested in the argument and there is nothing in the learned Subordinate Judge's judgment in this case to show that he was not genuinely of opinion that he was required for the ends of justice to adopt the course taken.

V.S./R.K. *Appeal dismissed.*

(1) [1917] 44 Cal. 929=41 I. C. 598.

A. I. R. 1918 Patna 505 (2)

MULLICK AND THORNHILL, JJ.

Sheo Saran Ram and *others*—Judgment-debtors—Appellants.

v.

Basudeo Prasad Sahu and *others*—Decree-holders—Respondents.

Appeal No. 297 of 1917, Decided on 24th July 1918, from appellate order of Dist. Judge, Shahabad.

Presidency Towns Insolvency Act (1909), Ss. 17 and 25—Insolvency proceedings do

not bar execution of decree in absence of protection order under S. 25—Limitation continues to run during pendeccy of proceeding — Time cannot be excluded—Limitation Act (1908), S. 15 and Art. 182.

The pendency of an insolvency proceeding under the Presidency Towns Insolvency Act does not of itself, in the absence of a protection order under S. 25 of the Act, bar the remedy of a decree-holder to execute his decree by arrest of the judgment-debtor. Limitation for execution of a decree therefore continues to run against a decree-holder during the pendency of an insolvency proceeding and he is not entitled to exclude the period during which the insolvency proceeding has been pending from the period allowed for execution of the decree. [P 507 C 1]

A dceree-holder arrested his judgment-debtor in execution of his decree. On 19th August 1911, however, the judgment-debtor was released on the production of an adjudication order made under the Presidency Towns Insolvency Act. No further action was taken by the decree-holder and the execution proceedings dropped. In January 1916 the adjudication was annulled. The decree-holder then applied for execution.

Held: that in the absence of a proteotion order under S. 25 the decree-holder was at liberty to execute his decree by arresting the judgment-debtor, and that, therefore limitation continued to run against the decree-holder and the present application for execution was barred by time. [P 507 C 1]

Rajendra Prasad—for Appellants.

Parmeshwar Dayal and *Jadubans Sahai*—for Respondent.

Thornhill, J.— The facts presented to the Court are as follows: The respondents in execution of a money-decree had a judgment-debtor brought up under arrest in the Court of the 1st Subordinate Judge of Arrah. On the production of an adjudication order made in the High Court of Calcutta under the Presidency Towns Insolvency Act, he was released on 19th August 1911. Subsequently no further action was taken by the decree-holders and the execution proceedings dropped. In January 1916, the adjudication was annulled. The decree-holders then applied for execution, when it was held that the application for execution was not time-barred. On appeal to the District Judge of Shahabad this order was upheld, the District Judge holding that although the decree-holders could have taken steps in the insolvency proceedings towards realizing their decree at the same time they were prevented from executing the decree against the judgment-debtor, and therefore the time during which the judgment-debtor was an undischarged insolvent must be excluded in calculating the time allowed for execution.

The question is, can this period be excluded in calculating the three years referred to in Art. 182 (5), Limitation Act. The decree holders suffered from no disability, and therefore can have no extension of time under S. 6. S. 9, provides that when once time has begun to run no subsequent disability or inability to sue stops it.

As pointed out in Mitra's Law of Limitation, "Disability is want of a legal qualification to act. Inability is the want of physical powers to act." According to Birdwood, J., in *Hanmantram Sadhuram Pity* v. *Arthur Bawles* (1), the inability referred to in S. 9 is a personal inability affecting the plaintiff himself and having reference to his condition, or state, or position, and not to the circumstances of the person against whom he is entitled to institute a suit. S. 15 of the Act of 1877 gave relief in computing the period of limitation prescribed for any suit the institution of which had been stayed by injunction or order, but this section was held not to apply to applications for execution even where the execution had been stayed by an injunction, *Rajarathnam* v. *Shevalayammal* (2), but the difficulty was got over by considering the decree-holder's application for execution, after the removal of the injunction, as only an application for the continuation or revival of the previous application which had been interrupted owing to a cause for which the decree-holder was not responsible, *Lakhmi Chand* v. *Ballam Das* (3). In *Ashrafuddin Ahmed* v. *Bepin Behari Mullick* (4), after the decree-holder had applied for execution of the decree, the judgment-debtor represented that, as all his property had vested in a Receiver proceedings in execution could not be carried on, and thereupon the Court released from attachment the salary of the judgment-debtor which had been attached at the instance of the decree-holders. After the discharge of the Receiver the decree-holders applied to the Court to re-attach the salary of the judgment-debtor and to allow them to proceed with the execution case originally instituted by them from the point which it had reached and at which it was stopped by

(1) [1884] 8 Bom. 561.
(2) [1888] 11 Mad. 103.
(3) [1895] 17 All. 425.
(4) [1903] 30 Cal. 407.

the order of the Court. It was held that the application was no fresh application for execution but a mere continuation of the previous application, and the period of limitation applicable to it was that prescribed by Art. 178, Sch. 2, Limitation Act of 1877.

In consequence of conflict of decisions the law was amended and S. 15 (1) of Act 9 of 1908 enacted that in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded. This Act came into operation on 1st January 1909, and the Presidency Towns Insolvency Act, one year later. The latter Act, S. 25, expressly provides that any insolvent who shall have submitted his schedule as aforesaid may apply to the Court for protection, and the Court may, on such application, make an order for the protection of the insolvent from arrest or detention.

There is also a provision in that section that no such order shall operate to prejudice the right of any creditor in the event of such order being revoked or the adjudication annulled. It therefore appears clear in the present case that the execution taken out by the decree-holders under which they had the judgment-debtor arrested was not interrupted by the insolvency proceedings, as no protection order was made. He was simply released when it was known that he had become an insolvent, presumably on the ground that the decree-holders thought it useless to proceed further. S. 17, Presidency Towns Insolvency Act, provides that during the pendency of the insolvency proceedings a creditor shall have no remedy against the property of the insolvent save with leave of the Court, but it does not exclude the arrest of the person. It would therefore appear that the decree-holders' execution arresting the judgment-debtor in 1911 was neither stayed by any injunction or order, nor was it interfered with by the insolvency proceedings, and therefore the present application cannot be taken as a continuation or revival of the former proceedings, even on the arguments advanced in *Ashrafuddin Ahmed* v. *Bepin Behari Mullick* (4), which was a decision prior to the limitation Act, of 1908. Having regard therefore to the above, and to the express provisions of S. 15 Act 9, of 1908, coupled with the fact that the Insolvency Court had power to stay any suit or other proceeding pending against the insolvent in any other Court (S. 18), but made no such order, we think the decree-holders' application for execution is time barred.

Mullick, J.—I agree.

V.S./R.K. *Appeal dismissed.*

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* A. I. R. 1918 Patna 507
Special Bench

CHAPMAN, ATKINSON AND IMAM, JJ.

Charu Chandra Mitra—Defendant—Appellant.

v.

Sambhu Nath Pandey and *others*—Plaintiffs—Respondents.

Appeals Nos. 230, 292 and 293 of 1915, Decided on 14th February 1918, from original decree of Sub-Judge, Purulia, D/- 23rd February 1915.

*** (a) Civil P. C. (1908), O. 23, R. 3—Compromise affecting property outside scope of suit can be enforced—Entire compromise must be recorded.**

Per *Atkinson, J.*—Under O. 23, R. 3, Civil P. C., if a compromise deals with matters directly within the scope of the suit the Court must accept the compromise and record it and having so accepted and recorded it, it must prepare and draw up a decree in accordance with it so that the same may be executed in the due and ordinary course of procedure. If the compromise contains matters outside the scope of the suit the Court must make an order recording the entire compromise and when it has done this it must draw up a decree giving the parties the right to execute the decree in respect of the matters which properly fall within the scope of the action leaving it to the parties to enforce by whatever means they like that portion of the compromise which refers to the matters outside the scope of the suit. The entire compromise must be recorded and be embodied by an order in the record of the suit or proceeding. Each case must depend upon its own facts as to whether or not the compromise does in fact include within its terms matters outside the scope of the original suit. [P 512 C 1]

(b) Civil P. C. (1908), O. 23, R. 3—Compromise dealing with matters outside scope of suit—Compromise recorded on petition duly filed is exempt from registration and is admissible in evidence in subsequent suit—Registration Act (1908), S. 17 (2).

Per *Atkinson, J.*—Where a compromise deals with matters which are within the scope of the suit and also with matters outside the scope of the suit in which the compromise is effected, and the compromise is recorded on a petition duly filed it is evidence in a judicial proceeding and therefore admissible in evidence in a

subsequent suit and is exempt from liability to registration. [P 517 C 2]

Per *Chapman, J*,—Where a suit is properly adjusted, but the adjustment consists partly of an agreement relating to matters outside the scope of the suit if the entire compromise is laid before the Court and the Court is invited in consequence to dispose of the suit and the Court does dispose of the suit accordingly then the agreement is exempt from registration under the Registration Act, although the decree deals only with the subject-matter of the suit and does not deal with the portion of the compromise which lies outside the suit. It is immaterial whether the Court notices that a portion of the compromise is outside the subject-matter of the suit or not. The proeeedings however must be proper and not fictitious or collusive and must be regular and in accordance with law. [P 519 C 2; P 520 C 1]

In order to bring a case within sub-S, (2), Cl. (vi), S. 17, Registration Act, it is permissible to look not only at the order of the Court but also at the pleadings which resulted in that order. [P 519 C 2; P 520 C 1]

(c) Civil P. C. (1908), O. 32. R. 7—Compromise not sanctioned by Court on behalf of minors is not binding—Sanction must be expressly recorded.

By virtue of the provisions of O. 32, R. 7, a compromise, even though it is accepted by the Court is not binding on minor parties unless the Court expressly records its sanction to the compromise on behalf of the minors as a compromise beneficial to their interests. [P 519 C 2]

*** (d) Civil P. C. (1908), O. 23 R. 3—Compromise—Submission of compromise petition filled—Suit disposed of—Compromise varying terms of lease held admissible without registration—Document varying terms of lease is not a creation of lease—Transfer of Property Act (4 of 1882), Ss. 105, 107—Registration Act (1908), S. 17.**

Plaintiffs leased a certain area of coal land to the defendant on 19th April 1895. The lease provided for the payment of a royalty and commission at certain rates. One of the clauses of the lease enabled the lessee to absolve himself from liability under the lease in the event of the mine proving unworkable either through accident or on account of a fall in the market price of coal. In 1901 the plaintiffs sued the defendant for royalty and commission on the basis of the lease. The defendant pleaded that he was not liable as the mine had ceased to be workable. The parties however agreed to a compromise by which the rates of royalty and commission payable by the lessee were reduced, but in all other respects the lease of 1895 continued in force. On the submission of the compromise petition to the Court it passed the following order: "Parties filed a solenama. Suit decreed in terms of the solenama." In the judgment the Court remarked: "The terms of the lease have also been changed; but this is no part of the subject-matter of the suit." In a subsequent suit by the plaintiffs to recover royalty and commission at the rates stipulated in the lease of 1895:

Held: (1) that although in the suit of 1901 the Court did not expressly give effect to the entire compromise as an executable decree nevertheless it did record the compromise and by reference necessarily and impliedly incorporated and made it part of its decree. [P 513 C 1]

(2) that the compromise did not by itself create a lease, and that therefore by virtue of S. 17 (2), (vi) it was admissible in evidence without registration. [P 516 C 2]

Lalmohan Ganguly and *Naresh Chandra Sinha*—for Appellant.

Pugh and *Sishir Kumar Mitra*—for Respondents.

Atkinson, J.—By a lease dated 19th April 1895 granted by the Pandeys as lessors in favour of Nagendra Chandra Mitter as lessee, 175 bighas of coal land situate in Mouza Tetulia were leased for a term of years. The lease provided for the payment of a royalty and commission under the terms embodied in paras. 10 and 11 of the lease. Substantially the terms are as follows: That a minimum royalty of Rs. 1,750 annually shall be paid by the lessee; that the rate of royalty was to be assesssed upon the basis of 6 annas per ton over and above a certain quantity of coal taken from the mine in eaeh year and that in default the minimum royalty was to be measured at Rs. 1,750 and payable in four equal kists. Cl. 14 of the lease also contains an important provision enabling the lessee to absolve himself from liability and commission payable in the event of the mine proving unworkable either through accident or on account of a fall in the market price of coal. This provision expressly provides that if the conditions specified arise then the lessee shall not be liable to pay any royalty or commission or even the minimum royalty or commission fixed by the lease for the period during which the mine should be closed. The present three suits, namely, First Appeal No. 230 of 1915, First Appeal No 292 of 1915 and First Appeal No 293 of 1915, are brought by the successors-in-title of the original lessors claiming to recover, each according to their respective shares, an aliquot part of the royalty and commission payable under the lease of 19th April 1895 Many of the original lessors are dead and they have been substituted on the record by their heirs. Likewise the original lessee is also dead, and the defendant is his successor-in-title under the lease of 1895. There is an important provision contained in Cl. 24 of the lease, which stipulates that the royalty and commission payable shall be payable to each of the cosharer lessors according to their respective shares; and that in respect of the share of each cosharer he

shall be entitled to recover the same by suit from the lessee; and the lessee also covenants with the lessors that he will pay to each of the cosharers according to their shares specified in the lease the royalty and commission due from time to time. Therefore the rent payable under the lease of 19th April 1895 was, by common consent of the contracting parties, partitioned between them according to their respective interests.

The present suit was instituted on 13th July 1913 to recover royalty and commission for the years 1314 to 1319. The action in form was in the nature of an action for rent. The written statement filed by the defendant states that he is not liable to pay the rent sued for inasmuch as by virtue of a compromise made and entered into in a former suit, the rent or royalty payable under the lease of 1895 was, by agreement, reduced in accordance with the terms specified in that compromise. I shall consider in detail the terms of the compromise at a later stage. One issue in this case involves the determination of the validity of the compromise which was effected in Suit No. 8 of 1901 instituted by the lessors on the one hand against the original lessee on the other, parties to the lease of 19th April 1895. The suit in 1901 was brought on behalf of all the existing cosharers as a body; four of whom were minors at the time that the suit was instituted; and they were properly brought upon the record by their guardians. The suit instituted in 1901 sought to recover rent on the basis of the terms provided by the lease of 1895. The plaint in that suit was filed in March 1901. The defendant subsequently filed his written statement, and in that written statement the defendant pleaded that under the terms of the lease he was not liable for the rent then sued for, inasmuch as the mine had ceased to be workable within the meaning of Cl. 4 of the lease. The defendant apparently suggested in his written statement that he was willing that the plaintiffs should accept a surrender of the lease, take over the property and discharge him, the defendant, from all further liability under the original lease.

The suit did not proceed to a final hearing, but with this defence upon the record, the parties agreed to a compromise of the disputes then pending between them on the basis suggested by the defendant; that he would be willing to retain the colliery as lessee thereof provided the commission and the royalty payable under the original lease were reduced. Thereupon the lessors on the one hand and the lessee on the other accepted this position and a compromise was accordingly drafted embodying the details upon which Suit No. 8 of 1901 was compromised. The compromise itself bears date the 10th March 1902; and was subsequently filed as a part of the record in the proceedings then pending in that suit before the Court and was recorded by the learned Judge. The rent sued for in Suit No 8 of 1901 was for the rent due up to Chaitra 1308. Immediate before that suit was instituted, the plaintiffs and their representatives as lessors, having got into certain financial difficulties, granted to Harshamal Marwari a perpetual lease of Mouza Tetulia under a pattah dated 15th August 1900. That lease has since been surrendered but in referring to it, it is only necessary to state that the suit of 1901 was conversant with the arrears of rent due prior to the granting of this perpetual lease of 15th August 1900.

The compromise entered into in Suit No. 8 of 1901 is set out fully in Ex. 1 at p. 41 of the paper-book. A reference for the purposes of this case need only be made to para. 2 thereof, whereby the terms of the pattah and kabuliyat that existed and controlled the rights of the plaintiffs and defendants respectively were altered in the following manner:

By clause (ka) it was stipulated that the defendant is at present bound to pay Rs. 1,750 as minimum royalty. In place of that from 1309 the defendant shall have to pay to the plaintiffs annually Rs. 1,300 as minium royalty, and by Cl. (ga) it was provided that the rate of commission was changed from six annas to five annas; and in the event of over 7,000 tons of coal being raised from the mine within every six months that then the commission was to be reduced from the sum five annas to four annas.

The amount of rent claimed in Suit No. 8 of 1901 (when I speak of rent I for brevity refer to royalty and commission) was Rs. 8,000 odd, and the compromise provided that in respect of that claim the plaintiffs would accept, in full payment on behalf of the entire body of cosharers, a sum of Rs. 2,500 and that

the original pattah was to be altered and varied in one single respect only with regard to the quantum of the royalty and the quantum of the commission that should henceforth be payable; and in all other respects the original lease was to subsist and be the governing contract between the parties. Cl. 3 of the compromise provided that if the parties desired that there should be a formal agreement embodying the terms agreed on, then a supplementary pattah or kabuliyat would be executed on or before the month of Baisakh 1309. No supplemental agreement or lease was in fact executed, but it would appear from the subsequent history of the case that the compromise effected was acted upon by both the parties to the litigation in which it was made. Perhaps I had better at this stage dispose of one contention submitted by Mr. Pugh in the course of his very clear and forcible argument; because it lies on the threshold of the case. It was the last argument that he addressed to us, namely, that this compromise Ex. 1 was not a bona fide compromise, but was a compromise procured fraudulently by one of the cosharer plaintiffs behind the backs of the other cosharers and that these cosharers, other than Girish Pandya and Narhari Pandya, were not really or effectively bound by this compromise at all. The learned Judge in the course of his judgment, without finding expressly that the compromise was not binding on all the plaintiffs, seems to suggest that the compromise was lacking in bona fides. With regard to the cosharers other than the minors Girish and Narhari, in our view, on the evidence, this compromise was a fair and honest compromise arrived at between the parties to settle and adjust the differences then prevailing between them and which formed the subject-matter of the then pending litigation.

We have had our attention directed to the evidence adduced by the plaintiffs and by the defendants. The evidence given by the plaintiffs seems to us artificial, unreliable and untrue, while, on the other hand, the evidence given by the defendant's witnesses seems more natural and more probable; and certainly, in my judgment, bears upon its face the appearance of candour and of truth. Therefore, so far as it is open to us as a question of fact in these appeals to find, we do find as a fact that this compromise was an honest compromise fairly and deliberately made between the parties to it and binding upon them accordingly. As I have said, four of the parties to that compromise were minors at the time when it was entered into, namely, Girish, Narhari, Harihar, Pandya and Khageswar. It is contended very forcibly by Mr Pugh that by virtue of the provisions of the O. 32, R. 7, Civil P. C. the compromise, even though it was accepted by the Court, is not binding on the minors, inasmuch as the Court never expressly recorded its sanction to the compromise on behalf of the minors as a compromise beneficial to the interests of the minors; and that thus as against all the parties to the compromise the same is voidable. This argument has been supported by Mr. Pugh by reference to two cases, namely, one reported as *Virupakshappa* v. *Shidappa* (1) and another as *Lakshmana Chetti* v. *Chinnathambi Chetti* (2). Mr. Pugh contends that the rent payable under the lease is indivisible; and that being indivisible the whole contract must go and that it cannot be said to be void in part and not in its entirety. With that submission we do not agree because the parties themselves, by virtue of the contract made in April 1895, agreed that the rent was to be apportioned as between the respective cosharers and that each cosharer was to be entitled to recover his apportioned and separate share. None of the adult cosharers who were parties to the compromise of 1901 have ever sought to avoid it; and it is too late to do so now, and by that compromise they are conclusively bound.

With regard to the minors Girish and Narhari Pandya we are of opinion that they are not bound by terms of this compromise. The Court did not give its sanction to the compromise on their behalf, and therefore to this extent qua these minors only, the compromise lacks the necessary legal essential to make it binding upon them. Thus we must hold that in this litigation the minors Girish and Narhari Pandya are not bound by the terms of the compromise. Different considerations apply with regard to the former minors Harihar Prasad and Khageswar Lal. Girish has since attained

(1) [1902] 26 Bom. 109.
(2) [1901] 24 Mad. 326.

his majority but it must be borne in mind that in the year 1906 he was an adult and in the litigation that was pending in that year, viz., Suit No, 39 of 1906, Girish filed a written statement and expressly challenged the validity of the compromise, contending that as a minor at the time it was made it was not binding on him. Suit No. 39 of 1906 was subsequently compromised, but in no sense could it be held, having regard to the written statement filed by Girish, that he ratified or adopted the compromise effected in Suit No. 8 of 1901. In the litigation that was pending, viz., Suit No. 39 of 1906, between practically the same parties with reference to the same subject matter as is now in issue before us, Khageswar, a minor when the compromise was made, was added as an adult party to that suit and he never in any way sought to impeach the validity of the former compromise entered into in the antecedent litigation in 1901. Therefore we must hold that in this case he subsequently ratified and adopted the compromise that was made and entered into on 10th March 1902, and that accordingly he is bound thereby now. Harihar Prasad stands on a different footing.

He prior to Suit No. 39 of 1906 disposed of his entire interest in the leasehold property as follows: One-third of his share was purchased by Shambhu Nath, one of the plaintiffs in Appeal No. 230, and another one-third share was purchased by Jagneswar, one of the plaintiffs in Appeal No. 292; and the remaining one-third of his share was purchased by Khageswar, one of the plaintiffs in Appeal No. 293 of 1915. These persons, who purchased the interest of Harihar, were all then adults and being themselves bound in respect of their own individual shares are also bound, in our opinion, in respect of whatever share or shares they may have acquired by purchase of the property that formerly belonged to the minor Harihar at the time when the compromise was executed. Therefore in disposing of this question of infancy and minority it is sufficient for us to say that we yield to the argument of Mr. Pugh so far as the two plaintiffs in Appeal No. 230 of 1915, namely, Girish and Narhari, are concerned. That disposes of two important matters raised in the course of the argument for our determination.

As I have indicated, the main contention put forward by the plaintiffs in this suit is that the compromise that was executed on 10th March 1902 was not admissible in evidence, and could not be relied upon by the defendant in exoneration of his liability for the payment of the rent contracted to be paid under the lease of 1895. Therefore it becomes necessary to trace the subsequent history of this compromise as between the parties to this suit. On 26th February 1902 the parties in Suit No. 8 of 1901 appeared before the learned Subordinate Judge of Manbhum and applied for an adjournment of the trial of that suit, on the ground that the parties were desirous of settling the disputes that existed between them as disclosed by the pleadings and intimating that a petition of compromise would be filed immediately. Accordingly time was given and on 18th March 1902 a compromise petition was submitted to the Court duly executed by all the parties to the suit and the learned Judge in the order sheet recorded the following order :

"Parties filed a solenama. Suit decreed in terms of the solenama."

Now on the same day after the petition of compromise had been filed and recorded by the learned Judge the learned Judge gave judgment in the suit and in his judgment, which will be found at p. 106 of the paper book, he distinctly embodies by reference the entire compromise, The judgment delivered was very short and very concise. It is as follows:

"The plaintiffs and defendant have compromised and filed a solenama. It appears from the solenama that the plaintiffs received Rs. 2,000 out of the sum of Rs. 2,500 for minimum royalty. The terms of the lease have also been changed ; but this is no part of the subject-matter of the suit. The suit is decreed for Rs. 500 in terms of the solenama."

Consequential upon this judgment the learned Judge passed a decree which will be found on p. 51 of the paper book. Much importance must be attached to the form and phraseology of that decree. The learnd Judge in the declaratory part of the decree expressly provides as follows :

"It is ordered that the suit be decreed in terms of the compromise filed by both parties ; and further that within three weeks from this day the defendant shall pay Rs. 500 only to the plaintiffs

If the money be not paid to the plaintiffs within that time then the said money will be realized by executing the decree against the defendant."

It is contended that this compromise in terms dealt with matters which were within the scope of the suit and also with matters which were outside the scope of the suit, having regard to the cause of action pleaded in the plaint. The learned Judge's duty with regard to the acceptance of the compromise and his obligations relative thereto are provided for by what is now O 23, R. 3, Civil P. C., formerly S. 375, Civil P. C. of 1882. Except for some verbal alterations the old section and the present rule are substantially the same. In the present rule the words "shall order the agreement to be recorded" have been substituted for the words "shall record." This really is the substantial difference which seems to me to be of any importance so far as this case is concerned. What is the obligation which is cast upon a Subordinate Judge or upon any Subordinate Judicial Officer in dealing with a compromise such as we have to consider in this suit ?

If the compromise deals with matters directly within the scope of the suit, then his duty is clear ; he must accept the compromise and record it and having so accepted and recorded it he must prepare and draw up a decree in accordance with it so that the same may be executed in the due and ordinary course of procedure. If the compromise contains matters outside the scope of the suit what then is the obligation cast upon the learned Subordinate Judicial Officer ? It appears to us that such officer must make an order recording the entire compromise and when he has done this he must draw up a decree giving the parties the right to execute the decree in respect of the matters which properly fall within the scope of the action; leaving it to the parties to enforce by whatever means they like that portion of the compromise which refers to the matters outside the scope of the suit. The entire compromise must be recorded and be embodied by an order in the record of the suit or proceeding. Each case must depend upon its own facts as to whether or not the compromise does in fact include within its terms matters outside the scope of the original suit. The learned Judges in a case reported as *Joti Kuruvetappa* v. *Izari Sirusappa* (3), in construing this section, say :

"that the language of the section is wide and general and does not preclude parties from settling their disputes on such lawful terms as they might agree to without being restricted to such relief as one only of parties had chosen to claim in the plaint."

It is necessary for us to consider whether the compromise that was arrived at in Suit No. 8 of 1901 did in fact include within its terms matters outside the scope of the suit ; or to use the words in S. 375 itself matters which did not relate to the suit. I have indicated as clearly as I can the issues which were raised for determination on the pleadings in Suit No. 8 of 1901 and I have stated already what plea was taken by way of defence in exoneration of the defendant's liability for rent under the lease of 1895, and under the provisions of Cl. 14, thereof. And it would appear to us that the compromise was really an adjustment of the rights and differences in respect of all matters in dispute between them, whether as framed in the plaint or set up by way of defence in the written statement; and that the compromise purported to be a final settlement and adjustment of these disputes on a fair and satisfactory basis acceptable to all and therefore in our opinion viewing the compromise of 10th March 1902 as a whole it was referable to the matters properly relating to the issues then in suit between the parties. The decision reported as *Joti Kuruvetappa* v. *Izari Sirusappa* (3) seems to us to apply and the words "relates to the suit" must receive a more extended meaning than has been contended for in the argument before us and they must be deemed in effect to mean referable to the claim put forward. Therefore in our opinion, Ex. I merely dealt with matters referable to and relating to the claim in Suit No. 8 of 1901 and as such the learned Judge might have given effect thereto by his decree passed in that suit. Mr. Pugh argued that though that may be the correct legal view now to adopt of the case yet the learned Judge whether rightly or wrongly did not think fit in 1901 to enforce that portion of the decree which was conversant with the alteration of the terms of the lease as to royalty and commission henceforth to be payable. I think myself the learned Judge might very easily

(3) [1907] 30 Mad. 478.

have drawn up a decree in the form of a declaration embodying the altered terms of the lease agreed upon by the compromise. He did not do so but merely ordered that the suit be decreed in terms of the compromise and that the decree be executed for Rs. 500, the balance due in respect of the money provided to be paid by the compromise. But did the learned Judge's failure to make provision by his decree for the carrying out of the compromise so far as the altered terms of the lease are concerned really affect the validity of the compromise as a binding agreement between the parties? It had been accepted by the Court on 18th March 1902 expressly by an order made on that date. The learned Judge in his judgment referred to the solenama in its entirety; his attention was directed to all its terms and he stated that in his opinion a portion of the compromise was outside the scope of the suit; but he drew up a decree expressly incorporating the entire compromise by reference. We think that although the learned Judge did not expressly give effect to the entire compromise as an executable decree nevertheless he did record the compromise and by reference necessarily and impliedly incorporated and made it part of his decree. The learned Judge did not expressly narrate in extenso in the decree the several terms of the compromise. When I say that the compromise was impliedly incorporated in the decree I mean to convey that it would be impossible to construe the decree of 26th March 1902 without reference to the compromise and that the compromise and the decree must necessarily be read and construed together and therefore I take it on the authorites which appear to me to be reasonably clear that such reference must of necessity incorporate in the decree the entire compromise upon which that decree is founded.

The argument then advanced is that under the provisions of S. 17, Registration Act (Act 16 of 1908), this compromise is not admissible in evidence because it is not registered under the provisions of S. 17, sub-S. (1) of that Act. The plaintiffs contend that the document creates an interest in immovable property of more than Rs. 100 in value and that therefore it must be registerad as such and that by reason of non-registration it is not admissible in evidence and cannot now be relied upon by the defendant as a party to it. Sub-Cl. (2), S. 17, expressly provides that Cls. (b) and (c), sub-S. (1), S. 17, shall not apply in certain cases; and in all twelve exceptions are stated to which the provisions of Cls. (b) and (c), sub-S. (1), S. 17, shall not apply; and by Cl. (vi), sub-S. (2), it is expressly enacted that nothing in Cls. (b) and (c), sub-S. (1), applies to any decree or order of a Court or any award. It is contended on behalf of the defendant that the compromise entered into in Suit No. 8 of 1901 was embodied in the decree of the Court or in its order, and that thus it has become a matter of record in that legal proceeding which was a properly constituted legal proceeding and therefore it is now admissible in evidence in support of the defendant's case. Mr. Pugh replies to that argument by saying

"no, it does not come within Cl. (b) at all of S. 17; it comes within the provision of Cl. (d) and that sub-S. (2) has no application to leases which requuire registration".

Under the provisions of sub-S. (1), sub-Cl. (d), S. 17, Registration Act, read in conjunction with S. 107, T. P. Act, it becomes necessary to consider whether the compromise dated 10th March 1902 was a lease; bearing in mind that what the compromise purported to effect was to alter only one single provision contained in that lease of 1895, namely, to regulate the amount of rent which was to be paid henceforth during the continuation of the lease. It did not deal with anything else and reading the compromise alone. as my learned brother pointed out to-day, could it be contended that, taking the compromise as it stands, it constituted a lease in all of the essential elements of a lease contemplated by S. 105, T.P. Act. To ask the question is to answer it; this compromise obviously per se could not constitute a lease. Mr. Pugh relies upon a Full Bench ruling reported as *Lalit Mohan Ghose* v. *Gopali Chauk Coal Co., Ltd.* (4) and he contends on the authority of that decision that the present case is analogous to that and that the two documents together constitute a lease and that therefore this compromise must be deemed a lease within the meaning of S. 107, T. P. Act and requires registration under S. 17, sub-S. (1), sub-S. (1), sub Cl. (d), Registration Act. It would appear to us that the facts of this

(4) [1912] 39 Cal. 284=12 I. C. 723.

case are wholly and entirely distinguishable from the case referred to in the Full Bench ruling reported as *Lalit Mohan Ghose* v. *Gopali Chauk Coal Co., Ltd.* (4). The learned Chief Justice in giving judgment in that case did say:

"that the document that was relied upon in that case varied the amount of rent to be paid under the then existing lease and provided the time and method for the payment of the altered rent, coupled with the consequences that would ensue in the event of default of payment of the rent as it fell due."

These considerations and facts, the learned Chief Justice considered, constituted the essential element of a lease and that the letter relied on in that case was in itself a lease and thus required registration. The elements which the learned Chief Justice in that case considered to be the essential elements, which constituted a lease, are entirely absent in the present case; but apart from this fact there are other reasons why we think that the case cited is also distinguishable having regard to the judgment reported as *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (5). In that case the learned Judges held that if a lease is registered as it must be according to law, that then its terms can only be varied by a registered document, and that the document that is contemplated by way of variation is a registered document of a non-testamentary character, such as is provided for by Cls. (b) and (c), sub-S. (1), S. 17, Registration Act, and that such a document does not necessarily constitute a lease within the meaning of the provisions of Cl. (d) of that sub-S. (1), S. 17. That view, I think, must be taken to have been approved of by their Lordships of the Privy Council in the case reported as *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (6). Their Lordships of the Privy Council say that they concur in the expression of opinion by the High Court of Calcutta when they say that the document was not admissible in evidence by reason of the want of registration and also by reason of the fact that there was no consideration to support the validity of the compromise.

I take these general words and observations to mean that their Lordships of the Privy Council approved of the decision of the High Court, so far as that decision decided that a registered lease must be varied by a registered document; but that such a document varying a written registered instrument is a non-testamentary document of the class provided for within the purview of Cl. (b), sub-S. (1), S. 17, Registration Act. That being the true legal position, this document, the compromise of 1901, if it required registration, would be registrable under Cl. (b), sub-S. (2), S. 17, Registration Act. Now the proviso contained in sub-S. (2), S. 17, expressly provides that nothing in Cls. (b) and (c) shall apply to any decree or order of a Court or any award. Thus the nett issue that remains to be decided is, was this compromise embodied in the decree or order of the Court? If it was, then it is conceded on the authorities cited that it is exempt from liability to registration, and without being registered would be admissible in evidence. This point has been twice considered and decided in two cases before their Lordships of the Privy Council; and these two decisions lay down the law which applies to cases such as the present one in this country.

There has been a great deal of conflict of judicial opinion concerning the true meaning and interpretation of these decisions; but to my mind their interpretation and conclusions are reasonably clear and free from any real ambiguity. The first case is reported as *Bindesri Naik* v. *Ganga Saran Sahu* (7). That was a case in which a suit was instituted for foreclosure of a property under a mortgage-deed coupled with a claim to recover interest due on the money advanced under the mortgage. The suit was much protracted and from time to time various applications by way of petitions were made to the Court for adjournment, the defendants in that case always admitting that a certain rate of interest was payable on the mortgage debt and practically admitting the substance of the plaintiffs' claim. Eventually that suit was disposed of. In order to enforce the claim for interest the plaintiffs in that suit, viz., the mortgagees, were obliged to bring a subsequent suit and in the subsequent suit they relied upon the petitions that were filed by the defendants admitting the rate of interest that was payable, and in fact that the interest was payable. It was contended in that suit that these

(5) [1910] 37 Cal. 293=4 I. C. 713.
(6) [1914] 41 Cal. 493=40 I. A. 223=21 I. C. 750 (P. C.)
(7) [1898] 20 All. 171=25 I. A. 9 (P. C.).

petitions were admissible in evidence for the purpose of establishing the liability of the defendants for the payment of the interest. The argument that was advanced before the Privy Council was "no, these petitions are not admissible in evidence because they are not registered." The learned Lords of the Privy Council came to the conclusion on the construction of the mortgage-deed itself that the interest was payable, but they went out of their way, having regard to the argument that had been addressed to them, to lay down that they conceived to be the law with regard to the necessity of registration. I quote from the passage in the judgment of Lord Watson of the Privy Council, which is reported as *Bindesri Naik* v. *Ganga Saran Sahu* (7), as follows:

"Although in the view which their Lordships take the question whether those proceedings can be founded on, without their having been registered in terms of the Act of 1877, does not necessarily arise in this appeal, they think it right to add that, having heard counsel fully upon the point, they are satisfied that the provisions of S. 17 the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court."

Now we seek to give that decision no wider interpretation than this, that in respect of documents of the nature of affidavits, petitions or pleadings which are filed in the course of a proper judicial proceeding that the same are admissible in evidence without the necessity of registration, and that they are protected from registration by virtue of the provisions contained in sub-S. (2), S. 17, Registration Act. I am aware that a more extended interpretation has been gigen to this decision by the learned Judges who decided the case reported as *Natesan Chetty* v. *Vengu Nachiar* (8). So wide is the interpretation which their Lordships attributed in that case to the decision of the Privy Council case reported as *Bindesri Naik* v. *Ganga Saran Sahu* (7), already cited, that practically it would apply so as to cover the case of the grant of a lease as a matter of compromise in a judicial proceeding in a pending litigation which would apparently be within the provisions of Cl. (d), S. 17, Registration Act. We wish it to be clearly understood for the purposes of our decision in this case that we do not consider that the decision of their Lordships of the Privy Council is wide enough to cover the case of a document constituting a lease arisIng out of a compromise ina judicial proceeding within the provisions of Cl. (d), sub-S. (1), S. 17, Registration Act. We think it applies to documents coming within the class of documents contemplated in Cls. (b) and (c), which are protected under the provisions of Cl. (vi), sub S. (2), S 17, Registration Act from registration. The next case that I must refer to is the case reported as *Pranal Anni* v. *Laxmi Anni* (9). The report is at p. 508 (of 22 *Mad.*) In order to understand the quotation it is necessary to state some of the facts.

A suit referable to immovable property was instituted between certain persons. They also were entitled to certain other property not conversant with the suit; and the reason why it was not so referable was because that other property was subject to a mortgage, which for the time being did not involve any dispute between the respective persons entitled thereto. But in the course of the previous suit which was instituted in 1885, a compromise was arrived at and the compromise purported to deal expressly with the property that was then in suit in the year 1885 and also with the other property which was on mortgage and was not the subject-matter of that suit. The consent was carried out by two documents, one called the union of agreement and the other called the razinamah. The razinamah did not contain any express reference to the union of agreement further than by a remark in the last schedule to the razinamah. It was not incorporated in it nor did it form part of it. The learned Judge in that suit (viz., the suit of 1885) by consent of the parties decreed the suit in the terms of the razinamah but in the decree he made no reference whatever to the provisions contained in the union of agreement. A subsequent suit was brought and it was contended that having regard to the terms of the razinamah the union of agreement must be deemed to have been incorporated as part of the Court's order and, therefore exempt from registration. Their Lordships of the Privy Council held in effect:

"no, you never brought the union of agreement at all to the notice of the Court; it was dealing with property outside the scope of the suit as

(8) [1910] 33 Mad. 102=3 I. C. 701.

(9) [1899] 22 Mad. 508=26 I. A. 101 (P. C.).

originally framed, and therefore if you wanted to have an order recognizing the union of agreement so as to make it exempt from registration, you should have brought it to the notice of the Court."

In that view their Lordships laid down a general principle applicable to all cases. And their Lordships say:

"that if the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken either in the razinamah or in the judicial order which gave effect to it."

I take it that their Lordships meant that there was no express incorporation of the union of agreement in the razinamah, nor was there any express incorporation of it in the decree of the Court, for the simple reason that it was never brought to the mind or knowledge of the Court to enable it to make any order with regard to it. However the decision of their Lordships certainly suggests that if the union of agreement had been incorporated in the decree of the Court, as it might well have been, then even though it dealt with matters outside the scope of the original suit in 1885, it would have been admissible in evidence without registration by reason of the union of agreement having been incorporated in the Court's order or decree. In this case before us the facts are otherwise. The whole compromise was brought to the knowledge of the Court; the Court recorded the entire compromise on the file, and made a decree in terms of the compromise without any limitation and so far as it could; if the Court believed that the compromise did deal with matters outside the scope of the suit, it performed its duty as provided by S. 375 of the old Civil P. C., leaving it to the parties, if necessary, to enforce that agreement either by a separate suit or by any other way they might be advised.

But is this compromise inadmissible in evidence in this suit? In support of the plaintiffs' case Mr. Pugh contends that it is. To our mind it clearly is admissible in evidence because the document is duly incorporated in the decree of the Court, and by reason of such incorporation it is a matter of judicial evidence, being a document embodied in the decree or order of the Court in a properly constituted judicial proceeding. There are many authorities dealing with the point which arises for our determination in this respect and the preponderating weight of judicial authority strongly supports the conclusion at which we have unanimously arrived. The strongest case that can be obtained in favour of Mr. Pugh's argument is the case reported as *Ravula Parti Chelamanna* v. *Ravula Parti Rama Row* (10). That case was decided in the year 1911. But that decision has gone further than any other decision that has been reported since the case reported as *Bindesri Naik* v *Ganga Saran Sahu* (7) was decided, and that decision is to this effect. That unless the decree or order of the Court expressly incorporates verbatim the entire provisions of the compromise, it becomes inadmissible in evidence unless registered.

The whole current of authority both in the Madras High Court, in which Court the case cited was decided, and in the Punjab and recently in Calcutta has all tended in one direction, viz., to give these two decisions of the Privy Council a fair and liberal construction; and where the compromise is referred to and is incorporated in the order of the Court or is filed by way of petition in the proceedings then it is within the protection provided by Cl. (c), sub-S. (2), S. 17, Registration Act. There are two cases reported in this Court, one in *Bisseswar Ram* v. *Mahadeo Pahan* (11), the decision of Mullick, J., and the other a more recent case of *Karu Mian* v. *Tejo Mian* (12). The latter was a decision of my learned colleague Chapman, J., sitting with Jwala Prasad, J., both Judges there held that it was necessary to give the two decisions of the Privy Council cited above a fair and liberal interpretation.

But viewing the authorities as a whole they may be arranged as follows: Those upon the side of admitting this compromise in evidence without being registered number about 16, while on the other hand as against the admission of such a document in evidence there are only four. The cases which tend to support, and which do in fact support the admission

(10) [1911] 36 Mad. 46=12 I. C. 317.

in evidence of such a compromise without registration are to be found reported as *Bindesri Naik* v. *Ganga Saran Sahu* (7), *Pranal Anni* v. *Lakshmi Anni* (9), *Raghubans Mani Singh* v. *Mahabir Singh* (13), *Bisseswar Ram* v. *Mahadeo Pahan* (11), *Karu Mian* v. *Tejo Nian* (12), *Natesan Chetty* v. *Vengu Nachiar* (8), *Rustam Ali Khan* v. *Gaoura* (14), *Janardan Missir* v. *Janki Koer* (15), *Ambica Charan Sher Kaibarta* v. *Srinath Dutta* (16), *Sellappa Koundan* v. *Gurumoorti* (17), *Sankaravelu Pillai* v. *Muthusami Pillai* (18), *Manickammal* v. *Rathnama* (19), *Robert Skinner* v. *James Skinner* (20) *Murlidhar* v. *Gobind Ram* (21) and *Joe* v. *Jaimal Singh* (22).

There is one other case, namely, *Palavalasa Appalaswamy* v. *Dantaluri Narayana* (23). This case seems to have gone further than any other case, because in that case the particular compromise was not recorded in any proceeding in the Court. The parties intended that it should have been recorded, and because that was the governing intention, the High Court of Madras held that it was admissible in evidence without registration. Without committing ourselves to the accuracy of that decision, we only desire to refer to it for the purpose of showing that the trend of the modern decisions even in the Madras High Court has been consistently and persistently opposed to the authority and accuracy of the decision reported as *Ravula Parti Chelamanna* v. *Ravula Parti Rama Row* (10) and that case can, having regard to the recent current of authority which has prevailed in all High Courts since 1911, no longer be regarded as subsisting law. It is unnecessary for me to go through all these cases in detail. We have read them and analysed them and we have applied their principle as a guide for our determination with regard to the facts of this case. These authorities have been cited at the Bar at length, and it could serve no useful purpose to refer to them in detail.

On the other hand the cases which support the argument put forward by Mr. Pugh are to be found reported as *Gurdeo Singh* v. *Chandrika Singh* (24) *Ravula Parti Chelamanna* v. *Revula Parti Rama Row* (10), *Kashi Kunbi* v. *Sumer Kunbi* (25), and *Janardan Missir* v. *Janki Koer* (15). With regard to the decision in *Gurudeo Singh* v. *Chandrika Singh* (24), we desire to say, with profound respect to the learned Judges who decided that case, that in our opinion having regard to the line of recent authority already cited, that the decision in that case can no longer be regarded as a correct interpretation of the law touching the question arising for our determination in this appeal. There is however just one case which I think it necessary to refer to and, that is the case reported as *Ambica Charan Sher Kaibarta* v. *Srinath Dutta* (16). The decision in that case was the decision of Sir Lawerence Jenkins C. J. and it is of importance, because that distinguished Judge did not follow the authority of the decision reported as *Gurdeo Singh* v. *Chandrika Singh* (24), but adopted the line of authority established by *Natesan Chetty* v. *Vengu Nachiar* (8), following the two decisions of the Privy Council referred to and thereby receding from the uncertain and varying law previously laid down in some antecedent decisions in the Calcutta High Court. The learned Chief Justice in that case distinctly laid down that where a compromise which deals with matters within the scope of the suit and outside the scope of the suit in which the compromise was effected, and the compromise is recorded on a petition duly filed, it is evidence in a judicial proceeding and therefore admissible in evidence in a subsequent suit and is exempt from liability to registration. That disposes of the question of registration and the admissibility of the compromise in evidence in this Court. There is only one other matter to be considered relative to the conduct of the parties subsequent to the compromise being effected, for the purpose of showing that the plaintiffs have consistently recognized the compromise, and are thereby

(11) [1916] 1 P. L. J. 208=36 I. C. 290.
(12) [1921]3 P. L. J. 43=43 I. C. 282.
(13) [1905] 28 All. 78.
(14) [1911] 33 All. 728=12 I. C. 109.
(15) A. I. R. 1914 Cal. 586=22 I. C. 687.
(16) [1913] 19 I. C. 551.
(17) A. I. R. 1915 Mad. 590=26 I. C. 790.
(18) [1915] 31 I. C. 260.
(19) A. I. R. 1914 Mad. 20=22 I. C. 35.
(20) [1915] 91 P. R. 1915=31 I. C. 537.
(21) A. I. R. 1914 Lah. 131=20 I. C. 817=20 P. R. 1914.
(22) [1915] 29 I. C. 311.
(23) [1916] 34 I. C.446.
(24) [1909] 36 Cal. 193=1 I. C. 913.
(25) [1910] 32 All. 206=5 I. C. 234.

estopped now from denying its validity. The defendant in the Suit No. 8 of 1901 failed to pay the balance of the decretal amount of Rs. 500 that was due to the plaintiffs; and the plaintiffs in that suit, who were the lessors of the lease of 1895, immediately proceeded to issue execution on foot of the decree, thereby adopting the decree. But when the execution came to be levied the defendant paid up the amount due and finding that there was an error in the petition for leave to issue execution, the defendant wisely asked the plaintiffs to have the form of the petition corrected or amended so that it might provide that the rent as stated therein should be amended so as to conform with the terms of the compromise. Accordingly by Ex. L the necessary amendment was made in the application of the plaintiffs. This was an act done by the plaintiffs openly and notoriously recognizing the validity and operative effect of the compromise that was made between the parties. As I have said, in 1900 a permanent lease was granted by the plaintiffs to one Hansamal. It became necessary for him to sue the defendant in the year 1906 for the rent due under the lease of 1895 as assignee of the original lesssors; and accordingly this person as plaintiff instituted a suit against the defendant joining as co defendants in that suit all the cosharer proprietors or their representatives who granted the lease of 1895. The suit was framed upon the basis that the rent was payable as provided by the lease of 1895. The defendants came forward and by way of defence said:

"no; the rent is not payable under the lease but is payable under the terms of a compromise that was effected in Suit No. 8 of 1901."

The defendant in that suit with the other pro forma defendants, who were the cosharer proprietors under whom he derived his title and who were parties to that suit, consented that judgment should be given for the rent not as sued for but as provided by the terms of the compromise; and accordingly the antecedent compromise of 1901 was set out in the decree in that suit and was acted on, and which decree is referred to as Ex. N in this case. Thus the plaintiffs' assignee in suing the defendant sought to establish his liability in the presence of the present plaintiffs for rent under the lease of 1895 and in the year 1906 the claim in that suit was filed and by common consent of all the parties to that suit the compromise effected in 1901 was unequivocally recognized and established. The defendant having succeeded in that suit proceeded to deal with the property in the colliery as he thought fit; and he accordingly sub-leased the lands to one Mr. Ghose, setting out in express terms in the lease to Mr. Ghose the fact that the rent as provided by the original lease had been altered and that henceforth he was liable to pay only the rent agreed on by the compromise. When the defendant was subletting to Mr. Ghose he intended to exact from him a higher rent than the defendant himself had to pay. The lease to Mr. Ghose is to be found at p. 35 of the paper-book (Ex. D), and that document sets out concisely the terms of settlement which were conclusively established by the suit of 1901. Therefore the defendant relying in good faith on this compromise, acted upon it as a binding agreement between himself and the plaintiffs in this suit who were parties to it. In our opinion beyond a shadow of doubt the plaintiffs, so far as the adult plaintiffs are concerned other than Girish and Narhari, are conclusively estopped and barred from disputing now the validity of that compromise.

I have dealt with all the matters which seem to me of importance in this case as submitted for our consideration, and accordingly we think that these appeals must succeed. We accordingly allow these appeals with costs in this Court. The result will be as follows: That in Suit No. 243 of 1915 and Appeal No. 292 of 1915, the plaintiffs will have judgment for royalty and commission on the basis of the compromise, dated 10th March 1902 with proportionate costs in the Court of the Subordinate Judge. In Suit No. 235 of 1913 and Appeal No. 293 of 1915 the plaintiffs will have judgment for royalty and commission upon the basis of the compromise dated 10th March 1902 with proportionate costs in the Court of the Subordinate Judge. In Suit No. 36 of 1913 and Appeal No. 230 of 1915, the plaintiff Shambu Nath will be entitled to judgment in respect of his share of the royalty and commission upon the basis of the compromise of 10th March 1902, and the plaintiffs Girish and Narhari in that suit will be entitled to royalty and commission in respect of their three-annas share on the basis of

the royalty and commission payable under the lease of 19th April 1895 with proportionate costs in the Court of the Subordinate Judge. These appeals are consequently allowed and the plaintiffs will pay the defendant his costs in this Court.

Chapman, J.— I agree. The novel feature of this case in respect of which there was no express authority is this The Subordinate Judge in dealing with the compromise of 1902 remarked that the terms of the lease had also been changed but that that was no part of the subject-matter of the suit. The question raised is whether, where a Court excludes a portion of a compromise expressly from the decree, the compromise is nevertheless exempted from registration. It appears to me, having regard to the judgment of their Lordships of the Privy Council in the two cases reported as *Bindesri Naik* v. *Ganga Saran Sahu* (7) and *Pranal Anni* v. *Lakshmi Anni* (9), that it makes no material difference whether the Court remarks that a portion of the compromise forms no part of the subject-matter of the suit or not. In the first case their Lordships were dealing with petitions for adjournment which had been filed in the course of an application for foreclosure made under the old Regn. of 1806. The High Court when dealing with the case had held that the mortgage bond did not provide for post diem interest, but they had held that by reason of the petitions for adjournment in which both parties joined, the registered mortgage bond had been varied. In replying to the contention that these petitions were not admissible for want of registration they had held that the practice of the Court was to receive statments of accounts for the purposes of making orders upon them, and that these statements were admissible in evidence although they created charges upon immovable property and were not registered. In dealing with the appeal their Lordships held that the High Court was wrong in their interpretation of the registered bond. They held that the bond had provided for post diem interest but they went on to say in effect that they agreed with the Judges of the High Court in holding that these petitions for adjournment read with orders upon them were admissible in evidence, although they created or might have created charges on immovable property and although they were not registered. It follows from this decision very clearly that in order to bring a case within the proviso to S. 17, Registration Act, it is permissible to look not only to the order of the Court but also to look at the pleadings which resulted in that order. The orders passed in the course of the proceedings of the application for foreclosure were apparently orders merely adjourning the case and would by themselves give no intimation as to the contents of the petitions which resulted in the order. I read their Lordships' judgment to mean that in such a case it is permissible to look at the petitions which resulted in the order of the Court for adjournment and to draw the inference which naturally would follow from a perusal of those petitions; and if they afford proof of an agreement creating a charge, the agreement would be given effect to although ordinarily such agreements require to be registered. In the other case reported as *Pranal Anni* v. *Lakshmi Anni* (9) their Lordships of the Privy Council were dealing with a compromise relating partly to properties outside the scope of the suit in the course of which the compromise had taken place. They say that if the entire compromise had been placed before the Court and the Court had been invited by reason of the compromise to dispose of the suit and if the order so obtained had referred to or narrated the terms of the compromise, the order would have been evidence of the agreement although not registered. It is manifest that their Lordships cannot have contemplated that the order would have actually given effect to matters outside the scope of the suit.

They contemplate merely that the order would have referred to or narrated (not given effect to) the terms of the compromise and that the Court would have been invited to dispose of the conclusions of the suit and of those only. I infer from the judgments of Lord Watson in these two cases that where a suit is properly adjusted but the adjustment consists partly of an agreement relating to matters outside the scope of the suit, if the entire compromise is laid before the Court and the Court is invited in consequence to dispose of the suit and the Court does dispose of the suit accordingly, then the agreement is exempt

from registration under the Registration Act, although the decree deals only with the subject-matter of the suit and does not deal with the portion of the compromise which lies outside the suit. In accordance with the view which I take of their Lordships' judgments in the two cases to which I have referred, it appears to me to make no material difference whether the Court notices that a portion of the compromise is outside the subject-matter of the suit or not. The only limitation of the rule laid down by Lord Waston appears from the words used by him in the case reported as *Bindesri Naik* v. *Ganga Saran Sahu* (*7*). The proceedings must be proper and they must not be fictitious or collusive and they must be regular and in accordance with law. In so stating the rule I have not in my mind the question of leases or gifts of immovable property. It is possible that the rule is not applicable to them. Iu my opinion the agreement with which we are dealing in the present case was not a lease.

I concur that the matter should be disposed of in accordance with the judgment of my learned brother.

Imam, J.—I concur.

V.S./R.K. *Appeals allowed.*

A. I. R. 1918 Patna 520

MULLICK AND THORNHILL, JJ.

Mohammed Abdus Salam—Petitioner.

v.

Kamalmukhi and *others* — Opposite Party.

Civil Revn. No. 25 of 1918, Decided on 17th May 1918, from order of Sub-Judge, Bhagalpore, D/- 21st November 1917.

(a) Civil P. C. (1908), O. 32, R. 4 (2)—Guardian ad litem alone is entitled to represent minor.

Order 32, R. 4 (2), requires that when a guardian has been appointed by a competent authority, that guardian alone is entitled to represent the minor unless the trial Court considers that the appointment of another guardian will be to the welfare of the minor. [P 521 C 1]

(b) Civil P. C. (1908), O. 32, R. 4 — Error in procedure of appointment of guardian ad litem—High Court will not interfere.

The appointment of a guardian of a minor for purposes of suits is really a question of procedure and an error in matters of procedure is not generally revisable under S. 115, P. C. [P 521 C 2]

(c) Bengal Court of Wards Act (1879), Ss. 5, 6 (e) and 35—Suit on contract against disqualified proprietor under Court of Wards—Manager of Court of Wards is not necessary party.

Where a Court of Wards is in possession of the property of a disqualified proprietor under S. 6 (e), a suit brought against such a proprietor based upon contract may proceed without causing the defendant to be represented by the Manager of the Court of Wards. Also a suit for a declaration of title to or for recovery of possession of property which is not in the actual possession and disposal of the Court of Wards under Ss. 35 and 5 of the Act, may proceed against the proprietor alone. [P 522 C 1]

Fakhruddin—for Petitioner.

Manuk Jagernath Prasad, Murari Prasad, Ram Prasad and *D. N. Sircar*—for Opposite Party.

Mullick, J.—This is an application for the exercise of our revisional jurisdiction under S. 115, Civil P. C. The facts are these:

A gentleman named Luchmi Prasad Singh had certain properties. One of these properties called the Bahadurpur estate he gave by will to his grandson Ram Bahadur Singh. Another property called the Shankarpur estate he gave by will to his second son Udit Narain Singh. After his death there were disputes between the members of the family, and by an ekrarnamah it was settled that Ram Bahadur Singh should keep possession of the Bahadurpur estate and Udit Narain Singh should keep possession of the Shankarpur estate, subject to the arrangement that upon the death of either of them the other should succeed to his property. In 1907 Ram Bahadur Singh having applied to become a disqualified proprietor under S. 6, Court of Wards Act, the Court took possession of the Bahadurpur estate under Cl. (e) of that section. Similarly in 1908 the Court of Wards took possession of the Shankarpur estate on behalf of Udit Narain Singh. Ram Bahadur Singh died in January 1917 leaving two widows, who have now instituted a suit for declaration of title to the Bahadurpur estate. In the body of the plaint it is stated that no prayer for possession is made but in the relief portion there is a prayer for possession if the Court considers that the widows have been dispossessed by the Court of Wards.

It is necessary to notice that after Ram Bahadur's death the Court of Wards took possession of the Bahadurpur estate not on behalf of Udit Narain Singh, but under S. 13, Court of Wards Act, which authorizes the Court to retain possession

of an estate if the succession to it is disputed until the right to possession of the claimant has been determined by a competent civil Court. In the suit just mentioned Udit Narain Singh's minor son Loliteswar Prasad Singh was impleaded as a co-defendant. On 12th September 1917, the Subordinate Judge appointed a pleader of his Court as the guardian ad litem of this minor as the father, Udit Narain Singh, had refused to act in the suit on his behalf. On 16th September the manager of the Shankarpur estate, a gentleman named Abdus Salam, made a petition to the Court asking that he and not the pleader should be the guardian ad litem of the minor boy. He also contended that he was entitled to represent Udit Narain Singh by reason of S. 51, Court of Wards Act (Act 9 of 1879). The Subordinate Judge refused the prayers of Abdus Salam and confirmed the appointment of the pleader. The Court of Wards through Abdus Salam have now made this application for the exercise of the revisional jurisdiction of this Court.

The plaintiffs are represented before us by Mr. Manuk, Udit Narain Singh, the father, by Mr. Murari Prasad and the minor by the Deputy Registrar through Mr. D. N. Sircar.

Now the first submission that has been made is that whatever may be the case as regards Udit Narain Singh, the learned Subordinate Judge is bound to appoint the Court of Wards Manager as the guardian of the infant. Now it is not clear whether the Court of Wards has yet taken charge of the person and property of the infant ; if it has done so the Court of Wards would be entitled under O. 32, R. 4, sub-Cl. 2, to demand that it should represent the minor. The section requires that when a guardian has been appointed by a competent authority, that guardian alone is entitled to represent the minor unless the trial Court considers that the appointment of another guardian will be to the welfare of the minor. Assuming that the Court of Wards in this case is the guardian duly appointed under S. 7, Court of Wards Act, in respect of the minor the question is whether the learned Subordinate Judge has exercised a proper discretion in appointing the pleader and in refusing to appoint the Manager of the Shankarpur estate as guardian of the minor.

Now this is a pure question of discretion, and at the outset we are met with the difficulty that in such a matter we cannot exercise our powers of revision. The Subordinate Judge upon the materials before him was satisfied that the pleader would be the best guardian to look after the interests of the minor and we cannot interfere with his discretion in this matter. Moreover, it would seem upon the facts before us that the learned Subordinate Judge had very good reason for not appointing the Manager of the Shankarpur estate in this case. The Court of Wards having taken possession of the Bahadurpur estate as a stake-holder seems to be financing both the plaintiffs and the defendants, and it is quite clear that in such a state of affairs it cannot look after the interests of the minor as satisfactorily as a guardian who has no duty whatever towards the plaintiffs. On that ground alone, therefore, the learned Subordinate Judge would seem, in my opinion, to have been right in refusing to appoint Abdus Salam, guardian of the minor. Then again the appointment of a guardian of a minor for the purpose of suits is really a question of procedure, as has been held by their Lordships of the Privy Council in *Walian* v. *Banke Behari Pershad Singh* (1), and an error in matters of procedure is not generally revisable under S. 115, Civil P. C. Therefore, so far as the minor is concerned, the petitioner before us has no just cause for complaint.

Mr. Murari Prasad on behalf of the father contends that if the Manager is not appointed then he must be appointed the guardian ad litem, and he submits that he declined to act in the Court below only for the reason that he was under the impression that as a disqualified proprietor he was not competent in law to act as guardian ad litem in a civil suit. Here again a question of discretion arises. If the learned Subordinate Judge was of opinion that the pleader was the best person to represent the minor, he was at liberty to disregard the claims of the father and to appoint the pleader. The welfare of the minor was the only consideration that could really operate in the matter. We now pass on to the question of the representation of Udit Narain Singh. If S. 51, Court of Wards Act, is mandatory, then the Mana-

(1) [1903] 30 Cal. 1021=30 I. A. 182 (P. C.).

ger must be entered as the guardian ad litem of the disqualified proprietor. It is urged by Mr. Fakhruddin that the Court should have compelled the plaintiffs to describe Udit Narain Singh as a ward of Court and to direct that he be represented in the suit through Abdus Salam, the Manager of the Shankarpur estate. This brings us to a consideration of the terms of S. 51 of the Act. Now the section itself is enacted in very wide terms and if it were to stand alone, it would seem that the contention of the learned vakil for the petitioner before us must prevail. Judicial decisions have however considerably restricted the very wide meaning which is sought to be attached to the section, and it now seems to be settled that where a Court of Wards is in possession of the property of a disqualified proprietor under S. 6. Cl. (e) of the Act, a suit brought against such a proprietor based upon contract may proceed without causing the defendant to be represented by the Manager of the Court of Wards. So also has it been held with regard to suits for declaration of title to or recovery of possession of property that if the suit is in respect of property which is not in the actual possession and disposal of the Court of Wards under Ss. 35 and 5 of the Act, then the suit may proceed against the proprietor alone. The cases in support of these propositions are *Dhunput Singh* v. *Shoobhudra Kumari* (2), *Krishna Pershad Singh* v. *Gosta Behari Kundu* (3), *Tekait Krishna Prasad Singh* v. *Moti Chand* (4) and *Ananda Kumari Debi* v. *Durga Mohan Chuckerbutty* (5).

If therefore the Court of Wards had been in possession of the Bahadurpur estate on behalf of Udit Narain Singh alone, then it would have been entitled to demand that Udit Narain Singh should be sued, not in person, but through the Manager; but holding the property as a stake-holder and as a trustee on behalf of the true owner, in my opinion the Court of Wards cannot claim the benefit of S. 51 of the Act. Moreover, in this case it has been contended that the suit is really based upon contract, namely, the ekrarnamah, made in Ram Bahadur's life-time, and that in such a suit it is quite sufficient to sue Udit Narain in his personal capacity. The case of the plaintiffs is that they cannot be deprived of their life-interest as Hindu widows merely by a personal arrangement made by the male members of the family. Whether this contention really goes to the root of the matter or not it is unnecessary to determine. The first ground, namely, the possession of the Court of Wards on behalf of the true owner and not on behalf of Udit Narain Singh seems to me to be sufficient for the disposal of the contention before us. In my opinion the learned Subordinate Judge was right in refusing to allow Udit Narain Singh to be described as a ward of Court and to be sued through his Manager Abdus Salam. The result therefore is that the petition must be dismissed with costs. The plaintiffs who are represented by Mr. Manuk will be entitled to their costs from the petitioner. The disqualified proprietor Udit Narain Singh will be entitled to no costs, because his only substantial contention befcre us, namely, that he should be appointed the guardian of his son, has been disallowed. Then as regards the costs of the vakil, who has been instructed by the Deputy Registrar, who is the guardian ad litem of the minor in these proceedings, no orders are necessary as he has already received his costs from his client. Hearing fee Rs. 32.

Thornhill, J.—I agree.

V.S./R.K. *Petition dismissed.*

(2) [1882] 8 Cal. 620.
(3) [1907] 5 C. L. J. 434.
(4) [1913] 40 Cal. 635=19 I. C. 296=40 I. A. 190 (P. C.).
(5) [1916] 32 I. C. 1.

A. I. R. 1918 Patna 522

ROE AND JWALA PRASAD, JJ.

Dand Bahadur Singh—Appellant.

v.

Deonandan Prasad Singh and *another*—Respondents.

Misc Civil Appeal No. 108 of 1917, Decided on 4th January 1918, from order of Sub-Judge, Monghyr.

Mortgage—Sale in execution of decree on prior mortgage—Right, title and interest of mortgagor and subsequent encumbrances of same mortgagee are extinguished.

The sale in execution of a decree on the basis of a prior mortgage destroys the right, title and interest of the mortgagor in the property and extinguishes all encumbrances subsequent to the mortgage.

A mortgaged the village *K* to the plaintiffs and subsequently by a second mortgage mortgaged the villages *K* and *B* to the plaintiffs. The latter obtained decrees on their mortgages and in execution of the decree on the prior mortgage brought to sale and purchased the village *K*.

Subsequently they sought to enforce the decree on the second mortgage against the village *B* alone. Defendants, who were the purchasers of the equity of redemption in village *B*, objected to this:

Held: that the second incumbrance on *K*. having been destroyed by the sale in execution of the decree on the prior mortgage, the mortgagees were entitled to enforce the whole of their debt upon the remaining security.

[P 523 C 2]

Shivanandan Rai—for Appellant.

Jagannath Prasad and *Nirsu Narain Sinha*—for Respondents.

Judgment.—The facts of this case are that one Ajodhia Prasad Singh was the owner of two villages, Kalyanpur and Balehpur. He mortgaged Kalyanpur to one Dand Bahadur and subsequently by a second mortgage mortgaged both villages to the same Dand Bahadur. Dand Bahadur sold these mortgages to the respondents, who have obtained a decree upon them and have in execution of the decree on the prior mortgage brought to sale and bought in Kalyanpur. The decree upon the second mortgage directs that both villages be sold in satisfaction of the decree, but that Kalyanpur should be sold subject to the prior mortgage lien which had at the date of the decree not ripened into a sale in execution. The appellants have purchased the equity of redemption in village Balehpur. The respondents now seek to bring to sale Balehpur only. The appellants object that Balehpur could not alone be sold since under the decree both properties had to be sold. The learned Subordinate Judge has disallowed this objection. An appeal is therefore made to this Court on the ground that under S. 82, T. P. Act, any assets left of the village Kalyanpur after the respondent's auction purchase should be held liable to contribute to the mortgage-debt and that therefore before execution could proceed against Balehpur there should be a deduction from the amount due under the decree of the sum for which Kalyanpur was liable. In support of this contention reliance is placed on the case of *Ponnusami Mudaliar* v. *Srinivasa Naickan* (1) and *Mahomed Taki Raza* v. *W. A. Thomas* (2). These two cases are not in point, for in each of them the sales whereby the property liable upon the prior mortgage had passed out of the hands of the mortgagor were private transactions. In the case before us the property was taken out of the hands of the mortgagors in execution of a decree upon a prior mortgage. The effect of such an execution is to destroy the right, title and interest of the mortgagor in the property, and to extinguish all encumbrances subsequent to the mortgage. The second encumbrance on Kalyanpur having been destroyed, it is open to the mortgagees to enforce the whole of their debt upon the remaining security. It is to be noted that in the case of *Bohra Thakur Das* v. *Collector of Aligarh* (3) their Lordships say :

"As Kachaura was sold and purchased by Nand Kishore in execution and part satisfaction of a decree obtainad on the prior mortgage of 1868, the Courts in India properly overruled the appellant's contention (which is in fact the contention new set up before us) which has not been pressed before this Board. Agrana therefore is now liable for the entirety of the mortgage debt."

There is no substance in the appellants' contention that Kalyanpur is in any sense liable for the debt upon the subsequent mortgage. There is no ground upon which they can reasonably object to the execution proceedings desired by the decree-holder. The appeal is dismissed with costs, hearing fee in accordance with the scale laid down.

V.S /R.K. *Appeal dismissed.*

(1) [1908] 31 Mad, 333.
(2) [1906] 4 C. L. J. 317.
(3) [1910] 32 All. 612=7 I C. 732=37 I. A. 182 (P. C.).

A. I. R. 1918 Patna 523

JWALA PRASAD, J.

Bundi Singh and *others* —Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 56 of 1918, Decided on 6th March 1918, from an order of Deputy Magistrate, Palamau.

Criminal P. C. (1898), S. 522—Dispossession must be accompanied by criminal force and as result of criminal force—Mere show of criminal force is not sufficient.

The dispossession contemplated by S. 522 must be accompanied by criminal force and as a result of the criminal force used, and the mere show of criminal force is not enough for an order under that section. The foundation of an order under S. 522 should be the finding of the Court to the effect that the person in whose favour the order is made has been dispossessed of a specific property by use of criminal force, which forms the material ingredient in the matter of criminal conviction. [P 523 C 2]

Akbari and *Harihar Prasad Sinha*—for Petitioner.

Judgment.—We are concerned in this case only with the order under S. 522,

Criminal P. C. passed by the Deputy Magistrate of Palamau, directing that the disputed Bhunder be restored to the possession of the complainant Mr. De. The order was passed on a conviction of the petitioners under Ss. 143 and 379, I. P. C. On appeal the Judicial Commissioner of Ranchi set aside the conviction under S. 379, on the ground that the charge of theft laid by the complainant's servants was exaggerated and was not true. The conviction under S. 143 was however upheld. There is no reference to the order under S. 522 by the Judicial Commissioner in his judgment and hence that order of the Deputy Magistrate remains. The petitioners have therefore come to this Court aggrieved by the said order of the Deputy Magistrate. The conviction under S. 143 is based upon the following finding of the Judicial Commissioner, which substantially is also the finding of the Deputy Magistrate:

"I consider this evidence as establishing the fact that Mr. De's servants were actually in possession of this Bhunder. The evidence further satisfies me that the accused after some previous threats turned up in a body and threatened all the servants of the Bhunder, whereupon the servants left the village and came to Court where they lodged a complaint. During the interval between their departure and the Police coming on the scene, Bundi Singh (one of the accused) again established himself in possession of the Bhunder."

The above finding clearly shows that the dispossession took place subsequent to the complainant's servants having left the village and gone to the Court to complain of the offence under S. 143 of theft committed by the petitioners. There is no finding that the dispossession took place during the course of the offence under S. 143 of which the petitioners were convicted. There is also no finding that the dispossession took place on account of any force having been used by the petitioners. The conviction under S. 143 in itself is not one which is attended by "criminal force." The common object mentioned in the charge under S. 143 is to take forcible possession of the complainant's master's Bhunder and to remove the grains stored therein. The offence under S. 143 is not necessarily attended by the "criminal force" and in this particular case there is no finding that it was so attended. No "criminal force," as defined in Ss. 349, 350, Criminal P. C. was at all held to have been used by the petitioners. It was held so far back as in *Mohunt Luchmi Dass* v. *Pallat Lall* (1) that

"the foundation of an order under S. 534 (corresponding to the present S. 522) should be the finding of the Court to the effect that the person in whose favour the order is made has been dispossessed of a specific property by use of criminal force, which forms the material ingredient in the matter of criminal conviction."

The leading case of *Ram Chandra Boral* v. *Jityandria* (2) reiterated that principle. All the High Courts appear to be in agreement in respect of the interpretation of the expression used in S. 522 "attended by criminal force" and later in the section

"by such force any person has been dispossessed of any immovable property."

The result of the authorities has been that the dispossession must be accompanied by "criminal force" and as a result of the "criminal force" used, and further "the mere show of criminal force" is not sufficient for an order under S. 522. It may be mentioned here that the inequity of such an interpretation of the section and perhaps of the expression used by the legislature has been felt by more Judges than one, notably in the case of *Chhakoo Mandal* v. *Emperor* (3), where the anamoly of the position has been fully dealt with. The words in the section put a peaceful man, who yields to the threats and show of force and gives up possession of a property, to a great disadvantage and hardship. The Full Bench case of *Mohini Mohan Chowdhry* v. *Harendra Chandra Chowdhry* (4) felt that the construction put upon the section is too narrow. I may say that I am in full accord with the views of the learned Judges who decided the above cases and would go further than that and hold that the interpretation works as a hardship, but as all the Courts have followed it, I feel bound to accept it. More so, because the rule of construction of a Statute does not permit a Court to use words not expressly mentioned in the section. To give effect to the inequitous position felt by the Judges already adverted to will necessitate the reading into the section the words "or by show of criminal force." I therefore in concurrence with the views held by all the Courts, hold that the order in this case passed by the Deputy Magistrate under

(1) [1875] 23 W. R. Cr. 54.
(2) [1898] 25 Cal. 434.
(3) [1907] 11 C. W. N. 467=5 Cr. L. J. 278.
(4) [1904] 31 Cal. 691. (F.B.)

S. 522 is illegal and without jurisdiction. It is accordingly set aside.

V.S./R.K. *Rule made absolute.*

A. I. R. 1918 Patna 525

MULLICK AND THORNHILL, JJ.

Hemanigini Debi—Appellant.

v.

Haridas Banerjee—Respondent.

Appln. in First Appeal No. 182 of 1917, Decided on 18th April 1918.

(a) Civil P. C. (5 of 1908), Ss. 107 and 151—Appellate Court can add parties to appeal.

Both under S. 107 and under its inherent powers conferred by S. 151 of the Code, an appellate Court has power to add a party to an appeal although he was not a party to the original suit. [P 526 C 1]

(b) Probate—Possibility of interest is sufficient to entitle person to become party—Party entitled to intervene in lower Court is entitled to support will in appellate Court.

Even the possibility of an interest is sufficient to entitle a person to become a party to probate prceedings. [P 525 C 2]

A party who is entitled to intervene as a party to prove a will in the lower Court is also entitled to support the will as a respondent in the appellate Court. [P 525 C 2]

Hasan Imam, Muhammad Fakhruddin and *Bimola Charan Sinha* — for Petitioner.

Susil Madhab Mullick, Bulwant Sahay, Newal Kishore and *Panchanan Banerji*—for Opposite Party.

Judgment.—The facts in this case appear to be as follows :—One Haridas Banerji obtained probate in common form of the will of one Kedar Nath Banerji. Upon the objection of Hemanigini Debi, the widow of Kedar Nath Banerji, the executor Haridas Banerji was required to prove the will in solemn form and in spite of a spirited contest by Hemanigini Debi he succeeded in doing so. Hemanigini has now appealed to this Court against the order granting the probate. The present petitioner before us, Thakur Thakurdas, is the head of an endowment which under the will is entitled to a certain legacy. It appears that he was cited as a witness in the probate proceedings but did not appear. He now applies to us to be added as a respondent in the appeal, on the ground that he has reason to suspect that there is collusion between the appellant Hemanigini and the executor Haridas and that the appeal will not be adequately contested by the executor. The application is opposed on behalf of the sole respondent, the executor. The appellant Hemanigini is represented here by Mr. Hasan Imam and states that while she has no objection to the addition of the petitioner as a party she desires to repudiate the allegations which have been made with regard to her collusion with the respondent Hari Das.

I thing the applicant had a right to intirvene in the Probate proceedings. Even the possibility of an interest ls sufficient to entitle a person to become a party to the proceedings [*Crispin* v. *Doglioni* (1)]. The applicant would have been entitled under the Probate Act to apply for administration and if he would have been entitled to so apply, I see no reason why he cannot resist an application to revoke probate. In *Kashi Chundra Deb* v. *Gopi Krishna Deb* (2) it was held that a mortgagee had a sufficient interest to entitle him to intervene and to be heard in opposition to an application made to withdraw the probate. I see no reason why, if the applicant is entitled to intervene as a party to prove the will in the lower Court, he is not so entitled to support the will as a respondent in the appellate Court. In *Gyanananda Asram.* v. *Kristo Chandra Mukherji* (3) the Court held that under S. 32, read with S. 582, Civil P. C., 1882, an appellate Court was entitled to add as respondents in appeal persons who were not parties to the original suit. In that case the grounds upon which the intervenors sought to be added were very similar to those in the case now before us, and it is alleged that the plaintiff and defendant were colluding together and that unless the intervenors were made parties, the appeal would not be properly contested and that it was necessary that the intervenors should have an opportunity of laying the case before the Court of Appeal and supporting the decree.

It has been pointed out by Mr. Hasan Imam that S. 582, Civil P. C., 1882, which corresponds to S. 107 of the present Code, does not premit the addition of respondents although such power is allowed to an appellate Court in exercise of inherent powers under S. 151 of the present Code, and he relies upon *Dwarka*

(1) [1860] 2 S. W. & Tr. 17.
(2) [1892] 19 Cal. 48.
(3) [1904] 8 C. W. N. 404.

Nath Biswas v. *Debendra Nath Tagore* (4). I have not been able to follow the reasoning given in the judgment of the last case, and it appears to me in conflict with the opinion expressed in the later decision of the Calcutta High Court to which I have just referred. In any event the provisions of the present Civil Procedure Code seem to me to be wider and to intend that all the provisions applicable to suits, including provisions for the addition of parties, shall be applicable to appeals, unless there is any express provision in the Code to the contrary or unless it is impossible otherwise. In my opinion both under S. 107 of the present Code and under its inherent powers the appellate Court has power to add the intervenor although he was not a party to the original suit.

Mr. Sushil Madhab Mullick, on behalf of the executor, objects on the ground that the conduct of the appeal will be hampered but I see no force in this contention. On the contrary it is admitted that the executor is not in funds and has already had to apply to the petitioner for pecuniary assistance. His intervention therefore will certainly be beneficial, and as for the appellant, she will have extra security for her costs if this application is allowed. We direct that the petitioner be permitted to intervene as a respondent in the appeal from this day and that necessary amendments be made upon the record.

V.S./R.K. *Application allowed.*

(4) [1900] 4 C. W. N. 58.

A. I. R. 1918 Patna 526 (1)

ROE AND JWALA PRASAD, JJ.

Dharamdeo Singh—Plaintiff—Appellant.

v.

Ram Prasad Sah and *others* — Defendants—Respondents.

Second Appeal No. 278 of 1917, Decided on 31st January 1918, from a decision of District Judge, Saran, D/- 24th November 1916.

Specific Relief Act (1877), S. 27 (b) — Suit for specific performance—Plaintiff proving prior contract — Party alleging subsequent bona fide transfer must prove it.

A party pleading an exception must prove the exception. Where in a suit for specific performance of a contract the plaintiff proves his prior contract, the burden of proving a subsequent bona fide transfer for value without notice under S. 27 (b), lies on the party alleging it. [P 526 C 2]

Lakhmi Narayan Singh and *Rajendra Prasad*—for Appellant.

Kulwant Sahay and *Nirsu Narayan Sinha*—for Respondents.

Judgment.—In this case the last question in issue 5 seems to us to have been decided upon an erroneous view of the burden of proof. That issue runs: If so whether such contract can prevail against the defendant's sale deed? The answer to it is to be found in S. 27, Cl. (b). The contract would prevail except against a transferee for value who has paid his money in good faith and without notice of the original contract. It is, we believe, well settled that a party pleading an exception must prove the exception. We therefore remand the case to the lower appellate Court for a decision upon the evidence upon the record of the following issues: (a) Have the defendants 1 and 2 put before the Court a prima facie case which, if unrebutted, would show that they were transferees for value who have paid their money in good faith and without notice of the original contract and (b) If such a prima facie case has been put before the Court have the plaintiffs succeeded in rebutting it either by cross examination of the defendants or by direct evidence of their own? Let the record be returned with the findings upon these issues before the Ester Vacation.

V.S./R.K. *Case remanded for findings.*

A. I. R. 1918 Patna 526 (2)

JWALA PRASAD, J.

Gobind Misser—Plaintiff—Appellant.

v.

Behari Gope and *another*—Defendants—Respondents.

Second Appeal No. 636 of 1917, Decided on 1st August 1918, from a decision of Sub-Judge, Monghyr.

(a) Civil P. C. (5 of 1908), S. 11—Plea of, can be taken up in appeal.

The plea of res judicata is a question of law and can be raised at any stage of a suit. [P 528 C 2]

(b) Civil P. C. (5 of 1908), S. 11—Question left undecided by appellate Court but decided by trial Court is not res judicata.

An appellate Court's judgment takes the place of and supersedes the decision of the trial Court so that the principle of res judicata cannot apply where a question is left open and undecided by an appellate Court although it was decided by the trial Court. [P 528 C 2]

Mohammad Tahir—for Appellant.

Lalit Mohan Ghose and *Baranasi Prasad Jhunjhunwala*—for Respondents.

Judgment.—The plaintiff is the appellant. He brought a suit for ejecting the defendants from the lands in suit under S. 66, Ben. Ten. Act, after serving them with a notice under S. 49, Ben. Ten. Act, alleging that they are his under-tenants. There is also a prayer to recover Rs. 26-9-0 the rent of the land as damages including cesses and also mesne profits from 1322 F.S. up to the recovery of possession. The defendants on the other hand claimed that they had acquired the rights of occupancy tenants and that the plaintiff was merely a tenure-holder on the basis of a mustajri lease and not an occupancy tenant of the land. Thus the pleadings of the parties raised the following issues framed by the Munsif who tried the case. The issues were: (1) What is the status of the plaintiff in relation to the jote in suit? (Issue 4 of the Court below). (2) Are the defendants shikmidars of the plaintiff? (Issue 5 of the Court below).

The Munsif decided both the issues against the plaintiff and held that the plaintiff was a tenure-holder and that the defendants were occupancy raiyats of the disputed land. The Munsif accordingly dismissed the suit of the plaintiff. The plaintiff appealed to the District Court and raised the question that the defendants were precluded from claiming that they were occupancy tenants and that the plaintiff was a tenure-holder inasmuch as the status of both the defendants and the plaintiff was decided in a previous litigation between the parties. In other words, the plaintiff contended that the plea of the defendants was barred by res judicata. Prior to the present suit there were two suits brought by the plaintiff against the defendants and the contentions of the parties are based upon the decisions in those cases. It is therefore necessary to give briefly the history of those two cases. In 1911 the plaintiff brought the first suit under S. 66, Ben. Ten. Act, for the ejectment of the defendants in the Court of the Munsif of Monghyr being Suit No. 48 of 1911. In that suit it was held that,

"the defendants are under-raiyats and the plaintiff is the raiyat of the land in suit."

Upon that basis a decree for rent was made with the direction that

"if the decree amount be not paid within 15 days the plaintiff to get khas possession of the jote land."

The judgment of the Munsif is Ex. 12 and the decree is Ex. 9. There was no appeal from that decree. Apparently the defendants paid the amount of the decree and hence they were not ejected. Subsequently the plaintiff brought another suit in the same Court for the rent of 1318 and the first 8 annas kist of 1319, and for ejectment. This suit was numbered 123 of 1912. The same Munsif who decided the first case held contrary to his previous decision that the "defendants are under-raiyats and the plaintiff a raiyat" and dismissed the suit. The Munsif did not give effect to his former judgment on the ground stated by him in the following words:

"the judgment Ex. 2, shows that the decree for ejectment in that suit was based upon the entry in the khatian, that is, the defendants are under-raiyats and the plaintiff a raiyat but it has now been found in this case that the said entry is not correct. So I hold that the defendants are not precluded from raising this question in this suit."

This judgment is dated 15th June 1912 and is Ex. D filed by the defendants. On appeal by the plaintiff the Additional Subordinate Judge upheld the aforesaid decision of the Munsif on a ground quite different from that of the Munsif in the following words:

"It appears to my mind that there would not have been a decree for ejectment in this suit on quite a different ground. The arrears sued for were one for the last half of 1318 and the first half of 1319,"

and hence:

"there could not be a decree for ejectment in this suit under S. 66 as there was a claim for the arrears of the first half year of 1319. . . . . The pleaders on both sides now admit that there could not have been a decree for ejectment in this suit under S. 66, as there was a claim for the arrears of the first half of 1318."

The Subordinate Judge concluded his judgment in the following words:

"It is therefore unnecessary for me to decide if the defendants were raiyats or under-raiyats of the land."

This judgment is Ex. D in Rent Appeal No. 136 of 1912. Upon the judgment and the decree, Exs. 12 and 9 respectively in Suit No. 43 of 1911, the plaintiff contended before the lower appellate Court that the plea by the defendants as to their status is barred by the principles of res judicata. The learned Subordinate Judge at one place in his judgment said that S. 11, Civil P. C. and the judicial decisions would:

"apparently make the decision of the first suit res jndicata on the question of status."

But curiously enough the learned Subordinate Judge did not give effect to his finding on the ground stated by him:

"that in the peculiar circumstances of the case I cannot hold that the first previous judgment now relied upon by the appellant can operate as res judicata and disallow this contention of his."

I fail to appreciate this. The principle of res judicata bars the jurisdiction of the Court to entertain the matter already decided between the parties by a Court of competent jurisdiction. All the requirements of S. 11, Civil P. C. were complied with as held by the learned Subordinate Judge. Hence no circumstances would at all prevent the decision of that case from operating as a bar to the entertainment by any Court of the issues decided in that case. I therefore hold that the decision in suit No. 43 once for all determined the status of the parties. I cannot yield to the contention on behalf of the respondents that the decision arrived at in that suit was subsequently held in Suit No. 123 of 1912 to be wrong and hence the judgment cannot operate as res judicata. It was for the defendants to set right the decision of the Munsif by an appeal or proper proceedings sanctioned by law. This was not done and it was not open to the defendants to dispute in any way the validity of that judgment and to set up the plea that they have the status of occupancy tenants in the subsequent suit No. 123 of 1912, nor is it open to them to raise the plea in the present suit. The judgment in Suit No. 43 of 1911 is final and is binding between the parties as to their respective status in the land in suit.

It is then contended that the decision in the second case operated as res judicata. The Subordinate Judge has accepted this view and I think that he is entirely wrong. The appellate Court's judgment in that case is Ex. 11 and the decree is Ex. 8. No doubt the Munsif in his judgment Ex. D, dated 15th June 1912, held that the defendants were not under-raiyats and he did not at all take into consideration the decision in the first case. The appellate Court however left the question undecided and thought that for the purpose of that case it was unnecessary to decide the status of the parties inasmuch as the suit of the plaintiff was dismissed on the ground that it comprised claims for more than one year in contravention of S. 66, Ben. Ten. Act. The appellate Court's judgment has taken the place of and superseded the decision of the Munsif. It is well known that the principle of res judicata cannot apply where the question is left open and undecided by the Court.

It was then contended that the question of the defendants' status was left open in the judgment of the Subordinate Judge in the second case, and hence it was open to the defendants to show by evidence that they have acquired the status of occupancy tenants in the lands in suit. It has been suggested that the decision of the Subordinate Judge in the second suit leaving the question of the status open would operate as res judicata upon the contention of the plaintiff that the question was concluded by the decision of the first case. I am not able to appreciate this argument. This appears to me to be an argument in circle. The decision of the first Court was a final adjudication of the status of the parties and is a permanent bar to the points decided therein being agitated in any Court. Lastly it has been contended that the plea of res judicata cannot be given effect to as it was not raised in the trying Court. The plea of res judicata is a question of law and can be raised at any stage. In the case of *Muhammad Ismail* v. *Chattar Singh* (1) a Full Bench of the Allahabad High Court held that the plea of res judicata can be taken for the first time even in second appeal. Latterly the same Court in *Kanahai Lal* v. *Suraj Kunwar* (2), a Divisional Bench of the same Court qualified the above by holding that the appellate Court is not bound to entertain the plea, for it cannot be decided upon the record before that Court if its consideration involves the reference of fresh issues for determination by the lower Court.

In the present case the plea of res judicata does not appear to have been raised in the first Court but the judgments and decrees of that case were filed and marked as Exhibits in that Court. The plea was not only definitely taken in the lower appellate Court but was entertained and decided by that Court. On the other hand, it does not appear from the judgment of the lower appellate Court that any objection was taken by the respondents to the plea being raised and determined by that Court. The materials were

(1) [1882] 4 All 69.
(2) [1899] 21 All 446.

sufficient for the determination of the plea in the first Court and also in the lower appellate Court and so in this Court as well. I therefore overrule the contention of the respondents and hold that the plea was rightly entertained by the lower appellate Court and that the plaintiff is entitled to press it in second appeal in this Court. Upon the judgment and decree of the first case in Suit 43 of 1911, which were conclusive and operative as res judicata, the defendants are only under-raiyats and are liable to be ejected from the holding under S. 66, Ben. Ten. Act, the conditions of which have been fully complied with. The Munsif has held that the notice under S 49, Ben. Ten. Act, was properly served and that it was valid and sufficient for the purpose of the suit and also that the issue regarding the payment was not pressed by the defendants: vide the decision of the Munsif on issues 3 and 8. These findings of the Munsif have not been challenged by the defendants either before the lower appellate Court or in this Court, and must be accepted. The plaintiff is therefore entitled to a decree for possession as well as to recover rent of the land for the year 1320 and damages and mesne profits from 1322 up to the date of recovery of possession. The result is that the suit is decreed with costs throughout. The appeal is also decreed with costs.

V.S./R.K. *Appeal decreed.*

A. I. R. 1918 Patna 529

CHAPMAN AND ROE, JJ.

Akbar Ali—Defendant—Appellant.

v.

Gopal Prasad Chole—Plaintiff—Respondent.

Appeal No. 81 of 1917, Decided on 16th April 1918, from appellate decree of Dist. Judge, Cuttack, D/- 21st September 1917

(a) Behar and Orissa Tenancy Act (1913), S. 154—Nij chas is proprietor's private land—Land to be nij chas must be recorded as such not only in Provincial Settlement but also in settlement between 1906 and 1912.

Section 154 does not entitle a landlord to a declaration that certain land is nij chas or the proprietor's private land unless the land was recorded as nij chas not only in the Provincial Settlement but also in the settlement between the years 1906 and 1912. [P 529 C 2]

(b) Behar Orissa Tenancy Act (1913), S 232—S. 232 provides for contracts between landlord and tenant preventing tenants from acquiring occupancy land under kabuliyats with stipulation to give up possession—Tenants held liable to be ejected under kabuliyat.

The provisions of sub-S. (2), S. 232, make it clear that the legislature, when they enacted that Act, meant to give effect to contracts made between landlord and tenant under which tenants could be prevented from acquiring occupancy rights in land, provided the contracts had been made more than six years before the commencement of that Act. [P 530 C 1]

Defendants were admitted into possession of certain lands under kabuliyats of the months of May and June of 1906. Under these kabuliyats the defendants entered into an express stipulation that after the expiry of the term they would leave the lands to the khas possession of the plaintiffs:

Held: that at the time when these kabuliyats were executed, that is, more than six years before the Orissa Tenancy Act came into force, it was open to the defendants to contract that they should not acquire occupancy rights in the lands in their possession, and that the express stipulation in the kabuliyats that on the expiry of the term the landlord should be entitled to khas possession of the lands, should be interpreted to amount to such a contract. [P 530 C 2]

M. S. Das—for Appellant.

Biswanath Sinha—for Respondents.

Chapman, J.—In this case the defendants were recorded at the last Revisional Settlement as occupancy-raiyats in respect of the lands in suit. The suits were for recovery of possession and for a declaration that the lands were nij chas lands held as khas by the plaintiffs. The learned District Judge in first appeal decreed the plaintiff's suit for the lands in all the schedules except Sch (gha) The plaintiff's suit was dismissed in regard to Sch. (gha). Against the first part of this decision the defendants appeal. Their contention in appeal is that the learned District Judge was wrong in holding that these lands are nij chas lands and that it followed that he was wrong in giving a decree in ejectment. The learned District Judge has relied for his finding that the lands were nij chas, on an entry in the Provincial Settlement to that effect. S. 154, Orissa Tenancy Act of 1913, however would not entitle the plaintiff to a declaration that the lands were nij chas or rather proprietor's private lands unless the land was recorded as nij chas not only in the Provincial Settlement but also in the settlement between the years 1906 and 1912 In the latter settlement these lands were not recorded as nij chas. The learned District Judge therefore fell into an error in relying upon the entry in the Provincial Settlement. We need refer only to Cl. (b), sub-S. (1),

S. 154. In support of their case the respondents can only refer to kabuliyats of the months of May and June, 1906, in which the land is purported to have been let as nij chas land.

There appears however from the terms of S. 154 above referred to, to be a distinction between the expression nij chas and nij jot. It could not, in our opinion, suffice to prove that the lands were private lands to produce a kabuliyat prior to August 1906, in which the lands were described as naj chas. In so far, therefore as the learned Distriet Judge's award to the plaintiffs declaring that the lands were nij chas is concerned his judgment and decree must be set aside. It remains to consider whether the learned District Judge's decree in ejectment could be supported. The plaintiffs-respondents have contended that they are entitled in any event to a decree for ejectment. The finding of the learned District Judge is that the defendants were introduced into the land under kabuliyats of the months of May and June 1906. Under these kabuliyats the defendants entered into an express stipulation that after the expiry of the term they would leave the lands to the khas possession of the plaintiffs. At the date when these kabuliyats were executed by the defendants under which they were admitted to the possession of the land, Ss. 20 and 21, Ben. Ten. Act, were in force in Orissa, there was also in force S. 7, Act 10 of 1859. The latter section recognized the power to contract out of the application of the law under which rights of occupancy could be acquired. It has not been shown to us that there was at the time when these kabuliyats were executed, any express law under which a tenant was forbidden to contract himself out of the provisions of Ss. 20 and 21, Ben. Ten. Act, then in force and prevent himself from acquiring rights of occupancy in the lands leased to him. The provisions of sub S. (2), S. 232, Orissa Tenancy Act of 1913 also make it clear that the legislature, when they enacted that Act, meant to give effect to contracts made between the landlord and tenant under which tenants could be prevented from acquiring occupancy rights in land, provided the contracts had been made more than six years before the commencement of that Act.

In these circumstances we are of opinion that at the time when these kabuliyats were executed in May and June 1906, that is, more an six years before the Orissa Tenancy Act of 1913, it was open to the defendants at the time when they took the lease of these lands to contract that they should not acquire occupancy rights in them. The expres stipulation in these kabuliyats that on the expiry of term the landlord should bs entitled to khas possession, must be interpreted to amount to a contract that the defendants should not acquire occupancy rights in those lands. In the Full Bench case of *Pundit Sheo Prokash Misser* v. *Ram Sahoy Singh* (1) it was said by Couch. C. J., that if a raiyat agreed expressly to give up the land at the expiration of the term of the lease, that would be regarded as an express stipulation contrary to a right of occupancy. There is also the fact that in this case the raiyat described the land as nij chas, and we have been referred to a Settlement Report in which it is mentioned that the former custom was not to permit the acquisition of rights of occupancy in nij chas lands although that custom was not given effect to by that settlement. We are of opinion therefore that the plaintiffs were entitled to a decree in ejectment upon the gronnd that the lease had expired and upon the ground that under the stipulation in the kabuliyat the defendants were prevented from acquiring occupancy right. The suit was brought within six months of the expiry of the term of the lease and is within time. There is no reason therefore why the plaintiff should not be awarded a decree in ejectment. The result is that the judgment and decree of the learned District Judge is set aside in so far as it awards a declaration that the land is nij chas, otherwise his judgment and decree is affirmed. The appeal is allowed in part. We make no orders as to costs.

Roe, J.—I agree.

V.S./R.K. *Decree modified.*

(1) [1872] 17 W. R. 62=8 B. L. R. 165.

A. I. R. 1918 Patna 530

ROE AND COUTTS, JJ.

Nandlal Singh and *others*—Appellants.

v.

Mt. Bhagwati Koer—Respondent.

Appeal No. 67 of 1916, Decided on 30th May 1918, from original decree of Sub-Judge, Monghyr, D/- 27th March 1916.

Hindu Law—Partition—Reunion—Burden of proof—Complete conjunction of estate with intention to reunite must be proved.

Once the members of a joint family have separated the onus is heavy on any member who pleads re-union. In order to establish a case of reunion it is necessary to show not only that parties already divided, lived or traded together but that they did so with the intention of thereby altering their status and of forming a joint estate with its usual incidents. There must be a complete conjunction of estate with an intention to reunite and not a mere living together or joint enjoyment of the property. [P 532 C 2; P 533 C 1]

P. R. Das and *S. M. Das*—for Appellants.

Manohar Lal and *Hari Das Chatterji*—for Respondents.

Judgment.—The parties to this suit are all descendants of one Bekhdhari Singh. The following genealogy will show their relationship:

Babu Bhekhdhari Singh

By 1st wife	By 2nd wife	By 3rd wife
Kirit Narain Singh,	Lachmi Narain Singh.	Ram Rachya Singh, Nand Lal Singh defendant 1, Sant Lal Singh
Avadh Behari Singh, defendant 6. / Runmun Singh, defendant 7.	Ajodhya Singh, defendant 5.	Mt. Bhagwati Koer widow, plaintiff / Ganga Pershad Singh defendant 2.
Jadunandan Prasad Singh, defendant 3.		Jagdami Prasad Singh, defendant 4.

Up till 1906, the five brothers Kirat Narain, Lachmi Narain, Ram Rachya, Sant Lal and Nand Lal were joint. In that year Ram Rachya and Sant Lal are said by the plaintiff to have brought a suit for partition and by the defendants a suit for possession. The matter of the class of suit however is of no consequence because it is admitted that in that suit a compromise petition was filed by which it was argeed that the whole of the joint property was to be partitioned between the five brothers and a decree was passed accordingly. By this partition the properties in suit were allotted to Ram Rachya, and the case of the plaintiff Mt. Bhagwati Koer, his widow, is that he was in separate possession until his death in 1909. After his death the plaintiff applied for mutation of her name in the Land Registration Department, but she was successfully opposed by Nand Lal, defendant 1. During the proceedings in the Land Registration Department, a case under S. 144, Criminal P. C, was started between the plaintiff and this defendant and the plaintiff was found to be in possession. As however her title was affected by the Land Registration proceedings, she brought this suit for declaration of her title to the property which Ram Rachya had got by the partition. In the written statement the defendants admitted the compromise and the division of the property but they alleged that the partition had not been given effect to and that only Kirat Narain and Lachmi Narain had separated, the other brothers all continuing to remain joint proprietors, jointly holding possession over all the properties which had been entered in their names in the compromise petition as their separate properties. The learned Subordinate Judge has found that there was a partition and has decreed the suit in favour of the plaintiff.

So far as the partition between the five brothers is concerned, there is and can be no doubt. The suit in which the compromise was filed was instituted by Ram Rachya and Sant Lal against Kirat Narain, Nand Lal and Ajodhya and in the compromise it is recited:

"that the plaintiffs and the defendants possessed a good deal of moveable and immovable property of each of the plaintiffs and defendants and they were their private properties. That as the properties were private ones the plaintiffs often had disputes with the defendants, and consequently both suffered loss. That with a view to avoid future dispute and litigation and considering future loss of money and property, the plaintiffs and defendants amicably divided all the ijmali immovable property and the private property into five shares."

At the end of the compromise petition there are schedules showing exactly what properties were allotted to each of the five brothers. The compromise petition is therefore perfectly clear and unambigu-

ous, it shows without a doubt that there was an actual division and is exactly similar to the case of *Appovier* v. *Rama Subba Aiyan* (1) in which it was pointed out by their Lordships of the Privy Council that there are two kinds of division of property, a division of the title and a division of the subject to which the title is applied: and they held that although there might be no actual partition, still the character of the property was altered and it was converted from joint to separate ownership. This view has been followed by their Lordships of the Privy Council in the cases of *Doorga Perhsad* v. *Mt. Kundun Koowar* (2) and *Balkishen Das* v. *Ram Narain Sahu* (3) and is now settled law and there can, in our opinion, be no doubt that in the present case by the deed of compromise there was a conversion of the property of the family from joint to separate ownership.

Mr. Das has accepted this view which it was in fact impossible for him to contest, because not only is the compromise unambiguous in itself but was followed by certain transactions which show that it was acted upon. These are referred to by the learned Subordinate Judge in his judgment. The first is a sale executed by Sant Lal shortly after the partition in favour of one Tokhan Chowdhury. The sale was of a portion of his share, and in the deed to which his brothers were parties, it is recited that the properties had been divided and that Sant Lal alone had any connexion with the properties. There are also a series of plaints of the year 1908 by which Ram Rachya sued tenants for rent and in them he mentioned the fact of the partition, There is thus no doubt that there was a partition and that it was acted upon. Mr. Das however contends that the separation only lasted up till the year 1908 when three of the brothers Ram Rachya, Sant Lal and Nand Lal reunited. This was not the case made in the pleadings and it is doubtful whether the appellants should be allowed to make it now. It is however unnecessary to consider the point, because it does not appear to us that any case of re-union has been made out. To establish the case of reunion, we are referred to certain documents evidencing transactions which began towards the end of the year 1908. From the first of these documents, an exract from the Collector's Mutation Register, it appears that the three brothers made a joint application for registration of their names in respect of a property called Nabinagar which had been by the partition allotted to Ram Rachya's share. Apparently substitution was made and it appears to have been made on the strength of a "petition of admission" filed not by the applicants but by Kirat Narain and Adjodhya. In this petition it is recited that although a division had been made between the brothers, Ram Rachya, Nand Lal and Sant Lal remained joint and undivided.

This however is not a statement by the brothers who were seeking mutation of their names, and it cannot be said to, in any way, bind the plaintiff. Subsequent to this mutation proceedings a series of plaints were filed by these brothers jointly in respect of rent for this village Nabinagar; and in one of these plaints it was recited that there had been a partition and that these three brothers still remained joint. Four of these suits were filed in 1908 and one in the year 1909. There are also other documents of the years 1907, 1908 and 1909, which show receipts of rent also for this village of Nabinagar. Four of the plaints to which reference has been made, were filed before the mutation of names was made and it is not contended that there was in fact a reunion before this time. These plaints may therefore be left out of consideration and with respect to all this documentary evidence it is contended on behalf of the respondents that the transactions could not have been made with the knowledge and consent of 'Ram Rachya because for two years before his death in 1909, he was bed-ridden. There is considerable oral evidence in support of this story of Ram Rachya's illness which it is impossible to ignore: but even assuming that Ram Rachya had knowledge of these documents it cannot be said that they establish a case of reunion. Once the members of a family have separated, the onus is heavy on any members who plead reunion.

In fact Sir F. Macnaghten has said that the Pandits of the Supreme Court of Bengal told him that no case of reunion had formed within their knowledge and he himself says that he never met with

(1) [1866-67] 11 M. I. A. 75=8 W. R. 1 (P. C.).
(2) [1873-74] 1 I. A. 55=21 W. R. 214. (P. C.).
(3) [1903] 30 Cal. 738=30 I. A. 139 (P. C.)

such a case (F. MacNaghten 107, Mayne's Hindu Law, Edn. 8, p. 694). Cases of reunion therefore are rare, but it is clear that there are such cases and it is nowhere clearly laid down how reunion is to be established. What is clear however from all the decisions is that in order to establish a case of reunion, it is necessary to show not only that the parties already divided lived or traded together but that they did so with the intention of thereby altering their status and of forming a joint estate with its usual incidents. There must be a complete conjunction of estate with an intention to reunite and not a mere living together or in joint enjoyment of the property. In the cases of *Doorga Pershad* v. *Mt. Kundun Koower* (2) and *Balkishen Das* v. *Ram Narain Sahu* (3) there were joint transactions between certain members of the family after the partition but there was no reunion and it appears to us that although as in those cases there were in this case some joint transactions between the three brothers after the partition, these might at most establish that for certain purposes there was a partnership between the brothers. They cannot establish a case of reunion We are therefore of opinion that this appeal must be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 533

IMAM AND THORNHILL, JJ.

Rameshwar Singh Bahadur—Decree-holder—Appellant.

v.

Keshwar Rai—Judgment-debtor—Respondent.

Misc. Appeal No. 115 of 1918, Decided on 8th August 1918, from a decision of Dist. Judge, Darbhanga.

(a) Landlord and tenant—Sale of non-transferable holding in execution of money decree—Tenant can object although landlord consents.

A tenant can object to the sale of a non-transferable holding in execution of a money-decree even if the landlord consents to it. [P 533 C 2]

(b) Civil P. C. (1908), S. 11—Execution—Holding attached—Omission by tenant to raise objection as to non-transferability—He cannot raise it in subsequent execution proceeding.

If a tenant judgment-debtor omits to raise an objection as to the non-transferability of a holding in an execution proceeding in which the holding is attached, he is estopped from raising it in a subsequent execution proceeding in execution of the same decree. [P 534 C 1]

Purnendu Narayan Sinha and *Murari Prosad*—for Appellant.

Baikunthanath Mitter—for Respondent.

Imam, J.—The appellant who is a decree-holder proceeded to execute his decree as a mere money decree against the respondent and took out attachment against a non-transferable holding in the year 1913. It is admitted that when the attachment was made in that year the judgment debtor did not raise any question of the nontransferability of the holding. That execution proceeding seems to have ended infructucusly. A fresh attachment was issued in the year 1915 when the judgment debtor objected to the sale of the holding on the ground mentioned above. The learned Munsif of Madhubani held that the judgment-debtor was estopped from raising the objection on the ground of nontransferability as he had failed to do so in the previous execution proceeding. The judgment debtor appealed to the learned District Judge of Durbhanga, who allowed the appeal and held that the failure to raise the objection in the previous execution was no bar to its being advanced against the present attachment. He accordingly ordered that the property under attachment was not saleable.

The question therefore for consideration is, whether the omission to object to the sale on the ground of nontransferability in the previous execution proceeding is a bar to its being advanced now. The learned vakil appearing for the appellant contends that on the authority of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) and *Mazzem Hossein Mondal* v. *Sarat Kumari Debi* (2) the judgment-debtor is barred from raising the objection. On the authority of *Dayamoyi* v. *Ananda Mohan Roy* (3) and *Narayani* v. *Nabin Chandra Chowdhari* (4) it is quite clear that even if the landlord consents to the sale of a nontransferable holding the tenant can successfully object to the sale of such a holding. It is not denied that this is the case-law on the subject since 1914, when the decision in *Dayamoyi* v. *Ananda Mohan Roy* (3) was given. It is contended that even if

(1) [1882] 8 Cal. 51=8 I. A. 123 (P. C.).
(2) [1910] 5 I. C 89.
(3) A. I. R. 1915 Cal. 242=42 Cal. 172=20 I. C. 61.
(4) [1917] 44 Cal. 720=36 I. C. 803.

this is the law, the judgment-debtor cannot take advantage of it because of the decisions reported as *Mungul Pershad Dichit* v. *Girija Kant Lahiri* (1) and *Mazzebm Hossein Mondal* v. *Sarat Kumari Debi* (2). On the other hand, the learned vakil for the respondents contends that the state of the case-law in 1913 was uncertain and therefore his client in the earlier execution proceeding failed to raise the objection. There seems to be not much force in this contention. On the authorities referred to during the address at the Bar it is quite clear that there were conflicting decisions on the point which were considered and finally concluded by the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (3), indeed the learned vakil for the respondent does not contest the fact that the decisions prior to the Full Bench case were not uniform. The uncertainty of the case-law in 1913 however cannot be accepted as a sufficient justification for the omission in the earlier execution proceeding to raise the objection on the ground of nontransferability. In the circumstances the view taken by the lower appellate Court appears to be unsustainable. The order of the learned District Judge is set aside and that of the learned Munsif restored. The appeal is allowed with costs throughout.

Thornhill, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 534

ROE AND IMAM, JJ.

Chakrapani Nandi and *others*—Plaintiffs—Appellants.

v.

Gayamoni Dasi and *others*—Defendants—Respondents.

Second Appeal No. 255 of 1917, Decided on 20th March 1918, from a decision of Sub-Judge, Manbhum, D/- 11th December 1916.

Transfer of Property Act (1882), S. 43—Applicability depends upon fact whether erroneous representation has misled transferee.

Before S. 43 can be brought into operation, there must in fact have been an inducement by erroneous representation. The section does not apply where the transferee has knowledge that the representation made by the transferor is not true. [P 536 C 1]

Mritunjoy Lal—for Appellants.

Naresh Chandra Sinha and *S. K. Mitter*—for Respondents.

Judgment. — One Madhusudan Sen had three sons, Radhaballav, Ananta Lal and Haladhar Sen. He mortgaged a part of the property of the family for Rs. 2,500 to one Haradhan Das. In 1895 a decree was obtained upon this mortgage and the mortgaged property duly brought to sale. The price obtained was insufficient to cover the whole amount of the decree. Haradhan Das took steps to realize the deficit from the homestead of the family. Madhusudan was then dead. Two only of the sons, Radhaballav and Haladar, mortgaged the family dwelling house for Rs. 800 to Tincouri De. Tincouri De obtained a decree upon this mortgage. In order to save the property from sale the sons of Radhaballav executed a mortgage on 26th May 1904 in favour of the father of the plaintiffs for Rs. 1,999. The plaintiffs' father himself paid off Tincouri De's mortgage. The plaintiffs in due course on 3rd May 1912 obtained a mortgage decree and brought to sale the right, title and interest of their mortgagors which they alleged to be 16 annas. Haladhar Sen was then dead. His widow put in a claim to a one-third share. She obained an order under O. 21, R. 100, releasing her share of the property. Ananta Sen filed a similar claim which was dismissed. The plaintiffs therefore instituted the present suit asking for the following reliefs: (1) that Haladhar's widow had no interest in the property mortgaged, and that therefore the plaintiffs were entitled to the whole property; (2) that if it be found that Haladhar's widow had a one-third share, it be held that she and Ananta are liable to pay the money due to the plaintiffs on the ground that it was advanced for the payment of the debts of the father of Ananta Sen and Haladhar; (3) that Ananta Sen and his wife be held liable for the sum paid by the plaintiffs' father in respect of the mortgage entered into by Haladhar Sen and Radhaballav.

The details of the claim upon which the second and third reliefs are sought are set forth in para. 8 of the plaint. Briefly the proposition is that the mortgage entered into by the sons of Radhaballav kept alive the mortgage given by Radhaballav and Haladhar Sen, and that the mortgage given by Radhaballav and Haladhar kept alive the mortgage given by Madhusudan Sen, and that therefore

all the heirs of Madhusudan Sen are liable to contribute to the redemption of Madhusudan's mortgage generally and in particular to that part of Madhusudan's mortgage which was liquidated by the transaction to which Radhaballav and Haladhar were parties. The leading issue framed in the case was : Was the property of Madhusudan Sen held by the sons in ejmali or was it divided by metes and bounds ? This issue was found against the plaintiffs by the learned Subordinate Judge and this decision was not contested in appeal before the learned Judge. On the issue : Are defendants 2 and 3, that is to say, Ananta Sen and his wife, bound by the mortgage deed executed by Radhaballav and Haladhar Sen, the learned Subordinate Judge was of opinion that under Ss. 95 and 43, T. P. Act, the plaintiffs' father acquired a charge on the 1/3rd share of the house. This charge extended to half share of the money required to pay off the mortgage decree executed by Radhaballav and Haladhar, but that it was impossible to enforce this charge as an ordinary liability for contribution for the reason that the period of limitation for suits upon such a claim would be three years. It was further found as a fact by both the Courts that the mortgage made by the sons of Radhaballav was invalid by reason of defects in attestation. The suit was accordingly dismissed with costs, and the appeal was also dismissed with costs on grounds somewhat similar to those given by the learned Subordinate Judge.

In appeal to this Court it is urged, firstly, that under S. 95, T. P. Act, the defendant Gayamani Dasi is bound to contribute to the mortgage, and secondly, that the suit is not barred by limitation for the reason that the liability to contribute was a charge upon the property, and that therefore the limitation for such a suit would be 12 years. In answer to this claim it was pointed out by the respondents that the charge created by the payment of the whole mortgage debt by Radhaballav's sons vested, not in the plaintiffs' father who advanced the money, but in Radhaballav's sons who pledged their property as security for the advance. To meet this argument the appellants claim the benefit of S. 43, T. P. Act, and assert that inasmnch as in the mortgage deed the sons of Radhaballav erroneously stated that they were entitled to a 16 annas share in the property, any right vesting in them in regard to that property would vest in the plaintiffs. The points therefore which we have to consider in this case are : Firstly, whether the invalid mortgage given by Radhaballav's sons can bind anybody but Radhaballav's sons, and secondly, whether on the basis of the decree obtained against Radhaballav's sons the plaintiff can claim the benefit of the charge vesting in Radhaballav's sons without proof of the transaction as between them and Radhaballav's sons. The first point presents to our minds no difficulty at all. All that the learned Subordinate Judge and all that the learned vakil for the appellants has said with regard to the doctrine of subrogation may be perfectly true; but there can be no subrogation in respect of property of which there has been no new mortgage. It has been found as a fact, and the finding has been accepted, that Radhaballav's sons had no interest in 1/3rd share of this property. Nothing that they could do with respect to this 1/3rd share could affect the rights of the real proprietors, either by way of subrogation or by way of extending the liability of those proprietors.

The lien on the share of Radhaballav's sons might be carried back over the prior mortgages, but there could be no extension forwards or backwards of the lien on Haladhar's share under a contract to which Haladhar was not a party. Our difficulty with regard to the second point is that there was no suggestion in the pleadings that S. 43 could operate to give the plaintiffs a charge upon the share of Haladhar. We may grant for the sake of the argument that in view of the decision, *Danappa* v. *Yamnappa* (1), the charge vested in Radhaballav's sons would pass to the plaintiffs under S. 43, if indeed it were proved that there had been an erroneous representation. We may also grant for the sake of the argument that that mortgage having passed from the stage of contract to the stage of a decree, the plaintiffs would be entitled to claim any interest possessed by the sons of Radhaballav without further proof of their contract with the sons of Radhaballav. But there is ample authority for the proposition [vide *Gangadas* v. *Basvant Ballappa* (2) and *Pandiri*

(1) [1902] 26 Bom. 379.
(2) [1910] 34 Bom. 175=5 I. C. 866.

Bangaram v. *Karumoory Subbaraju* (3)] that before S. 43 can be brought into operation there must in fact have been an inducement by erroneous representation The question therefore of the applicability of S. 43 depends upon the issue of fact : Was the plaintiffs' father induced by the erroneous representation to advance the money to the sons of Radhaballav. There was no suggestion in the plaint of the facts brearing upon this question and no issue was raised upon it. We have however certain broad facts before us of which the chief is that the plaintiffs' father himself was a witness to the mortgage entered into by Radhaballav and Haladhar, and himself paid off the whole sum due under that mortgage. He must have been perfectly aware that Radhaballav was not the sole owner of this property; he must have known that Haladhar had an interest in it; he cannot now plead that he was misled by the assertion in the mortgage document executed by the sons of Radhaballav that they were in fact the sole proprietors of the property. In this view of the case there can be no question of the operation of S. 43, and in no other view of the case could the plaintiffs possibly succeed. We are therefore of opinion that the suit was rightly dismissed and dismiss this appeal with costs in one set.

V.S./R.K. *Appeal dismissed.*

(3) [1910] 34 Mad. 159=8 I. C. 388.

A. I. R. 1918 Patna 536 (1)

ROE AND JWALA PRASAD, JJ.

Jaggarnath Pershad--Petitioner.

v.

Chitragupta Narain Singh—Opposite Party.

Civil Revn. No. 178 of 1917, Decided on 15th January 1918, from order of Sub-Judge, Muzaffarpur, D/- 14th April 1917.

Civil P. C. (5 of 1908), O. 21, R. 66—Valuation of property to be sold how to be made by Court stated — Directing that value be put at 20 times revenue is not proper.

Where an executing Court directed that the value of the property to be sold should be reckoned at twenty times the Government revenue:

Held: that this was only a colourable pretence of exercising the jurisdiction vested in the Court by law to ascertain the actual value of the property and record it in the sale proclamation and that the Court should ascertain the value of the property by a reference to the rent-roll and to the Record of Rights showing the extent of the ziraits and bakasht lands of the village.

[P 536 C 2]

Chandra Sekhar Banerji—for Petitioner.

Harnarain Prasad — for Opposite Party.

Judgment.—In this case the learned Subordinate Judge has directed that the value of the property should be reckoned at twenty times the Government revenue. This we can regard only as a colourable pretence of exercising the jurisdiction vested in him by law to ascertain the actual value of the property and record it in the sale proclamation. We should have been willing to ascertain the value for ourselves, but the learned vakil for the decree-holder asks for a remand that the matter may be properly inquired into. We therefore direct the learned Subordinate Judge to ascertain the value of this property by a reference to the rent roll and to the Record of Rights showing the extent of the ziraits and bakasht lands of the village. The application is allowed. The decree-holder will pay the costs of the hearing.

V.S./R.K. *Application allowed.*

A. I R. 1918 Patna 536 (2)

MULLICK AND THORNHILL, JJ.

Phatali Singh and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 208 of 1918, Decided on 20th June 1918, against order of Sess. Judge, Monghyr, D/- 27th April 1918.

Criminal Trial—Evidence—Complainant's story disbelieved on essential details—Conviction based on part of story is not proper.

Where a party comes into Court with a story which cannot be believed as to its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused.

[P 537 C 1, 2]

Sushil Madhab Mullick — for Petitioners.

Manohar Lal—for the Crown.

Mullick, J.—The case for the prosecution was that on the evening of 5th September last the petitioners Chottoo Singh and Phatali Singh came to the house of one Somar and demanded some milk. Somar refused and thereupon the two petitioners, accompanied by the third petitioner Udho Singh, returned about 9 p. m. and assaulted Somar, his son Borham and his daughter Jagia with lathis. It is also alleged that they snatched away a hasuli which Jagia was wearing and then carried off seven buf-

faloes belongining to Somar to a pound in a distant village. Somar and Borham both had a number of injuries, which are said to have been caused by lathis, and the evidence in regard to the fracture on the left arm of Somar is that it might have been caused either by a lathi or by a fall. On the side of the petitioners, Chottoo had a scratch on the left shoulder, which might have been caused by a lathi, and which is said to have been in a region which is pronounced to be dangerous by the Medical Officer. The Deputy Magistrate, who tried the case, disbelieved the whole story as to the visit to Somar's house early in the evening and the subsequent return of the petitioners for the purpose of assaulting Somar. He found that the story told by the defence was true, namely, that the occurrence took place on 6th September when Chottoo was driving some buffaloes to the pound, which had trespassed into Chottoo's field. He also found that the three petitioners exceeded the right of private defence in assaulting Somar, Borham and Jagia so severely, although they were in the wrong in attempting to rescue the cattle.

The learned Sessions Judge in appeal has written a very unsatisfactory judgment. He does not come to any finding as to which version is true, and he has affirmed the convictions merely because the complainant and his companions were severely beaten. In my opinion upon the findings of the trial Court, the conviction cannot be sustained. The complainant comes into Court with a story which is disbelieved in its most essential details, and it is impossible to rely merely upon the injuries inflicted upon Somar and his party to say that the petitioners have committed the offence with which they are charged. The learned Depury Magistrate seems to think that the petitioners must have exceeded the right of private defence, but he does not say upon what evidence he comes to this conclusion. It may well be that if the story as to the attempted rescue is correct, then the resistance offered by the complainant and his party was such that it was necessary to inflict those injuries in order to secure the retention of the cattle. In any event, it is a recognized principle that where a party comes into Court with a story which cannot be believed as to its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused. The convictions and sentences will be set aside and the accused will be released. The fines, if paid, will be refunded.

Thornhill, J.—I agree.

V.S./R.K. *Convictions set aside.*

A. I. R 1918 Patna 537

DAWSON-MILLER, C. J. AND MULLICK, J.

Charitter Rai and *others*—Appellants.

v.

Kailash Behari and *others*—Respondents.

Letters Patent Appeals Nos. 72 to 76 of 1917, Decided on 8th February 1918, from a decision of Chapman, J.

(a) Evidence Act (1872), S. 90—Document more than 30 years old held inadmissible in evidence without proof under S. 90.

Where a party producing a document is unable to say who prepared or signed it or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than 30 years old does not make it admissible without proof under S. 90. [P 538 C 2]

(b) Practice—Appeal—Document admitted without objection — No objection can be taken in appeal.

Where a document is admitted in evidence without objection in the trial Court, no objection as to its formal proof can be taken in appeal. [P 539 C 1]

(c) Evidence Act (1872), Ss. 32 and 34—Jamabandi which cannot be admitted as corroborative evidence without independent evidence of fact of collection of rent can be used as independent evidence if relevant under S. 32.

A jamabandi which cannot be admitted as corroborative evidence without independent evidence of the fact of collection of rent at a certain rate under S. 34 can be used as independent evidence if it is relevant under S. 32 of the Act. But although it would not, as a matter of law, require corroboration, yet the Court is not bound to act upon it without corroboration. [P 539 C 1]

(d) Evidence Act (1872), S. 34 — Jamabandis must be carefully scrutinized before tenants are held liable to pay rent shown in them.

Zamindari papers such as jamabandis, being ex parte papers, ought to be carefully scrutinized before they are held sufficient to make the tenant liable for the rent shown in them. Every case in which a zamindar seeks to obtain enhancement on the strength of his papers must depend upon its own facts. [P 542 C 1]

Lakshmi Narain Singh and *Parmeshwar Dayal*—for Appellants.

Sushil Madhub Mullick and *U. C. Laha*—Respondents.

Mullick, J.—These five appeals arise out of five second appeals heard by Chapman, J., sitting alone as a Judge of

this Court. The litigation commenced with some applications made by the plaintiff landlords under S. 105, Ben. Ten. Act, against the raiyats of certain villages for assessement of fair and equitable rent. The tenants or some of them set up the defence that they were raiyats either at fixed rents or fixed rates of rent and that therefore the landlords were not competent to make any enhancements as regards their holdings and they contended that the entry in the Record of Rights published under S. 103 (b), Ben. Ten. Act, showing them to be settled raiyats was wrong. The Assistant Settlement Officer found, so far as the tenants before us are concerned, that the entry in the Record of Rights was correct and that they were not raiyats at fixed rents or rates of rent but settled raiyats whose rents were liable to enhancement. He accordingly assessed rent upon these raiyats allowing an enhancement on account of the rise in the price of food crops and for other grounds. The tenants thereupon appealed to the Special Judge and we are concerned with the four appeals which in the Court of this latter officer were Nos. 155, 160, 186 and 187 of 1912. It is necessary to observe that Appeal No. 186 of 1912 covered the cases of two sets of raiyats, the judgment in regard to one set being delivered by Mr. Monahan as Special Judge and the judgment in regard to the other set being delivered by Mr. Macpherson as Special Judge.

This in effect makes a total of five appeals before the Special Judge. The tenants succeeded before the Special Judge, who held on grounds which will be considered presently that the entry in the settlement record was incorrect. The landlords then preferred five second appeals to the Calcutta High Court, which were transferred to this Court for hearing. These second appeals were heard, as I have already observed, by Chapman, J., who came to the conclusion that the learned Special Judge was wrong and that the landlords had succeeded in rebutting whatever presumption as to fixity was raised by the evidence of the tenants, he therefore decreed the appeals before him and restored the judgment of the Assistant Settlement Officer. The present appeals are preferred against the judgment and decree of Chapman, J. by some of the raiyats who had succeeded before the learned Special Judge. Before dealing with each appeal separately it is desirable to take up one point which is common to all. Before Chapman, J., the landlords contended that the learned Special Judge was wrong in deciding that the collection and other papers produced by the landlords before the Assistant Settlement Officer were inadmissible in evidence. Chapman, J. came to the conclusion that this contention was well founded. In this Court the raiyat-appellants attack the judgment of Chapman, J. on the ground that he has taken an erroneous view of the law. These zamindari papers are papers produced from the office of the landlords dating from 1202 F. S., that is, two years after the Permanent Settlement.

The papers previous to 1861 appear to be unsigned and the plaintiffs are unable to say by what officer or officers they were prepared. The papers subsequent to 1861 appear to bear the signature of certain officers who are or were in the plaintiffs' employ or in the employ of their predecessors. Let us first examine the contention that the unsigned papers are admissible under S. 90, Evidence Act. Now S. 90 merely allows a party to ask the Court to presume that a document which is more than 30 years old and purports to have been prepared or signed by a particular person was in fact prepared or signed by such person. Further than that the section does not go. It certainly does not contemplate that where a party producing a document is unable to say who prepared or signed it or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than 30 years old makes it admissible without proof. If that was the law, it would be impossible to test the value of such evidence and in cases between landlord and tenant no tenant would be safe. S. 90, Evidence Act, will not therefore assist the landlord.

But the documents both signed and unsigned would be admissible not only as corroborative evidence but as independent evidence, if the landlords complied with the requirements of S. 32, Evidence Act. It was no doubt necessary for the landlords to establish the antecedent condition that the persons who prepared these papers were dead or could not be found, but the tenants appear to have taken this

for granted and the papers were accepted by the trial Court with an endorsement to the effect that they were admitted without objection. In these circumstances it is too late for the raiyats to take the objection that the documents required formal proof. This principle has been affirmed by their Lordships of the Privy Council in *Shahzadi Begam* v. *Secy. of State* (1), where at p. 1074 their Lordships observed as follows:

"Their Lordships are however of opinion that it is now too late for the respondent to take an objection to the admissibility of a document which was received without objection at the trial."

The learned Judge of this Court was therefore clearly right in holding that the documents are legal evidence. In *Aktowli* v. *Tarak Nath Ghose* (2) the question of the relevancy and weight to be attached to similar papers was very fully discussed by their Lordships of the Calcutta High Court and the conclusion arrived at was that although the papers could not be admitted under S. 34, Evidence Act, as corroborative evidence without independent evidence of the fact of collection at certain rates, they could be used as independent evidence if they were relevant under S. 32, Cl. (2). To like effect is the judgment of their Lordships of the Bombay High Court in *Rampyarabai* v. *Balaji Shridhar* (3). Their Lordships however added a caution in the concluding portion of their judgment as follows:

"At the same time we wish it to be distinctly understood that though the accounts, which are relevant under S. 32 (2), do not as a matter of law, require corroboration the Judge is not bound to act on them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact. In what I have said I have in no way limited the discretion of the Judge as a Judge of fact in determining whether or not he will act on the accounts without corroboration, the only point being that the law does not require corroboration."

It is necessary therefore to consider what weight the learned Special Judge would have attached to the papers if he had held them to be legally admissible. I will proceed therefore to deal with each Letters Patent Appeal separately. Letters Patent Appeal No. 72 of 1917 corresponds to Second Appeal No. 1298 of 1915, which corresponds to Appeal No. 186 of 1912 before the Special Judge. When Appeal No. 186 was first preferred in the Court of the Special Judge three holdings were concerned. Mr. Monahan, the Special Judge, dealt with the case of one of these holdings which was in the possession of the appellant Tirbeni (defendant 10 in the Court of the Assistant Settlement Officer), and came to the conclusion that Tirbeni had established the presumption required by S. 50, Ben. Ten. Act, and that the papers of the landlord had not fully rebutted that presumption. With regard to the tenants who were in possession of the other two holdings, namely, defendants 4 and 13 in the Court of the Assistant Settlement Officer, Mr. Monahan decreed the landlord's claim in the absence of the tenants. These tenants thereupon filed an application for review, which came up for hearing before Mr. Macpherson who was the successor of Mr. Monahan as Special Judge. Mr. Macpherson saw good grounds for admitting the review and finally disposed of these two cases by agreeing with Mr. Monahan (though for an additional reason) and holding that the landlord's papers were thoroughly unreliable and that the presumption raised had not been rebutted. The result of this was that out of Special Appeal No. 186 there have arisen two second appeals, namely, No. 1298 and 4183.

Letters Patent Appeal No. 72 deals with Second Appeal No. 1298. In this case the raiyats are, as I have observed, defendants 4 and 13 before the Assistsnt Settlement Officer. The learned vakil for the appellants urges that although the landlord has succeeded in Chapman, J's., Court in establishing that the collection and other papers produced by the landlord are admissible in evidence, still as there is a definite finding by Mr. Macpherson that the landlord's papers are thoroughly unreliable the appeal before Chapman, J., was concluded by a finding of fact and should have been dismissed. This would no doubt have been so if the matter had rested there. No doubt the finding of Mr. Macpherson that the landlord's papers were utterly unworthy of credit would altogether do away with the necessity of determining whether or not the papers were admissible under the provisions of the Evidence Act, and therefore Chapman, J's., decision that the papers were admissible would not in any way affect the compe-

(1) [1907] 34 Cal. 1059=34 I. A. 194 (P. C.).
(2) [1912] 17 I. C. 266.
(3) [1904] 28 Bom. 294.

tency of the appeals before him. But the learned vakil for the landlord before us meets this argument on behalf of the appellants by contending that defendants 4 and 13 have at the outset failed to establish that there was any presumption under S. 50, Ben Ten. Act, in their favour and he shows this in the following way. These two tenants have no rent receipts by which they can establish payment at a fixed rent for 20 years. It is not their case that they have paid at any fixed rate of rent. What they have done is this; they have asked us to look at the landlord's jamabandi of 1277 F. S. and to hold that the rental recorded in the survey and settlement record is identical with the rent recorded in the jamabandi of 1277 F. S.

Now this does not appear to be a fact. What appears to be the real fact is that the jamabandi of 1277 shows not only the rent now recorded in the survey and settlement record but an additional sum on account of company's batta. If therefore the tenants contend that their holdings were created at the time of or previous to the permanent settlement, then the landlord had prima facie a right to demand company's batta when sicca rupees were finally converted into company's rupees. The tenants cannot say that the entry on account of batta is to be disregarded and the amount represented in company's rupees only is to be taken as the true rent in 1277. If they contend that the amount entered on account of batta is an abwab, then they are in the dilemma that they must admit that their holding was created sometime subsequent to 1836 when the sicca rupee was finally declared not to be legal tender. The conclusion at which I have arrived is that the jamabandi of 1277 must be taken as a whole and the entry there must be taken to mean that the rentals payable by these tenants were not identical with the rents recorded in the survey and settlement record published in or about 1911. If that is so then the basis upon which the tenants claim to be entered as raiyats at fixed rents or rates of rent completely disappears; and this is admitted by the learned vakil for the appellants who says that if he is not entitled to pick out that part of the entry which relates to company's rupees in the jamabandi of 1277 then he is unable to raise the presumption in favour of his clients. Therefore the decision of the Assistant Settlement Officer in regard to these two tenants was correct and the decision of the learned Special Judge cannot be sustained irrespective of the fact whether or not the landlord's collection papers were admissible in evidence. If the landlord's papers are not admissible the tenants are unable to show the payment in 1277 at the rate which they claim to have paid.

If the landlord's papers are admissible then the entry must be taken as a whole, and it does not support the case that in 1277 the rent recorded in 1911 was the rent of the holding. It is to be observed that the Special Judge Mr. Macpherson was of opinion that although Company's batta may have been entered in the jamabandi of 1277 still in the absence of direct evidence to show that Company's batta was in fact realized, the tenant is competent to maintain that his real rent in that year was exclusive of Company's batta. The reply to this is that the rate of rent is not dependent upon the quantity collected. The landlord may be unable to collect his full rent but if his papers are complete and if they do in fact show that the full rent was inclusive of batta, then it is immaterial whether or not the batta was collected. The full rent therefore in the case of defendants 4 and 13 was the rent inclusive of batta and does not therefore agree with the rent shown in the survey and settlement record. That being so, Letters Patent Appeal No. 72 must be dismissed with costs. Chapman, J.'s judgment restoring the judgment of the Assistant Settlement Officer in regard to these two tenants must be affirmed. The tenants have failed to raise any presumption and the question of the admissibility of the papers does not arise.

Letters Patent Appeal No. 75, which corresponds to Second Appeal No. 4183, relates to the raiyat Tirbeni (defendant 10) who was the other tenant concerned in Appeal No. 186 of 1912 before the Special Judge. His case is also identical so far as concerns the question of presumption with that of the tenants in Letters Patent Appeal No. 72. In this case also the tenant had recourse to the jamabandi of 1277 for the purpose of establishing a uniform payment of rent at the rate of Rs. 210. Now the jamabands shows that the rent in 1277 was

Rs. 210-15-0, with Company's batta Rs. 14-13-0. The Record of Rights shows the rent to be Rs. 210-15-0. In my opinion the rent in 1277 F. S must be taken to be Rs. 210-15-0, plus Rs. 14-13-0, which is greatly in excess of the amount shown in the Record of Rights and therefore I must hold that Tirbeni has failed to establish a statutory presumption under S. 50, Ben. Ten Act. Letters Patent Appeal No. 75 must therefore be dismissed with costs. As regards the costs the respondents having succeeded and the appellants having failed upon the merits as well as on the ground of admissibility the landlords will be entitled to their costs. Letters Patent Appeal No. 74 arises out of Second Appeal No. 2845 of 1913, which corresponds to Appeal No. 160 of 1912 before the Special Judge Mr. Monahan. In this appeal the judgment of Chapman, J., as regards the admissibility of the zamindar's papers must be upheld and therefore the only question is whether the appeals must be remanded or whether there was any finding by the Special Judge which concluded the second appeal before Chapman, J. Now in this case there is a finding by Mr. Monahan to the following effect:

"Thus the above jamabandis of 1235 and 1237 taken in conjunction with the sharahwar jamabandis would be sufficient, in my opinion, to rebut the presumption in favour of fixity of rent provided that these jamabandis can be accepted as evidence."

Mr. Monahan decided that the papers were not admissible at all, but he was of opinion that if they were legally admissible then they were sufficient to rebut the presumption raised by the raiyats. There is no question that a prima facie presumption was legally raised. The only question is whether landlords had by their evidence rebutted that presumption. In view of the very deliberate finding recorded by Mr. Monahan it is impossible for us to accept the contention of the learned vakil for the raiyats appellants before us that Mr. Monahan did not take into consideration the collection papers at all or at any rate that he did not take into consideration all the collection papers and that he recorded his finding only upon the evidence which was in his opinion admissible. I cannot give his judgment this construction. I think it was his intention to provide for the contingency of the appeal Court holding that he was wrong upon the question of the admissibility of the documents and he therefore took the precaution of recording what would be his finding if the appeal Court came to the conclusion that the jambandis and other papers were admissible. Therefore, Chapman, J., having decided that the jamabandis were admissible, it was competent for him to decree the appeal forthwith and to order enhancement according to the rates found by the Special Judge. This he has directed to be done in the concluding portion of his judgment, which is as follows:

"I would therefore reverse his (Special Judge's) judgment in appeal and direct that the decree be drawn up in accordance with the rents, which it is apparent from the learned Special Judge's judgment he would have settled if he had admitted the jamabandi papers as evidence."

Our order therefore will be that the judgment and decree of Chapman, J. be affirmed and the appeal of the tenants before us be dismissed with costs. Letters Patent Appeal No. 73 corresponds to Second Appeal No. 482, which corresponds to Appeal No. 155 of 1912 before Mr. Monahan. In this case the question of the admissibility of the zamindars' papers having been decided in his favour, the only question is whether Mr. Monahan's finding disposed of the matter in dispute in second appeal. It appears that Mr. Monahan, after holding that the papers were not admissible, does not come to any clear finding as to whether they would have established the zamindars' case if his finding on the point of law had been otherwise. His judgment is not altogether satisfactory and I am not certain that he had a clear conception in his mind as to the nature of the proof which it was necessary for the zamindars to adduce in order to rebut the presumption created by the production of 20 years' receipts by the raiyats showing payment of a uniform rental. In my opinion the proper course will be to remand this case to the Special Judge in order that it may be dealt with according to law after consideration of the zamindars' papers which, agreeing with Chapman, J. we hold to be admissible in evidence. The Assistant Settlement Officer assumed that thase papers were genuine. There appears to have been some argument before him as to whether they were forgeries but he did not accede to the argument of the tenants on this point. Mr. Monahan, the learned Special Judge, appears also to have taken for

granted that the papers were genuine. The only question which was argued before him was whether they were admissible in evidence according to law. It will not be open therefore when the case goes back on remand, for the tenants to argue that the papers are not genuine.

The only question which will be open will be as to what these pepers prove and whether they do in fact entitle the landlords to say that they have rebutted the presumption which the tenants have raised. That is to say, the learned Special Judge will have to consider what credit is to be attached to these papers. He may be of opinion that these papers are not of any value whatever but that is a matter entirely for him. It is needless to refer to the caution which is given in *Gopal Mundul* v. *Nobbo Kishen Mookerjee* (4), to the effect that zamindari papers being ex parte ought be very carefully scrutinized before they are held sufficient to make the tenant liable for the rent shown in them. Every case in which the zamindar seeks to obtain enhancement upon the strength of his papers must depend upon its own facts.

The learned Assistant Settlement Officer appears to have applied himself only to a consideration of the rates of rent disclosed in the papers of the zamindars. As has been observed by Mr. Monahan, a change in the rates would not necessarily shew a change in the gross rental paid by a tenant who pleads uniform payment for 20 years, and it would be quite possible for a zamindar to re-arrange the rates from year to year without affecting the gross rental paid. The learned vakil for the zamindars, respondents before us, however asserts that he will be able to show from his papers that there is not a single tenant in the village here in question who was a tenant at the time of the Permanent Settlement who has not at some subsequent time paid a different rent for the same area in two successive years. If he can show this, that will throw back the onus upon the tenant to establish that although his rental has changed that rental still includes a part of the rental paid upon the original area held at the time of the Permanent Settlement. It is impossible for us to dispose of the matter finally, although it is eminently desirable that this litigation should be ended as quickly as possible. I think therefore although, in my opinion, the course is extremely unsatisfactory, that the only order we can make is that the appeal should be allowed and that the case should be sent back to the Special Judge in order that he may come to a finding upon the question of fact, namely, whether or not the presumption raised by the raiyats has been rebutted by the landlords, after giving due weight to the evidence adduced by both parties and to the observations made in this judgment. Neither party will be permitted to adduce additional evidence. As regards costs although the tenants succeed in obtaining a remand, it is to be observed that they might have obtained the same result in the Court of Chapman, J. if they had brought to his notice the judgment of Mr. Monahan in this case. The fact appears to be that they brought to Chapman J's notice only one judgment, namely, the judgment in the Appeal No. 186 of 1912. The other judgments were apparently completely ignored and I am quite certain that if the judgment of Mr. Monahan in Appeal No. 160 of 1912 had been brought to the notice of Chapman, J., he would not have restored the judgment of the Assistant Settlement Officer but would have remanded the case to the Court of the Special Judge for a decision upon the merits, in other words, he would have taken the very course which we have now taken. In these circumstances the appellants will not be entitled to any costs in this Court.

Letters Patent Appeal No. 76, corresponds to Second Appeal No. 3440 of 1913, which corresponds to Appeal No. 187 of 1912 before Mr. Monahan. In this case also there is no conclusive finding by Mr. Monahan in favour of either party. The same remarks apply to this appeal as to Letters Patent Appeal No. 74. For the same reasons this appeal must be decreed and the case remanded to the Special Judge for disposal in accordance with law after due regard to the judgment of this Court. No additional evidence will be allowed. The appellants having failed to bring to Chapman, J's notice the judgment of Mr. Monahan in Appeal No. 187 of 1912 before him they will not be entitled to any costs. In each of the Appeals Nos. 72, 74 and 75 the costs awarded to the res-

(4) 5 W. R. Act X Rulings, 83.

pondent-landlords will be assessed at three gold mohurs,

Dawson, Miller, C. J.—I agree.

V.S/.RK. *Order accordingly.*

A. I. R. 1918 Patna 543

ATKINSON, J.

Mt. Bibi Saleha — Plaintiff— Appellant.

v.

Antu Ram and *another*—Defendants—Respondents.

Second Appeal No. 405 of 1917, Decided on 10th January 1918, from decision of Dist. Judge, Shahabad.

(a) Bengal Tenancy Act (1855). Ss. 106 and 109—Proceeding under S 106 dismissed for default—Subsequent suit is not barred by virtue of S. 109.

A proceeding under S. 106, which is dismissed for default does not operate as a bar to a subsequent suit by virtue of the provisions of S 109 of the Act. [P 544 C 1]

(b) Bengal Tenancy Act (1885), S. 109—Bar under S. 109 to subsequent suit—Existence of decision by settlement officer on merits of claim is presupposed.

Section 109, in order to operate as a bar to a subsequent suit, pre-supposes the existence of a decision by the settlement officer on the merits of the claim. [P 544 C 1]

(c) Practice—Appellate Courts revzersing decision must give adequate and satisfactory judgment as required by law.

Where a Court of Appeal reverses the decision of the primary Court, the law imposes upon the Court of Appeal an imperative duty and obligation of giving an adequate and satisfactory judgment such as is required by law. [P 545 C 1]

Fakrhuddin—for Appellant.

Ganesh Dutt Singh—for Respondents.

Judgment.—The plaintiff instituted this suit claiming a declaration that she was entitled to a certain chhaur or pathway and that the same appertained to the plaintiff's village, of which she is the sixteen annas proprietress, the name of the village being Sarai Sarank. In the Record of rights this pathway was recorded as being half within the ambit of the plaintiff's village, and half within the ambit of the defendant's village Misraulia. The case came before the learned Munsif, who held in favour of the plaintiff's contention and granted the plaintiff a decree. Two issues were raised for consideration: one was, whether or not the suit was barred by the principle of res judicata; and the other was as to the qestion arising on the merits. The learned Munsif held that the principle of judicata did not apply and as I have aid, decided on the merits in favour of the plaintiff. It appears that during the course of the preparation of the Record of Rights a proceeding was instituted by the plaintiff under S. 106, Ben. Ten. Act claiming to have the Record of Rights corrected, so that it might accord, according to the plaintiff's case, with the actual facts and that the pathway might be described in the Record of Rights as being wholly within the limits of the plaintiff's village. For some reason or other it appears that the summons which was issued in that proceeding was not served upon the defendants; and when the matter was put in the list for disposai neither the plaintiff nor the defendants appeared; accordingly the learned Settlement Officer dismissed the application under S. 106 on the ground of non-appearance of parties. Subsequently the plaintiff instituted the present suit.

From the decision pronounced by the learned Munsif the defendants appealed. It is right to observe here that the learned Munsif bestowed upon the case the greatest possible care. There was a great deal of oral evidence given which appears on the record; and the learned Munsif considered that it would be a prudent thing for him to do, with a view to considering the evidence before him, to visit the locus in quo and to compare the maps which had been adduced in evidence. Accordingly the learned Munsif made a local investigation and compared the maps, i. e., the cadastral survey map and the revenue survey map; and from what he saw coupled with the comparison of the maps he formed the clear impression that the pathway in question fell within the ambit of the plaintiff's village. It has been contended that the learned Munsif was quite in error in making a local investigation, and that he really went to the spot where the pathway was more for the purpose of gleaning information than for the purpose of considering the evidence which was given. I am not at all satisfied that this is a proper view to take of the Munsif's action. There was a great conflict between the parties on the evidence and it was not unnatural, nor would it be illegal, for the learned Munsif if he thought it desirable, for the purpose of considering or explaining the evidence, to make a local investigation. On appeal the learned District Judge for the time being, Mr. Rowland, came to

the conclusion that the present suit was barred, not by reason of the application of the principle of res judicata, not by reason of the provisions of S. 11, Civil P. C., but by reason of the provisions of S. 109, Ben. Ten. Act. On the merits the learned Judge found in favour of the defendants and reversed the decision of the learned Munsif and allowed the appeal with costs.

The learned Judge, in my opinion, was quite right, notwithstanding that he found that the suit was barred, in disposing of the case on the merits. It becomes necessary however to consider whether or not the suit was barred in point of law under the provisions of S. 109, Ben. Ten. Act. The proceeding under S. 106, Ben. Ten. Act, it must be remembered, was dismissed for default and that at no stage of the proceeding under S. 106 was there a decision by the settlement officer upon the merits of the claim made by the plaintiff as against the defendants to have the Record of Rights corrected and brought into harmony with the contention put forward by the plaintiff. S. 107, Ben. Ten. Act, extends to proceedings under S. 106, Ben. Ten. Act the provisions of the Code of Civil Procedure for the trial of suits. S. 107 also provides that a decision of the settlement officer when given shall have the force and effect of a decree of the civil Court. After the proceeding under S. 106 had been dismissed, the plaintiff made an application for review and not for restoration. That application was rejected on the ground that it was not made within 30 days from the date of the order of dismissal. The learned Judge has held that in point of law the mere institution of a proceeding under S. 106 operates as a bar to a subsequent suit by virtue of the provisions of S. 109, even though the proceeding under S 106 may have been dismissed for default; or for non-appearance of parties or for any reason other than on the merits. In my opinion that decision of the learned Judge is entirely wrong. S 109 to operate as a bar to a subsequent suit presupposes the existence of a decision by the settlement officer on the merits of the claim. This view was upheld in the case reported as *Parbati* v. *Toolsi Kapri* (1). Their Lordships in that case says:

> "The decision of a settlement officer to which the force and effect of a decree of a civil Court is given by S. 107, Ben. Ten. Act, does not include an order of dismissal of a suit under S. 106 of the Act, for default, the word "decision" implying an adjudication on the merits."

If there has been a disposal of the claim under S. 105 or under S. 106 on the merits, then S. 109 operates as a bar in respect of a subsequent suit in the civil Court; but not otherwise. But if the rules of the Civil Procedure Code are to be applied to proceedings under Ss. 105 to 108, Ben. Ten. Act, as provided by S. 107, it would appear that the Civil Procedure Code applies to this particular case; because if the suit was dismissed for default it would be dismissed on one of the grounds specified in O. 9, R. 2 or R. 3. The order for dismissal made in this case would involve the application of R. 2 or R. 3, O. 9; and R 4, O 9 provided that:

> "where a suit is dismissed under R. 2 or R. 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set aside the order of dismissal,"

and so forth; so that the Civil Procedure Code contemplates that where a suit is dismissed for mere default it is not to operate as a bar in respect of a subsequent suit. Applying the reasoning of the Civil Procedure Code as well as its spirit, it would appear that the order of the learned Judge holding that the mere institution of a proceeding under S. 106 operates as a bar under S. 109 to a subsequent suit is quite untenable in point of law. Accordingly in my opinion the learned Judge was wrong in holding that the plaintiff's suit was barred under S. 109, Ben. Ten. Act. This however by no means disposes of the main difficulty in the case. The question is whether or not the learned Judge has adequately disposed of the case on the merits. I have no hesitation in saying that I have seldom come across a more unsatisfactory judgment than that pronounced by. Mr. Rowland. The case was an important one to the parties; a great deal of time and money had been spent upon the case; much evidence was adduced before the trial Court touching and concerning the matters in issue, and it appears to me that it was the bounden duty of the District Judge to have adequately, fairly, properly and honestly considered the evidence on the record, more especially having regard to the fact that he was reversing the decision of the

(1) A.I.R. 1914 Cal. 157=20 I. C. 1.

trial Court who had the fullest opportunity of seeing the witnesses, of hearing the evidence given before it and who had the additional advantage of having made a local investigation. Mullick, J., in a case reported in Calcutta Weekly Notes, the reference to which I have not been able to secure at present, has laid down in most express terms that where a Court of appeal reverses the decision of the primary Court, the law imposes upon the Court of appeal an imperative duty and obligation of giving an adequate and satisfactory judgment such as is required by law. What kind of a judgment has the learned Judge given in this case? I give below the learned Judge's judgment word for word touching and concerning his decision of the case upon the merits: The learned Judge says:

"It remains to consider the merits. The Munsif has decided the suit on the basis of a plotting by himself of the Revenue Survey map of 1844-45. But the Revenue Survey map is on the scale of 4 inches to the mile and the cadastral survey map is on the scale of 16 inches. It is extremely risky to base exact conclusions as to boundaries on an enlargement to four times the scale of the original map. I consider that it is more likely that the Munsif made a mistake in his relaying of the boundary than that the cadastral survey boundary is wrong. I am not satisfied that the disputed land does in fact lie within the village of plaintiffs. For these reasons the appeal is allowed and the suit of the plaintiffs dismissed with costs."

This is the entire of the learned Judge's judgment with regard to the disposal of this case on the merits. Can any one say reading that judgment and considering it that it is a fair representation of the facts and the evidence which was adduced at the trial; or that the learned Judge has brought his mind to bear upon a fair and impartial review of the evidence touching and concerning the merits of the plaintiff's claim? In this Court there is a decision of Chapman and Roe, JJ., reported as *Laloo Singh* v. *Tahbal Gope* (2). In that case the appellate Court was affirming the decision of the trial Court and therefore that case was a much weaker case than the present one. The judgment of affirmance of the appellate Court in that case was in the following words:

"The facts of the case have been fully discussed by the learned Munsif in his judgment and I do not think I need write them out again. I have gone through the record and do not find satisfactory evidence of plaintiff's possession. The witnesses who have deposed for the plaintiff have not been belived by the learned Munsif. They had appeared before him and he had the full opportunity of judging the truthfulness and otherwise of their evidence so I cannot interfere with the conclusions he arrived at. Under the circumstances I uphold the judgment and dismiss this appeal."

The learned Judges in that case held that it was not a satisfactory judgment such as the law requires and Chapman, J., at p. 194 (*of* 1 *P. L. W.*) says:

"I am of opinion that this judgment is not a sufficient compliance with law; because it was incumbent upon the subordinate Judge to state in his judgment what the questions for determination were what the nature of the evidence was and to write a judgment from which it could be inferred that he had really considered the evidence."

Applying that principle as a test in this case can it be said that the learned Judge has stated what the questions for determination were what the nature of the evidence was and that he has written a judgment from which it could be inferred that he had considered the evidence? To the like effect is the decision reported as *Mubarak Hussain* v. *Shah Hamid Hussain* (3), in which Mullick, J,, says:

"Now this question of identification has an important bearing on the defendants' title and possession and surely the defendants were entitled to a considered and reasoned judgment on this point from the learned Judge when he set aside the Trial Court's finding."

These decisions are all based upon the authority of the case reported as *Partap Narain* v. *Maigh Lall Singh* (4), in which Jenkins, C. J., observed:

"The matter in dispute is one of great importance to the parties and deserving of a far fuller discussion than the learned District Judge has bestowed upon it; and we cannot accept the few lines in which he has disposed of this part of the case as a judgment in accordance with the law."

In my opinion the learned District Judge's judgment is most unsatisfactory and is not a judgment in accordance with law. Therefore there was an error in procedure which error vitiates the conclusions arrived at by the learned Judge and enables me in point of law to set aside his judgmeht in toto. Accordingly I allow this appeal with costs and remand the case to the learned District Judge of Shahabad for re-hearing. I would request the learned District Judge to take the case up and dispose of it with the greatest possible expedition.

V.S./R.K. *Case remanded.*

(2) [1917] 38 I. C. 814.

(3) [1917] 38 I C. 509.

(4) [1909] 36 Cal. 927 = 2 I. C. 656.

A. I. R. 1918 Patna 546

IMAM, J.

Jagesur Singh Mahapatra —Appellant.

v.

Sridhar Sardar and *others*—Respondents.

Appeal No. 951 of 1917 Decided on 25th July 1918 from appellate decree of Dist. Judge Manbhum.

Civil P. C. (1908), S. 47—Suit by auction-purchaser to recover property purchased after confirmation of sale is not barred by S. 47—Time runs from date of confirmation—Suit is governed by Limitation Act (1908), Art. 138 and not by Art. 180.

A suit by an auction-purchaser for the recovery of possession of property which he has purchased at an auction sale which has been confirmed, is not a suit which is barred under S. 47 Civil P. C. Such a suit is governed by Art. 138 and not by Art. 180 and the period of limitation is 12 years after the confirmation of the sale.

[P 546 C 2; P 547 C 1]

Atul Krishna Ray—for Appellant.

Abani Bhusan Mukerji—for Respondents.

Judgment.—The plaintiffs and the pro forma defendant 4 and the predecessor-in-interest of the pro forma defendants 5 to 10 obtained a decree against the principal defendants in this case. In execution of the decree which was for rent, the property in suit was sold and the sale was confirmed on 6th May 1910. It appears that after the confirmation of the sale there was a partition in the family of the plaintiffs and the pro forma defendants. By the partition the property in suit was allotted to the plaintiffs. The plaintiffs now seek to obtain possession of this property as after the confirmation of the sale no action was taken and the principal defendants remained in possession. The principal defendants in para. 7 of the written statement have pleaded that although the sale had taken place and it was confirmed, yet the plaintiffs as a matter of fact continued to receive rent from them and that as such the relationship of landlord and tenant continued. The learned Munsif who decreed the suit of the plaintiffs has come to a distinct finding that there is no evidence to support the allegation in the written statement to the effect that the relationship of landlord and tenant had subsisted between the plaintiffs and the principal defendants after the confirmation of the sale. The principal defendants preferred an appeal to the learned District Judge of Manbhum Purulia, who has set aside the decree given by the learned Munsif and has dismissed the suit.

The points on which the lower appellate Court dismissed the suit of the plaintiffs are the points of limitation and that of jurisdiction. A perusal of the judgment of the learned Judge shows that he is labouring under the impression that the present action is a proceeding in execution of the decree obtained for rent. He has treated this case as one that is governed by the provisions of the Chota Nagpur Tenancy Act, 6 of 1908. It seems to me that the learned Judge has overlooked the fact that the action in question is in no way governed by that Act. If the relationship of landlord and tenant had continued to exist between the plaintiffs and the principal defendants, there might be something to say as regards the application of the provisions of that Act, but on this point the finding arrived at by the Trial Court is conclusive. The position of the parties therefore is that the auction purchaser has instituted a regular suit for the recovery of possession of the property that he bought at an auction sale that was confirmed. In the circumstances it appears to me that Ss. 139 and 231 of Act 6 of 1908 have no application.

The next question is, whether the suit is barred under the general law of limitation. The learned vakil appearing on behalf of the respondents has drawn my attention to Art. 180, Limitation Act and has invited me to hold that under that Article the suit should be regarded as barred because of the provision of three years' limitation. I do not think that Art. 180, Limitation Act was intended to apply to a case like this; on the contrary by reading the language of Art. 138, Limitation Act it is quite evident that the present action is governed by that Article. The period of limitation provided by that Article is 12 years. The suit having been instituted within 12 years of the confirmation of the sale is therefore not barred by limitation.

In the course of his address the learned vakil for the respondents also raised the question as to whether or not the suit is barred under S. 47, Civil P. C. His contention is that to ask for delivery of possession is a question arising between the parties to the suit in which the de-

cree was passed and relates to the execution of the decree, and that therefore under the provisions of that section a separate suit is not permissible. This view of the case receives no help from the clear and emphatic pronouncement of their Lordships of the Allahabad High Court in a Full Bench case reported as *Bhagwati* v. *Banwari Lal* (1) It has been heen held that a suit for the recovery of possession of a property which has been the subject of sale and the sale of which has been confirmed is not a suit which is barred under S. 47 of the Code. It seems to me therefore that the learned Judge in dismissing the suit both on the ground of limitation as well as on the ground of jurisdiction has misconceived the nature of the action. In the circumstances the order of dismissal of the learned Judge is set aside, the appeal is decreed, and the decree awarded by the learned Munsif is restored. The appellants will get their costs throughout.

V.S./R.K. *Appeal allowed.*

(1) [1909] 31 All. 82=1 I. C. 416.

A. I. R. 1918 Patna 547

CHAPMAN AND ROE, JJ.

Arjun Naik——Decree-holder — Appellant.

v.

Lakhan—Judgment-debtor — Respondent.

Misc. Appeal No. 2 of 1918, Decided on 9th April 1918, against order of Dist. Judge, Cuttack.

(a) Civil P. C. (5 of 1908), O. 21, R. 11 (3) —Application for execution is in accordance with law if particulars required on date of filing are given.

The question whether an application for execution is in accordance with law or not must be determined with regard to what the law requires to be done at the time when the application is made, and it is not permissible to consider what the law requires to be done after the application has been made. [P 548 C 1]

(b) Civil P. C. (5 of 1908), O. 21, R. 11 —Application for execution correct — Dismissal for failure to file copy of decree— Application is in accordance with law and saves limitation—Limitation Act (9 of 1908), Art. 182.

An application for execution of a decree, which satisfies all the requiremnts of R. 11, O 21, but which is subsequently dismissed on account of the decree-holder's failure to file a copy of the decree within the time specified by the Court, is an application in accordance with law within the meaning of Art. 182, and operates to save limitation. [P 548 C 1]

B. N. Sinha—for Appellant.

S. N. Roy—for Respondent.

Judgment.—This appeal arises out of proceedings in execution. Two questions arose, (1) whether the decree had been satisfied ; and (2) whether the particular application for execution was barred by limitation. In regard to the first point there is a concurrent finding of the original Court and the Court of first appeal. We are concerned only with the second question. The application for execution was filed on 11th May 1917. It recited that the suit had been decreed by the Munsif on 30th April 1911, and that the appeal had been disposed of by the High Court on 15th May 1914. The only defect in the application when filed were that the amount of costs were stated under the heading (g) of sub-R. 2, R. 11, O. 21, namely, under the head "the amount with interest (if any) due upon the decree." It would have been more regular to state the amount of costs separately under heading (h) of that sub-rule. Another defect in the application as filed was that reference was made to a previous execution petition filed with reference to the original decree made by the Munsif.

It is not clear whether this is or is not a defect ; all that can be said is that the previous application was not an application for the execution of the decree of the High Court. So far as the actual requirements of R. 11 are concerned, all the requirements of that rule were complied with when the application was presented. It appears however that the Court under sub-R. 3 of that rule required the applicant to produce a certified copy of the High Court decree within fifteen days' time and on the failure of the applicant to comply the application was rejected. The learned District Judge in first appeal has held that on the failure to comply with the order of the Court requiring a copy of the decree the application became an application not in accordance with law and was therefore not sufficient to save limitation. Under Art. 182, Sch. 1, Lim. Act, three years' limitation commences to run from the date of applying in accordance with law to the proper Court for execution or for some steps taken in aid of execution of the decree or order. Where no such application has been made or any such steps taken, the limitation runs from the date of the decree or order. Execution would in the present case be barred unless it is

possible to say that the application in execution was made in accordance with law or a step in aid of the execution is taken.

In the case of *Pachiappa Achari* v. *Poojali Seenan* (1) it was held by the Madras High Court, an application for execution is in accordance with law although the applicant does not comply with the order of the Court requiring a copy of the decree. The same view was taken by the Allahabad High Court in *Raghunandan Lal* v. *Badan Singh* (2). I am of opinion that a correct view was taken in these two decisions, namely, that the questions whether the application is in accordance with law or not, must be determined with regard to what the law requires to be done at the time when the application is made, and in order to ascertain whether the application is in accordance with law it is not permissible to consider what the law requires to be done after the application has been made. With the exception of informalities to which I have above referred, which would be excused under the rule long ago established by the Calcutta High Court that mere matters of informalities are disregarded, the application was in accordance with law at the time it was made. We have been referred to sub-R. 2, R 17, O. 21, which provides, where an application has been amended within time under the order of the Court, it is deemed to be an application in accordance with law and presented on the date when it was first presented. We have been asked to hold this as meaning that where a Court requires a copy of the decree to be filed and the copy is not supplied in time, the original application should be deemed to be not in accordance with law. This is not what the sub-rule says. The intention of the sub rule is to relax the law in favour of the decree-holder, it is not possible to interpret it in the direction of making the law more strict against the decree-holder. In these circumstances this appeal must be allowed. The order of the District Judge is set aside and that of the Munsif restored. The appellants are entitled to costs, one gold mohur.

V.S./R.K. *Appeal allowed.*

(1) [1905] 28 Mad. 557.
(2) [1918] 40 All. 209=43 I. C. 914.

✻ A. I. R. 1918 Patna 548

DAWSON-MILLER, C. J. AND IMAM. J.

Radha Kishan Rai and *others*—Defendants—Appellants.

v.

Nauratan Lal — Plaintiff — Respondent.

First Appeal No. 3 of 1916, Decided on 21st June 1918, from a decision of Sub-Judge, Patna.

✻ **(a) Limitation Act (9 of 1908), Art. 120 —Claim for proceeds of immovable property substituted by moveable property is not claim for immovable property—Art. 120 applies.**

A claim for the proceeds of what was once immovable property but has been substituted by moveable property cannot be regarded as a claim for immovable property or any interest therein or any benefit arising from land and is governed by Art. 120. [P 551 C 1]

(b) Hindu law—Alienation — Necessity—Bona-fide inquiry as to insufficiency to meet necessary requirements is necessary—Failure to prove legal necessity—Proof of bona-fide inquiry as to existence of necessity is sufficient—Costs of litigation are for necessity—Power to borrow is limited.

Under Hindu law the onus of proving the necessity for a loan contracted by a limited owner is on the lender, and to discharge this burden he must show not merely that the object for which the money was required was a legitimate one but also that the funds available to the limited owner were insufficient to meet the necessary requirements. [P 553 C 1]

If the creditor fails to prove any legal necessity, he can nevertheless succeed by establishing that he made proper inquiries and was honestly satisfied that such necessity existed. [P 555 C 1]

Per *Imam, J.*—Costs of litigation are a recognized head of necessity but the power to borrow for that reason is not unlimited. [P 562 C 1]

(c) Fraud—Non-service of summons is not. fraud—Suppression of process with intent to deceive and take undue advantage is fraud

Non-service of summons by itself is not fraud. Its suppression, on the other hand, with intent to deceive and take undue advantage of the opposite party amounts to fraud [P 561 C 1]

P. N. Singh and *Banwari Lal*—for Appellants.

Gangadhar Das and *Ganesh Dutt Singh*—for Respondent.

Dawson-Miller, C. J.—In this case the plaintiff, who succeeded to the estate of his maternal grandfather on the death of his mother in the year 1902, seeks to set aside a mortgage bond executed on behalf of his mother in favour of the defendants and to get possession of part of the mortgaged property which was purchased by the defendants at an auction sale in execution of a decree obtained on the bond. The plaintiff succeeded before the Subordinate Judge of Patna and the de-

fendants have instituted this appeal. The plaintiff's grandfather Babu Rai Radha Kishan died on 7th November 1879, leaving no male issue. His daughter Sheo Koer, his next legal heir, succeeded to her father's estate taking a life intrest. She had then two sons living, Sheo Ratan Lal, a young man of 22, and the plaintiff Nau Ratan Lal, a child of 2 years of age. When Radha Kishan died he left considerable property said to be worth many lakhs of rupees, the net income from which was at that time about Rs. 30,000 per annum. It was also alleged that in addition to his immovable property he left a considerable sum of money amounting to about Rs. 50,000 which passed into the hands of his heir, the plaintiff's mother. About four months after the death of her father, viz., on 26th February 1880 Sheo Koer, having a few days earlier obtained a certificate of succession, executed a muktearnama or general power-of-attorney in favour of her elder son Sheo Ratan and an old servant of the family named Isri Prasad to act as her agents in her business affairs and to sign documents on her behalf.

The exact nature of the powers conferred by this document will be considered later. In March 1882 Isri Prasad died leaving Sheo Ratan, who is alleged by the plaintiff to have been a young man of profligate habits and a spendthrift, the sole agent under the muktearnama. It was also alleged that for some time before his death Isri Prasad was ill and under the influence of Sheo Ratan. However this may be, it is certain that between the years 1880 and 1885 considerable sums of money were borrowed from the present defendants and others on the security of the property comprised in the family estate, although if the allegations of the plaintiff as to the resources available from the estate left by his grandfather be true, there seems to have been no pressing reason to justify such transactions. During this period loans were taken by Sheo Ratan purporting to act on behalf of his mother from the present defendant 1 and others amounting to something like Rs. 40,000. In addition other large sums of equal or greater amount were borrowed from other persons during the same period, and practically the whole estate was mortgaged to secure these loans which carried a high rate of interest. Between 1885 and 1890 there is no evidence that any further loans were contracted, but on 1st August 1890 what appears to have been the sole remaining property of the estate upon which no charge had been created was mortgaged by Sheo Ratan in his mother's name to secure a loan of Rs. 5,000 advanced by Rai Radha Kishan, Rai Bahadur, defendant 1, in the name of a benamidar, one Kurjee Dicshit. It is in respect of this last transaction that the present suit is brought by the plaintiff as reversioner claiming a declaration of his title and possession of part of the mortgaged property.

The properties hypothecated under the bond of 1st August 1890 comprised a share in Mauza Badalpura Faridpur, two bungalows in Badalpura and one bungalow at Muradpur. Sheo Ratan the plaintiff's elder brother died in 1894. No interest appears to have been paid either in Sheo Ratan's lifetime or after his death on the sum advanced and secured by this mortgage, and in the year 1900 the defendants instituted a suit to enforce the bond and in June of the following year obtained a decree against Sheo Koer for the sum of Rs. 23,897-10-6 principal and interest due on the bond. The properties were then sold at auction, the bungalows being purchased by the defendants themselves. Sheo Koer died about a year later on 10th June 1902, leaving her son, the plaintiff Nauratan, a barren heritage. He was then a young man of 24 or 25 years of age and obtained employment in the Indian Police. From inquiries he made and from what he already knew he came to the conclusion that this and other previous loans had been contracted and the property mortgaged during the lifetime of his mother and brother without legal necessity justifying such transactions and instituted suits against defendant 1 and other moneylenders who had taken mortgages by way of security to recover possession of those portions of the property which still remained in their hands. In some of these suits he was successful; in others a compromise was arrived at. In the present suit he claims possession of the Muradpur bunglow together with mesne profits and interest thereon for the three years preceding the institution of the suit. With regard to the two bungalows at Badalpura it appears that these were taken over from defendant 1 in a somewhat dila-

pidated condition in the year 1903 by the East Indian Ry. Co., under the provisions of the Land Acquisition Act for a sum of Rs. 924-9 7 which was paid to defendant 1 and the plaintiff claims the value of th ese two bungalows which he places at Rs. 6,799-9-7 together with interest, alleging that they were allowed to get into a dilapidated condition by the defendant and were dismantled by him, the material having been removed before the sale to the East Indian Ry. Co. The plaintiff's case is that by the muktearnama of 26th February 1880 his brother Sheo Ratan was not authorized to incur debts or mortgage the estate on his mother's behalf, and further the document in question was not validly executed as it was not explained to his mother nor plained did she understand it.

He further says that the mortgage-bond of 1st August 1890 was not executed with the knowledge and consent of Sheo Koer, nor was it ever read over and explained toher. He further says that his motherdid not in fact at that time receive the Rs. 5,000 or any portion of it; and that in any case there wasnot at the time when this transaction took place any legal necessity or pressure upon the estate such as would justify Sheo Koer in hypothecating the family property and that the defendants made no inquiries as to the existence of the alleged necessity. He further contends that the decree obtained by defendant 1 on the said bond was frandulent and collusive and that process was never served upon Sheo Koer and judgment was allowed to go by default. The defendants contended on the contrary that the muktearnama and the bond or rather a draft of it were both read over and explained to Sheo Koer and that she understood and consented to them, that the money was borrowed for the purpose of defending a law suit brought by one Badri Narain against Sheo Koer disputing her title to the estate and that it was urgently necessary to raise this money for that purpose; further that the money was only advanced after due and proper inquiries and after defendant 1 had by such inquiries formed a bona fide opinion that the loan was necessary and for the benefit of the estate. They further traversed the allegations of the plaintiff that the summons in the mortgage suit against Sheo Koer was not proporly served. Lastly they contended that the claim for the value of tho two bungalows sold to the railway company was not a claim for possession of immovable property within Art. 141 or Art. 144 Lim. Act but was a claim for moveable property and was governed by Art. 120 of the Act and, therefore barred, the suit not having been brought either to do that within six years of Sheo Koer's death when the plaintiff's interest in the estate became vested, or within six years of the purchase by the Railway Company. Other issues were raised at the trial by the defendants but are not now material and were abandoned by them in this appeal.

The Subordinate Jugde found (1) that the plaintiff's claim to recover the price of the two bungalows sold to the Railway Company was not barred by limitation as, in his opinion, the mony recovered by the defendants as the price of that property must be taken as representing the property and did not cease to be immovable property; (2) that the muktearnama of 26th February 1880 was properly executed by Sheo Koer but that it gave no power to Sheo Ratan to raise loans on her behalf without her knowledge and consent but merely to sign documents executed by her and that she could not delegate to any other person power to take loans substituting his discretion for hers; (3) that the mortgage bond of 1st August 1890 was not executed with the knowledge and consent of Sheo Koer; (4) that there was no legal necessity to warrant the transaction; (5) that there was no bona fide inquiry by the defendants as to the legal necessity: and (6) that the mortgage decree was fraudulently obtained by suppresing service of process and was not binding upon the reversioner. In accordance with these findings he entered a decree for the plaintiff granting him possession of the Muradpur bungalow together with mesne profits to be ascertained and for the price paid by the Railway Company to the defendants for the two Badalpura bungalows, together with proportionate costs.

The first point taken by the appellants relates to the claim for the price of the two Badalpura bungalows, which they contend is clearly a claim for moveable and not immovable property within the meaning of Art. 141 or Art. 144 of the Schedule to the Limitation Act. So far

as this part of the appeal is concerned I think the appellants must succeed. The plaintiff contends that the purchase-price which now represents what formerly was immovable property, should be treated as a benefit arising out of immovable property and claims that it is covered by the words "or any interest therein" in Art. 144, and by the definition in S. 3 (25), General Clauses Act (10 of 1897), which includes benefits to arise out of land. In support of this contention he relies upon the case of *Barhamdeo Pershad* v. *Tara Chand* (1). in which it was held that where property was sold under a decree obtained on a first mortgage, the right of a puisne encumbrancer to follow the surplus proceeds after the decree-holder's claim had been satisfied was an equitable right and that the right of the puisne encumbrancer is not extinguished or discharged by the sale but is transferred to the surplus sale procceeds. It should be pointed out however that that was a suit to enforce payment of mony charged upon immovable property, for which Art. 132, Sch. 2 of the Act expressly provides and in my opinion this case affords no authority for the plaintiff's proposition that a claim for the proceeds of what was once immovable property but has been substituted by moveable property can be regarded as a claim for immovable property or any interest therein or any benefit arising out of land. If the plaintiff wished to protect himself from the operation of the Limitation Act, I think in a claim of this sort. where the property has lost the impress of its original nature and been converted into money, he was bound to institute a suit within 6 years of the time when his cause of action accrued and so far as this part of the claim is concerned, I think the judgment of the Subordinate Judge must be set aside. [See *Ganpatrao Moroji* v. *Vamanrao Shamrao* (2).]

It is convenient here to consider the question which arises in regard to the execution and effect of the muktearnama or power of attorney executed by Sheo Koer on 26th February 1880. It was found by the learned Judge that the power of attorney was read over and explained to Sheo Koer and that she understood its legal consequences. The only witness on this point was Darbari Lal, and his evidence certainly falls far short of proving these facts. After saying that the draft of this document was read over and explained to Sheo Koer, he admitted that in his evidence in a provious suit brought by the plaintiff he stated that he could not recollect whether it was read over to her or not, and added that that was true and that he could not now swear that the draft was actually read over and explained to the lady. If this were the only evidence on the point I think the proof would fail. Nor does the evidence of this witness, who was at one time a tout, appear to me on reading it through to be worthy of much credit. It does however from the evidence of Sheo Koer herself who was examined in some other proceedings in 1894 and whose evidence was put in and referred to by both parties in this suit that she executed the power-of-attorney and understood the object of it I think therefore that the finding on this question is supported by the admission of Sheo Koer herself and may safely be accepted. The document recites that many cases are pending by and against Sheo Koer and various sums of money due on bonds and decrees and otherwise have to be collected as well as rents for villages and that being a pardanashin lady she is unable to look after these affairs. She therefore appoints Sheo Ratan and Isri Prasad as her agents to appoint vakils, counsel and mukhtears on her behalf and to collect her rents and other moneys due to her and grant receipts in her name and to deposit money in Court and pay Government revenue on her behalf as required. Then follows a special power given to Sheo Ratan alone which is relied on by the appellants. It is in these words:

"Babu Sheo Ratan Lal, my son, one of the mukhtears, shall put down my signatnre in his pen on whatever deeds of sale and conditional sale and ekrarnamah, sherakatnamah, hiba, thicca, kabuliyat, zarpeshgi, ijara, mukarrari, mortgage and simple bonds and patta and other documents of all sorts which might be written and executed on my behalf, and shall get them attested by witnesses on his admission and shall on his admission get them registered."

It seems clear that the power here granted to Sheo Ratan does not enable him to substitute his own discretion for that of Sheo Koer or to alienate or create any charge on her property without first obtaining her sanction to transaction of

(1) [1916] 33 Cal. 92.
(2) [1908] 10 Bom. L. R. 210.

such a nature. The power granted is in my opinion merely that of signing her name on her behalf to such transactions as she might authorize and direct. The hand shall be the hand of Sheo Ratan but the voice must be the voice of Sheo Koer. Even if it be taken that Sheo Ratan was held out as his mothers's agent for the purpose of executing such documents in her name, that would not in my opinion relieve defendant 1 from the obligation of proving that there was legal necessity for the loan as understood in this connexion or that he had made due inquires from which he formed a bona fied opinion that such was the case. Moreover it is part of the defendants' case that the transactions were carred out with the full knowledge and consent of Sheo Koer. I shall therefore proceed to consider this question. For this purpose it is necessary to state briefly the circumstances leading up to the present transaction. Shortly after the plaintiff's grandfather died in in 1879, there can be no doubt that the estate was producing a large income of at least Rs. 30,000 per annum and a considerable cash balance had been accumulated, but notwithstanding this it appears that 5 years later practically the whole estate had been mortgaged to secure the erlier loans already referred to. The ostensible reason assigned by the defendents and others in previous suits as the necessity compelling the loans was that the estate was involved in litigation and money was required for that purpose.

It is not necessary to review at length the circumstances under which these earlier loans were contracted. The facts relating to them are fully set out in the judgment of Mookerjee, J., in *Roy Radha Kissen* v. *Nauratan Lall* (3), in which the present plaintiff successfully sued the present defendent in a suit brought to recover possession of certain of the properties mortgaged to the defendant to secure some of the earlier loans. The defence in that case was practically the same as in this. I think I ought however to state shortly the main facts leading up to the present transaction, as it by no means follows that there was no necessity in 1900 which it has been decided there was no necessity to do some five or six years earlier. When Radha Kishan died and Sheo Koer obtained the certificate above referred to, her attempt to obtain registration was opposed by one Gobind Prasad, who contended that his son Badr-Narain was the adopted son of Radha Kishan the plaintiff's grandfather. He also endeavoured ard to some extent succeeded in stopping collection of rents by Sheo Koer. On 30th April 1881 Sheo Koer finally got her name registered, and after that there appears to have been little or no trouble in collecting her rents.

It is admitted by one or more of the defendants' witnesses that the difficulty in collecting rents did not last for more than 18 months or two years at the outset. There were also some criminal cases during this period connected with the collection of rents. In August 1881 a regular suit was instituted by Badri Narain claiming the estate as the adopted son of Radha Kishan. Much evidence was called and the suit was dismissed in October 1882. In March 1883 an appeal was preferred to the High Court. In June 1885 [see *Badri Narain* v. *Sheo Koer* (4)] it was dismissed for the default of the appellant in providing security for costs. Subsequently it was remanded by the Privy Council [see *Badri Narain* v. *Sheo Koer* (5)] to the High Court to be heard on the merits. In January 1901 the appeal was heard by the High Court at Calcutta and dismissed on the merits. I have already said that between 1885 and 1900 no money appears to have been borrowed, but in August 1900 when the suit was about to come again before the High Court the loan which forms the subject of the present suit was taken from the defendants and the properties in question were mortgaged to secure that loan. It is not disputed that the onus of proving that there was legal necessity for this loan and that the bond was executed with the knowledge and consent of Sheo Koer is on the defendants. Apart from the recital in the bond itself and a suggestion which was not supported by the evidence that the bulk of Sheo Koer's properties had passed out of her hands into those of the mortgagees, there is little or no evidence to show that she was in straightened circumstances in August 1900

Her properties it is true were mortgaged, but at that time she was still in

(3) [1907] 6 C. L. J. 490.

(4) [1885] 11 Cal. 716.

(5) [1890] 17 Cal. 512=17 I. A. 1 (P.C.).

possession of the greater part of the villages and collecting the rents, and this is admitted by the defendant himself. The account books kept on behalf of Sheo Koer by her Dewan have been disclosed. They were used in the previous suits and relied upon and although some of them have become in course of time torn and partly destroyed and others worm-eaten, some are still legible and extracts and certified copies of others taken in the previous suits have been preserved and from these it appears that during the years 1886 to 1890 there remained a considerable balance at the end of each year after paying all expenses. The following sums show the excess of income over expenditure for these five years respectively ending on 8th August 1890.

			Rs.
1886	...	...	... 2,138
1887	...	...	... 3,513
1888	...	...	... 4,959
1889	...	...	... 5,258
1890	...	...	... 5,389

During the year 1890 the collections made by Sheo Koer were Rs. 18,199 and and a further sum of Rs. 4,929 was collected and handed in to this account by Sheo Ratan himself. It is perhaps worthy of remark that of this latter sum Rs. 4,822 were for the first six months and Rs. 97 only for the last six months of that year. From these accounts it appears that money was being saved each year and there was no pressure upon the estate. There is no reason for supposing, therefore, that the estate was in such as embarrassed financial condition that it was necessary to mortgage any part of the property in order to raise a loan of Rs. 5,000 at a somewhat high rate of interest. There was at that time a credit balance in hand in the year's accounts of well over Rs. 5,000 end there is nothing to show that the accumulations of previous years were not still available. It is well established that the onus of proving the necessity for the loan in such cases is on the lender, and to discharge this burden he must show not merely that the object for which the money was required was a legitimate one but also that the funds available to the limited owner were insufficient to meet the necessary requirements. [See *Dharam Chand Lal* v. *Bhawani Misrain* (6) and *Bhimaraddi* v. *Bhaskar* (7)]. In my opinion the defendants have failed to make out any necessity for the loan. The question then arises, how it was that Sheo Koer authorized her son Sheo Ratan to borrow this money if there was no apparent necessity for doing so. On reading the evidence given on behalf of the defendants as well as that given by Sheo Koer herself in the proceedings above referred to, the conclusion I have arrived at is that the Subordinate Judge was amply justified in finding that the bond was not executed with Sheo Koer's knowledge and consent, and I think it is more than likely that she was kept entirely in the dark about this transaction, as was found to be the case in the earlier transactions which were the subject of the suit in the .Calcutta High Court in 1907 *Roy Radha Kissen* v. *Nauraten Lall* (3). Sheo Koer deposed that she knew nothing about this or any of the previous loans, that she had no necessity to borrow money and that she never authorized Sheo Ratan to do so. There is evidence to show that Sheo Ratan was addicted to drink and other vicious habits and this is corroborated to some extent by Darbari Lal one of the defendants' witnesses, and there is nothing improbable in the supposition that he kept his mother ignorant of the manner in which he was raising money by mortgaging the estate. There is also evidence to be gathered from Ex.E (p.31 of the paper-book), upon which the defendants rely for another purpose, that Rs. 3,500 only and not Rs. 5,000 of the loan in question were advanced to Sheo Ratan and as Mukherjee, J. observed in the earlier case where something of the same sort appears to have taken place, this is not at all an unlikely thing to happen if Sheo Ratan was a profligate and a spendthrift, and I may add that if there was a bona fide need of the money for purposes of litigation to defend the estate it is highly improbable that a bond for Rs. 5,000 would have been given and Rs. 1,500 less accepted. The evidence that the bond was executed with Sheo Koer's knowledge and consent depends on two witnesses for the defendants, Debi Prasad Singh and Munshi Lal.

The former who was the defendants' Gomashta says he together with one Mewa Lal and Matuk Prasad, the scribe who prepared the bond, both of whom have since died, went to Sheo Koer's

(6) [1898] 25 Cal. 189=24 I. A. 183 (P. C.)

(7) [1904] 6 Bom. L. R. 628.

house with the draft. They inquired if Sheo Koer was in and were told by Bhartan Lal a servant of Sheo Koer and Munshi Lal his son that the Musammat was present inside a room behind the door. Matuk read the draft. Sheo Ratan was present. The Mussamat then told Sheo Ratan to have it faired and executed. Next morning the bond was written out according to the draft at the defendants' garden house in Patna by Matuk Lal. Sheo Ratan then signed it and the witnesses attested it. This witness did not know Sheo Koer and had never seen her, not did she ever appear before him. He then says that 8 or 10 days later he and others took the money (Rs. 5,000) to Sheo Koer's house and Sheo Ratan, Bhartan and Munshi Lal took the money inside to the Mussamat after continuing it. In cross examination he says the money was counted in the Mokan, i.e. the zenana and not in the dewan khanah. Munshi Lal says he was not a servant of Sheo Koer but his father was and he used to go to the house although he was not employed there. He says he was present when the draft was read over to Sheo Koer and that it was explained to her. On the occasion in question he had no business in the house and was not asked to go; he merely happened to be present. He improves on Debi Prasad's story by saying that the fair copy of the bond was taken back from Patna to Sheo Koer's house at Badalpura and read over to her next morning and that Sheo Ratan signed it there and the witnesses did not sign it on that day.

This story entirely differs from that of Debi Prasad, who says the bond was executed by Sheo Ratan at Patna and attested there on the same occasion. It also contradicts the evidence of defendants' witness Bansi Lal, who says the bond was executed by Sheo Ratan at Patna. There are many other discrepancies in the evidence of the defendants' witnesses as to what took places when the money is alleged to have been handed over to Sheo Koer and, in my opinion the Subordinate Judge was amply justified in rejecting the whole of this story. The learned vakil for the appellants admitted that he could not ask the Court to accept Munshi Lal's story and if the evidence is expunged there is nothing whatevver to show that the effect of the bond was explained, to Mt. Sheo Koer, much less that she understood it. It is contended, however that there is documentary evidence (Ex. E) which strongly corroborates the fact that Sheo Koer was aware of the bond and its contents. This is a deed dated 10th May 1892, which purports to sell the mortgaged property to Babu Ram Anugraha Narain Singh, a relation of Sheo Koer and a gentleman of standing and repute in Patna. He died sometime ago and could not be called as a witness. This deed is executed by Sheo Ratan on behalf of his mother and recites that the property had been mortgaged to the defendants to secure the loan of Rs. 5,000 borrowed for defraying legal expenses for the benefit of the family and the benefit of the estate. It provides that the mortgage shall be paid off out of the sale proceeds.

It is suggested that a gentleman of Ram Anugraha's reputation would never have entered into this transaction unless he had been satisfied that his relation Sheo Koer, an illiterate pardanashin lady, was aware of the terms of the deed. I am quite prepared to admit the apparent force of such an argument, but there are two circumstances which seem to me to destory any inference that may be drawn from it in favour of the defendants' contention. First, the deed although registered never in fact became operative and the sale was not completed. Secondly, it recites that Rs. 3,500 only were realized from the defendants and that the balance of Rs 1,500 had never been realized, but that nevertheless as the bond in the hands of the mahajans was for Rs. 5,000 which with interest then amounted to Rs. 6,157-2-8, this sum was rightly payable and as an action was threatened it was expedient to pay this amount in the interests of the estate. It is not explained in the evidence why the sale fell through, but it is suggested that there was a dispute as to the amount properly recoverable by the mortgagee and the parties could not come to terms and therefore the sale was allowed to lapse. As the sale-deed provided for payment to the mortgagee of the full amount on grounds of expediency, it seems clear as between seller and purchaser this matter was settled and the suggestion that the matter was reopened after the parties had agreed between themselves and executed the deed is not one which impresses me very forcibly.

The real explanation may equally well be that Babu Anugraha Narain on making inquiries ascertained that Sheo Koer's part in the transaction was not so clearly established as he would wish and that at the last moment he withdrew as any honest man in the circumstances would have done. I can, therefore place no reliance on this deed as corroborative evidence of the defendant's story. There is hardly and evidence to show that this deed of sale was executed with the knowledge of Sheo Koer. The fact that it was read over to her is spoken to by one Jhumak Bhagat, a cultivator and a tenant of Dawarka Babu who was on bad terms with the plaintiff. He says Sheo Koer requested him to witness the deed, but he did not see that lady nor did anyone tell him that the person inside the house was Sheo Koer, and he attested it on the maidan outside. The Subordinate Judge rejected his evidence and Sheo Koer denied all knowledge of the transaction, and I see no reason for rejecting the conclusions of fact arrived at by the learned Judge. It is next said that the mortgage decree obtained by the defendants against Sheo Koer is res judicata and conclusive of the fact that the bond was duly executed by Sheo Koer. However this may be, that suit did not determine the important question of leagl necessity and in the view I take of the facts it is unnecessary to cousider this point further.

It remains to consider whether the defendant, although he has failed to discharge the burden of proving any legal necessity for the loan, has nevertheless established that he made proper inquiries and was honestly satisfied that such necessity existed. This depends upon the evidence of the defendant himself. The Subordinate Judge was not satisfied on the evidence that the defendant made any bona fide inquiries. In considering this question it must be remembered that in the previous suit between the same parties it was found that no proper inquiries had been made by the defendant as to the necessity for the loans advanced at an earlier date and one cannot, therefore, infer from the defendants' previous conduct that inquiries in this connexion were part of his habitual practice. There is also another matter which to my mind is of some importance in this connexion. It is sworn by the plaintiff that in or about 1894 he and his mother were turned out of the Badalpura house where they lived by the defendant, who attached and sold it to satisfy the balance due under a mortgage decree on another property and that in 1900 and 1901 his mother was living with him at Sassaram in the Shahabad District. This is corroborated to some extent by Sheo Koer's evidence, from which it appears that in December 1894 when her evidence was given she was then living in a hired house at Badalpura and not in her own house.

The summons in the mortgage suit on the present bond was served at Sheo Koer's Badalpura house in 1900. The peon who served it was dead. The witness Nathuni Singh a peada of defendant speaks to the service. According to his evidence he went with the Court peon to identify the house. He had never been there before but knew where it was. He says they remained outside the gate and the amlas of Sheo Koer took the summons and said Sheo Koer would not grant a receipt and they could serve it as they pleased. The summons was then attached to the door. He did not remember whether the summons was served before or after the house was sold in execution of the mortgage decree. If Sheo Koer had ceased to live there and had been turned out some years previously; this service was clearly irregular and the Subordinate Judge found that the decree in that suit was obtained by suppression of Summons and fraudulently and therefore was not binding on the estate. Although there is no direct evidence to connect the defendant with a deliberate attempt to effect service in this manner and findings of fraud ought not to be lightly arrived at, it is remarkable that the defendant, who must have known when the Badalpura house was sold in execution of his own decree, made no attempt to rebut the plaintiff's evidence that Sheo Koer ceased to live in the Badalpura house in or about the year 1894 and that in 1900 when the summons was served she was living with the plaintiff at Sassaram many miles away.

If the defendant had been deliberately trying to obtain a decree unknown to Sheo Kuer, service of process in this manner is just the sort of action on his part that might have been expected and it is quite consistent with the case of the plaintiff that from first to last Sheo Koer

was kept in ignorance of the mortgage transaction. Much may be said in support of the inference of fraud which the learned Subordinate Judge drew from these circumstances. I am not prepared to find, however, in the absence of more direct evidence connecting him with the service of summons, that the defendant fraudulently attempted to obtain a decree without proper service, but I cannot help feeling that before the decree was obtained this matter must have been brought to his notice but he was content to let things stand as they were and take the risk of any question being raised in the future. I have drawn attention to this matter, because in my view the conduct of the defendant throughout this case has a bearing upon the matter now under consideration. I have carefully considered the evidence given by the defendant concerning the inquiries he says he made as to the necessity for the loan. He says in his evidence in chief:

"I inquired from Munshi Shyam Narain, Babu Gajadhar Prasad and Khoda Bux, Khan Bahadur, and they said that the money was urgently necessary for the expenses of the High Court case and that the previous loans advanced by me would not be realised if this Rs. 5,000 was not advanced."

It is particularly unfortunate that o the only persons from whom the enquiries are alleged to have been made two were dead and the third Gajadhar Prasad was suffering from a nervous breakdown and unable to give evidence at the trial. This gentleman was a vakil who acted on behalf of Sheo Koer. Shyam Narain was a pleader who had acted both for and against Sheo Koer in different suits and was engaged on her behalf at that time. Khoda Bux, Khan Bahadur, was also a pleader employed by the defendant himself. In cross-examination the defendant says:

"Sheo Ratan was about 25 or 26 years old when he used to come to us. I did not make any enquiries about his mode of life or about his character. I did not personally enquire from Sheo Koer if she required the Rs. 5,000 for the expenses of the suit, I made enquiries through my servants. I did not personally enquire from Sheo Koer whether she had any money by her or not."

It is not suggested that the servants through whom the defendant made enquiries were dead or otherwise incapacietated and although several servants of the defendant have been examined, none of them has been asked about this matter. The evidence therefore so far as it goes, rests upon the uncorroborated testimony of the defendant. Now having regard to the fact that the defendant had failed in the previous suit to establish that he had made any proper enquiry as to the necessity for the loan, it must have been present to his m ind that this was an important issue upon which the burden of proof rested with him. Nevertheless the only evidence he gives is of a vague and amorphous character entirely uncorroborated and he does not even say that he was satisfied that the necessity existed. Indeed it is difficult to see how he could honestly believe that Sheo Koer was in need of Rs. 5,000, when no enquiries were made from that lady herself and he was aware as he admits that she was still in receipt of the rents of her property.

No doubt in one sen se money is always urgently necessary to conduct litigation and it did not require vakils and pleaders to inform him of this, but the question he had to consider was whether Sheo Koer's resources were so depleted that she could not herself provide the money. That the defendant honestly believed that Sheo Koer was in need of the money has not, in my opinion, been proved. The defendant does not say so, and I am not inclined to draw from his evidence any such inference in his favour when I find that although he had been in the habit of lending large sums of money to Sheo Ratan, a young man of proved extravagant habits, he nevertheless says he made no enquiries about his mode of life or about his character. It is part of a money lender's business to find out all about the character and habits of life of his cleints and it is almost incredible that living as he was within a few miles of Sheo Ratan, he should not only have been ignorant of his babits but should also have made no attempt to inform himself on the subject. Taking all the circumstances into consideration, I have come to the conclusion that the learned Subordinate Judge was right in finding that no bona fide enquiries were made and I am certainly not satisfied that the defendant honestly believed that Sheo Koer was in need of the money at the time when the loan was advanced. I find therefore that the defendant has failed to discharge the burden of proof in this as in other respects.

In the result I think this appeal should be allowed in so far as it seeks to set aside that part of the decree of the lower Court which awards to the plaintiff the price of the two bungalows received by the defendants from the East Indian Railway Company and in other respects the appeal should be dismissed. As the appellants have succeeded on one issue but failed on the others, I think each party should bear his own costs of this appeal.

Imam, J.—This is an appeal from a judgment of the 2nd Subordinate Judge of Patna partly decreeing the plaintiff's suit. As reversionary heir of one Babu Radha Kishen of Badalpura who died on 7th November 1879, the plaintiff seeks a declaration of title to and delivery of possession of the properties in suit. These are a bungalow situated in a quarter of this town called Moradpur and certain sums of money detailed in para. 35 of the plaint. On the death of Radha Kishen, Mt. Sheo Koer, the mother of the plaintiff, succeeded to the estate as the daughter and heir of the deceased. The plaintiff is the younger son of Sheo Koer, who died on 10th June 1902. Sheo Ratan Lal, her elder son, pre-deceased her in 1893. Radha Kishen left properties yielding a large income, but on his death the family was involved in very heavy litigation which occasioned the execution of a power-of-attorney by Sheo Koer in favour of the old Dewan of the family Isri Prasad and her elder son Sheo Ratan.

This was done on 26th February 1880. It is not necessary to allude to a large number of mortgages that were executed under the authority of this power-of-attorney by Sheo Ratan. But among these was a mortgage bond for Rs 5,000 (Ex E), dated 1st August 1890 executed in favour of one Quir Dechit who was, it is admitted, only a benami for defendant 1, Rai Bahadur Rai Radha Kishen. Among the properties mortgaged under this bond were three bungalows, two of them situated in Mouza Badalpura and the third at Moradpur. The defendant Rai Radha Kishen Bahadur instituted a suit to enforce this mortgage and obtained a decree on 17th June 1901 against Mt. Sheo Koer, and in execution of the said decree purchased said bungalows on 18th March 1901 for Rs. 4,000. A part of the two bungalows at Badalpura was acquired under the Land Acquisition Act by the East Indian Ry. Co. for Rs. 924-9-6, which was withdrawn by the defendants from the Government Treasury in 1903. The plaintiff, as reversioner of his maternal grandfather, lays claim to the properties in suit by challenging the entire transaction from the execution of the mortgage bond, Ex. F, to the delivery of possession of the bungalows to the defendants in execution of their decree on the basis of the aforesaid bond. The principal grounds on which he rests his contention are as follows:

(1) That the power-of-attorney, Ex. C, was executed by Mt. Sheo Koer, a pardanashin and illiterate lady, without undertsanding what the document was and without legal advice. (2) That she did not give any authority to Sheo Ratan to contract debts and execute mortgage bonds. Nor could such authority be legally delegated. (3) That the bond itself was executed without the knowledge and consent of Mt. Sheo Koer and without full consideration, (4) That the bond was executed without any legal necessity, (5) That the summons and notices in the suit brought on the basis of the bond were not served on Mt. Sheo Koer, and (6) that the decrees and sales obtained under the bond were not binding against the estate of plaintiff's maternal grandfather, Radha Kishen. The defendants contest the suit by a denial of these allegations and the plea of limitation. I will deal with the question of limitation first. The learned Subordinate Judge relies on Art. 141, Lim. Act and as the suit has been instituted within 12 years of the death of Mt. Sheo Koer, he holds that the plaintiff's claim is not barred by limitation.

Article 141 provides 12 years as the period of limitation for a suit by a Hindu entitled to the possession of immovable property on the death of a Hindu female, the period to run from her death. The present suit is of the same class as is provided for under Art. 140 of the Act. Under both these articles the suit is to be for possession of immovable property. What is immovable property is not defined by the Act itself. It has however been defined in the General Clauses Act 10 of 1897, S. 3, sub S. 25, as a term that includes lands, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. So far as the bun-

galow at Moradpur goes, there can be no question that the suit is for possession of immovable property and in so far as this property is concerned, the learned Subordinate Judge was right in applying Art. 141, Lim. Act.

The learned vakil on behalf ofthe appellants however contends that the rest of the properties in suit being money which is moveable property the Article in question is inapplicable. He relies on Art. 120 of the Act, which provides for six years limitation in all cases for which no period of limitation is provided for in Sch. 1 to the Act. The plaintiff claims the sum of Rs. 9,248-1-0 as the price of the two bungalows at Badalpura of which the materials are alleged to have been removed and a portion of which was acquired under the Land Acquisition Act. The point for decision is whether this sum of money can be regarded as immovable property.

Considerable argument has been advanced by both sides on the meaning of the words "benefits to arise out of land" in S. 3, sub-S. 25, General Clauses Act. The learned vakil on behalf of the appellants argues that the sums mentioned above are not covered by these words. The words "to arise" in Cl. 25 clearly show that future benefits are contemplated. It has been held in a number of cases that rents and profits that have already accrued due are not immovable property vide *Damodar Das* v. *Girdhari Lal* (8), *Rathna Mudaliar* v. *Tiruvenkata Chariar* (9), *Raoji* v. *Bala* (10). Certain classes of rights have been held to be immovable property for instance a right of redemption *Kanti Ram* v. *Kutubuddin* (11), a right of ferry *Ram Mahomed Gopal Bysack* v. *Nurumuddin* (12), a right of easement *Mohunt Deo Surun Poory* v. *Moonshee Mahomed Ismail* (13), a right of possession and manasement of endowed property and land *Narayan Jagannath Dikshit* v. *Vasudeo Vishnu Dikshit* (14), a right to the superstructure of a house exclusive of the land beneath *Narayan Pillay* v. *Ramasawmy Thavutharan* (15), and a decree for sale of mortgaged land *Gous Mahomed* v. *Khawas Ali Khan* (16), *Ahmad Khan* v. *Abdul Rahman Khan* (17). A hat has been held to benefit arising from land *Golam Mohiuddin Hossein* v. *Parbati* (18). So also a right to collect market dues on a piece of land *Sikandar* v. *Bahadur* (19) a malikana allowance *Mahomed Karamatoollah* v. *Abdool Majeed* (20), a right to recover the assessment levied on any land *Anandrao* v. *Joti* (21), the life interest of a widow in the income arising from her husband's landed estate *Beema Sunkar* v. *Jamasjee Shaporjee* (22), an annuity charged on the revenue granted by the sovereign *Collector of Thana* v. *Hari Sitaram* (23) and various other rights but there seems to be no authority in support of the view that rent already fallen due or the proceeds of the sale of a house or land are immovable properties. I am therefore unable to agree with the learned Subordinate Judge in the view that the sum of money claimed in Cl. (iii), para 35 of the plaint is immovable property. In the circumstances I have no hesitation in holding that Art. 141, Lim. Act is inapplicable to the suit so far as this claim is concerned.

It was also contended on behalf of the respondent that Art. 144 of the Act providing 12 years' limitation was applicable. I have already held that this sum of money representing the price of the two bungalows at Badalpura is not in my view immovable property. Art. 144, which deals with the possession of immovable property or any interest therein not otherwise specially provided for in the Schedule has therefore no application. There being no special provision in Sch. 1 to the Limitation Act applicable to this part of the claim Art. 120 of that Schedule which provides only six years' limitation from the time the right to sue accrues, must necessarily apply. It appears from para. 25 of the plaint that the defendants withdrew from the Government Treasury the price paid

(8) [1905] 27 All. 564.
(9) [1899] 22 Mad. 351.
(10) [1891] 15 Bom. 135.
(11) [1895] 22 Cal. 33.
(12) [1895] 20 Cal. 446.
(13) [1875] 24 W. R. 300.
(14) [1897] 15 Bom. 247.
(15) [1874-75] 8 M. H C. R. 100.
(16) [1896] 23 Cal. 450.
(17) [1904] 26 All. 603.
(18) [1909] 36 Cal. 665=1 I. C. 520.
(19) [1905] 27 All. 462.
(20) [1869] 1 N. W. P.,H. C. R. 288.
(21) [1900] 24 Bom. 615.
(22) [1866] 5 W R 121=2 M, I, A. 23 (P. C.).
(23) [1881-82] 6 Bom. 546 (F. B.).

under the Land Acquisition Act, in 1903, and even prior to that they are alleged to have removed most of the materials of the two bungalows situated in Mauza Badalpura.

I am therefore of opinion that the claim in respect of the money mentioned in Cl. (3), Para. 35, of the plaint having been preferred long after the statutory period of limitation is barred. As regards the Moradpur bungalow the claim is clearly covered by Art. 141, Sch. 1, to the Act and the suit in respect of the same is within time. I have now to consider whether the plaintiff can succeed with regard to such part of his claim as is not barred by limitation. This leads to the consideration of the various issues raised in the case. As regards the power-of-attorney dated 25th February 1880, (Ex. C), on a consideration of the evidence and the circumstances in which the family of Radha Kishen found itself on his death, the execution of this document by Mt. Sheo Kuer appears to have been a matter of urgent necessity. On her father's death a pretender claiming to be the adopted son of Radha Kishen was set up and the family found itself plunged in litigation. In the circumstances it was not only natural but necessary for a pardanashin lady to grant a general power-of-attorney for carrying on work on her behalf connected with her affairs pending in various Courts. Then again the power itself was granted to an old servant of the family Isri Prasad and to her son Sheo Ratan. Of the two Sheo Ratan alone was vested with the larger power of putting down her signature in his pen on deeds written and executed on her behalf. He was also authorized to get the deeds attested by witnesses and also have them registered on his admission. I agree with the Subordinate Judge that this documont was executed by Mt. Sheo Kuer with knowledge and consent and that she fully understood its legal effect.

The next question in connexion with this power-of-attorney is one of construction with reference to that part of the document which relates to the special powers conferred on Sheo Ratan. The correct view with regard to this passage seems to be that Sheo Ratan was not authorized to execute any mortgage or other deeds without the knowledge and consent of his mother. The power to execute a document in the sense of an independent action on his part was not conferred upon him. The execution in its essence was to come from Sheo Kuer, but as she was illiterate and pardanashin she authorized him to sign the document by putting down her signature in his pen. The matter of the admission, whether with reference to attestation by witnesses or registration, was evidently subject to the condition precedent that the execution proceeded from the lady herself. It would therefore seem to be quite clear that it was not comptent for Sheo Ratan to execute a mortgage-deed in the name of his mother without having previously obtained her consent to what he was doing. I am therefore of opinion that unless Ex. F, the mortgage deed dated 1st August 1890, is shown to have been executed with the consent of Mt. Sheo Koer, the execution was invalid and the decument was in no way binding on Mt. Sheo Koer and much less the estate of Radha Kishen that she represented as his daughter and limited proprietor. It is not denied in this case that Ex. F purports to be a document executed by Mt. Sheo Koer and bears her signature in the pen of her son Sheo Ratan Lal as her mukhtaram. The question then is whether this document was executed with her knowledge and consent. Munshi Lal is the only witness who swears that the bond, Ex. F, was executed at Badalpura in Mt. Sheo Koer's house and that Sheo Ratan signed it under her instruction.

This is nobody's case. The defendants admit that Ex. F, was signed by Sheo Ratan and the attesting witnesses in the garden house of defendant 1 at Patna. Munshi Lal is an unreliable witness in the extreme and the learned vakil on behalf of the appellants was right in asking us to discard his evidence altogether It would seem therefore that there is no evidence that the bond itself was ever read out and explained to the lady, but there is evidence to the effect that the draft from which Ex. F. was faircopied was taken to Badalpura from Patna and read out to Mt. Sheo Koer. The only evidence on this point is of Debi Prasad Singh, an old servant of defendant 1. He says that he, with two other servants of the defendant 1, who are dead, proceeded to Badalpura with the draft and on arrival having satisfied themselves that Mt. Sheo Koer was inside the zenana, the

draft was read out to her in presence of Sheo Ratan, on which she told him to have it faired and executed. The witness says that Munshi Lal was also present there.

I have already said why Munshi Lal's evidence must be rejected. The result is that there is no evidence on the record that the person present inside the zenana to whom the draft, Debi Prasad Singh says was read, was Mt. Sheo Keor. Then again there is no evidence that the person inside the zenana understood the contents of the draft and that it was at all explained. In the circumstances even if it be conceded that Ex, F. is a true and faithful copy of the draft that was taken to Badalpura, there is a complete failure of the defendant's case on the oral evidence as regards the point that the document was executed and signed by Sheo Ratan in the name of Mt. Sheo Koer with her knowledge and consent. In the case of a pardanashin lady it has been ruled that a document like this should be explained to her and there should he evidence to show that she understood it, vide, *Sudisht Lal* v. *Mt. Sheobarat Koer* (24), *Shambati Koeri* v. *Jago Bibi* (25). The defendants, however rely on Ex. E, which purports to be a sale-deed executed by Mt. Sheo Koer on 10th May 1892, for the contention that she had knowledge and given her consent to the execution of the mortgage-bond, Ex.F. The contents of the sale-deed no doubt show what is contended for by the appellants. But to bear out this contention it is necessary in its own turn for Ex. E, the sale deed, to be proved to have been executed by Sheo Koer with full knowledge and understanding of its contents.

The defendants have called one Jhumak Bhagat, an attesting witness of this deed, to prove the above. This witness is qualified to speak with reference to the document as he attested its execution. If believed, he proves that the deed was read over and explained to Mt. Sheo Koer whose voice he recognized behind the parda. There is nothing in his evidence to show that the lady understood the contents and realized the nature of the transaction she was giving her consent to. I am not disposed to think that this witness is unreliable, but his evidence is insufficient to carry the conviction that Sheo Koer understood the legal consequences resulting from the deed, the execution of which she asked the witness to attest. It is true that there is an endorsement on this deed by the Registrar of Dinapur to the effect that when he came to the Badalpura house to take the admission of the executant the deed was duly explained to the person in the zenana and identified as the executant by a servant of the family to the satisfaction of this officer. No oral evidence is forthcoming to support this endorsement. The officer in question has died since.

On the authority of *Kishori Lal* v. *Chunni Lal* (26), I am unable to accept this endorsement as in itself sufficient to prove that the contents of Ex. E. were, in fact, explained to Sheo Koer and that she understood their meaning. In this connexion I am also impressed by a passage in Ex. 9, which is the deposition of Sheo Koer herself given in Case 98 of 1894, dated 19th of December of that year. In her evidence in that case she denied having executed the sale-deed in question (Ex.). On a careful consideration of the facts and circumstances relating to Ex. E, I am not at all satisfied that the evidence produced by the defendants has reached the standard which has been set by judicial decisions to prove the execution of document by an illitertae pardanashin lady. I therefore hold that the defendants have failed to prove that Mt. Sheo Koer had knowledge of, or gave her consent to, the execution of Ex. F having fully understood the nature of the taansaction covered by that document.

The learned vakil on behalf of the appellants contends that the decree of obtained by the defendants against Mt. Sheo Koer on the basis of the mortgage bond, Ex. F, is a bar to the plaintiff raising any issue regarding the execution of Ex. F by Mt. Sheo Koer or its validity and that if the decree in question was obtained against the limited owner without fraud or coercion, it should operate as res judicata against the plaintiff, the reversioner, in so far as the validity of the mortgage bond, Ex. F, is concerned, apart from its being a valid charge on the estate of Radha Kishan. Reliance is placed for this contention on *Katama Natchier* v. *Rajah of Shivaganga* (27)

(24) [1881] 7 Cal 245; 8 I A 39 (P C)
(25) [1902] 29 Cal 749; 29 I A 127 (P C).

(26) [1902] 31 All 116=36 I A 9 (P C).
(27) [1861-63] 9 M I A 539=2 W R Cr. 31 (PC).

and *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (28). I accept the contention of the learned vakil that unless the plaintiff proves fraud or coercion in the obtaining of the decree it must operate as res judicata against him within its own limits. He admits that the matter of legal necessity and the creditor's inquiry thereto remain unaffected by the decree. The question then is whether this decree was obtained by fraud. Corecion has not been pleaded. Para. 23 of the plaint distinctly alleges that this decree, dated 17th June 1901, against Mt. Sheo Koer was fraudulently obtained by the defendants in collusion and concert with Babu Ramanugraha Narain Sinha and others, pro forma defendants in the mortgage suit, and without service of summons. There is no evidence on the record to show that there was any collusion or concert on the part of the defendants in the present case with Ramanugraha Narain Singh and others, pro forma defendants in the mortgage suit. Nor is there any evidence of fraud except the bare statement of the plaintiff that in the years 1900 and 1901 his mother was living wilh him at Sassaram in the District of Shahabad and that during that period she did not receive any summons in any suit on a bond of Rs. 5,000 (Ex. F) brought by Rai Radha Kishan, defendant 1. Non-service of summons by itself is not fraud. Its suppression, on the other hand with intent to deceive and take undue advantage of the opposite party is. This view is supported by the ruling reported as *Pran Nath Roy* v. *Mohesh Chandra Moitra* (29). The evidence of the plaintiff is insufficient to establish fraud. Ex. G-1 is the order-sheet of the mortgage suit which shows that the defendants in that suit were served with summons either personally or by house service. This is indicated by an order dated 14th February 1900. The evidence of Nathuni Singh (witness 13 for the defendant) shows that the service of summons on Mt. Sheo Koer took place by attaching the summons to the door of her house at Badalpura as Sheo Koer had refused to grant any receipt of service.

It is contended for the respondent that the evidence of this man is false for the reason that no less than six years before the mortgage suit Sheo Koer had been dispossessed of the Badalpura house by defendant 1 in execution of another decree that he had obtained against her. In this connexion our attention has been drawn to the deposition of Mt. Sheo Koer (Ex. 9). It appears from her evidence that she was living at the time she gave her evidence, in a rented house at Khagaul and that she had lived in that house since about February 1894 but that before that she was living in her father's house (Badalpura). The reason why she left her father's house however as stated by her does not help the plaintiff, for she said it was due to quarrels with her son Sheo Ratan. There is no reliable evidence on the record to show that at the time of the service of summons deposed to by Nathuni Singh, Mt. Sheo Koer was not living in the Badalpura house. The burden of proving this rests entirely on the plaintiff and unless that burden is discharged, the evidence furnished by the order-sheet (Ex. G-1) must be relied upon. In the circumstances I hold that the plaintiff has failed to prove that the decree in the mortgage suit was obtained by fraud. Moreover in the appeal before us unless the decree in the mortgage suit is displaced I have to recognize its existence and its legal effect upon the case. It was open to the plaintiff to bring an action for the setting aside of this decree within the period of limitation provided for by Art. 95, Sch. 1, Lim. Act, but he did not do so.

In my opinion therefore the decree under consideration operates as res judicata against the plaintiff and bars his raising any of the issues covered by that decree. The result is that the decision in this case turns upon the evidence relating, first to the existence or non-existence of legal necessity to borrow the Rs. 5,000 mentioned in Ex. F and secondly, on the question of the creditor (defendant 1) having satisfied himself upon a reasonable inquiry that there was a family necessity for taking the loan by executing the bond. I will now proceed to consider these two questions on the evidence before me.

The recital in the bond, Ex. F, says that the necessity to borrow the R. 5,000 from the defendant was for defraying the costs in the suit of Badri Narayan, appellant, versus Sheo Koer, the executant-respondent, filed in the High Court at Calcutta. It is not denied that the suit

(28) [1915] 27 I. C. 954.
(29) [1897] 24 Cal. 546.

referred to in the recital was of vital importance to the estate left by Radha Kishan. Badri Narain, as has been mentioned before, was claimant to the estate as the adopted son of the deceased and if the claim succeeded, the entire estate of Radha Kishan would be diverted from the daughter Sheo Koer and her line and vest in the adopted son. It has not been denied that resistance to this claim was a matter of paramount importance and necessity for the preservation of the entire estate in the interest of the limited owner Sheo Koer and the reversioners, her two sons, Sheo Ratan and Nau Ratan, the plaintiffs. The object therefore on which the money borrowed from defendant 1 was to be spent, clearly falls within the principle enunciated in the leadng case of *Huncomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (30) decided by their Lordships of the Privy Council. The dictum of the Judicial Committee on this point is in the following words:

"The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

The suit pending in the High Court was a danger that was to be averted and the occasion was one which clearly demanded the expenditure of money for an object that unquestionably fell within the principle laid down in this Privy Council decision. This is not disputed nor denied. Costs of litigation are a recognized head of necessity but the power to borrow for that reason is not unlimited: vide *Bhimaraddi* v. *Bhaskar* (7). The plaintiff asserts that as a matter of fact at the time when the money was borrowed the estate was financially so placed as to be able to defend the suit in Calcutta without having to borrow at all. The validity of the charge of Rupees 5,000 advanced by defendant 1, therefore as regards legal necessity to borrow depends on the evidence relating to the financial condition of the estate in the hands of Sheo Koer at the time the loan of Rs. 5,000 was advanced. The burden of proof is upon the defendants, the mortgagees, to prove the validity of the transaction on which their title rests. This was ruled by the Judicial Committee in the case of *Amarnath Sah* v. *Achan Kuar* (31) The onus of proving as a fact that Mt. Sheo Koer was financially so placed in August 1890 that she could not resist the suit in Calcutta without taking the loan rests heavily on the defendants. They have lamentably failed to prove that she was so disadvantageously placed. There is next to no evidence on the record to prove her impecuniosity.

An effort was made in the cross-examination of plaintiff's witness, Nandu Lal, that a considerable portion of the estate left by Radha Kishan had, at the time of this transaction, passed into the hands of strangers. Nanda Lal's evidence on this point cannot be relied upon, for there is documentary evidence on the record to show that in any event till the closing months of the year 1890, when the money was borrowed, Mt. Sheo Koer was in possession of the properties left by her father.

This is evident from a perusal of Ex. 4 (b), which is a judgment given in the case of *Nau Ratan Lal* v. *Stephen*. Then again the account books produced in this case show that since 1885 every year there were large balances on the credit side in favour of the view that in these years considerable savings were effected from the estate in the hands of Mt. Sheo Koer. Ex. 3 (h) is the account book of 1890 up to 8th August of that year. This book shows that in that year alone there was a large balance not less than Rupees 5,389-1/2 to the credit of the estate after paying all expenses. There is nothing incredible in this as the estate in the hand of Mt. Sheo Koer was considerable and on the lowest computation sums of money amounting to an average of at least Rs. 25,000 a year were received by Mt. Sheo Koer as rent paid to her from the various villages in her possession. It is true that in her evidence, in Case No. 98 of 1894 (Ex. 9), she had said that on her father's death whatever money there was had gone into the hands of her son Sheo Ratan and only on occasions when she wanted any money Sheo Ratan used to give it to her "in Rs. 200 or Rs. 400." It is immaterial to consider whether the actual custody of the savings or the large sum of money left by her father was in Mt. Sheo Koer or Sheo Ratan. The question for consideration is whether taking all the facts and circumstances of the financial condition of the estate and also of the extravagant habits of Sheo Ratan, in the absence

(30) [1854-57] 6 M. I. A. 393=18 W. R. 81 note.
(31) [1892] 19 I. A. 196=14 All. 420 (P. C.).

of any reliable evidence adduced by the defendants, it can be held that at the time Ex. F was executed, Mt. Sheo Koer had no money to defend the suit at Calcutta. I cannot say that this has been established. On the authority of the decision of their Lordships of the Privy Council, in *Dharam Chand Lal* v. *Bhawani Misrain* (6), necessity is to be established by proof that there were no funds in the hands of the limited owner sufficient to meet the demand. I must therefore hold that the necessity to borrow has not been proved as a fact. In coming to this conclusion I am not regardless of the galaxy of legal talent engaged by Mt. Sheo Koer to defend her suit in Calcutta nor the heavy expense which such a course must have entailed. The next question for consideration is whether defendant 1 advanced the Rs. 5,000 after due inquiry. The enquiry must be proved to have been bona fide and that defendant 1 had reasonable grounds to accept the representations made to him showing necessity to borrow.

. This principle is a well established one and supported by the authority of the Judicial Committee laid down in *Hanoomanpersaud Panday* v. *Mt. Babooee Munraj Koonworee* (30) and *Amarnath Sah* v. *Achan Kuar* (31). In this connexion, mention may be also made of *Nanda Lal Banga Chandra Dhur* v. *Jagat Kishore Acharjya* (32) and a Full Bench decision of this Court given in *Ram Bahadur* v. *Jagernath Prasad* (33). The recital in Ex. F, as has already been stated, mentions the necessity to have been the defending of the suit in Calcutta. It is evident therefore that this was the representation made to defendant 1. His evidence is that at the time negotiations were opened he inquired from Munshi Sham Narayan, Babu Gajadhar Pershad and Khoda Bux Khan Bahadur and that they said to him that the money was urgently needed for the expenses of the High Court case and that the previous loans advanced by him would not be realized if the Rs. 5,000 was not lent. He says in his evidence further that he made some inquiries through his servants also, but what they were. there is nothing to show. The question then is whether the inquiry made by him from the three gentlemen mentioned above is sufficient to hold that it was bona fide and that he had reason to give credence to the representations made to him by them. The three gentlemen mentioned above were lawyers by profession and the first two of them were the pleaders of Mt. Sheo Koer in the adoption suit. Munshi Sham Narayan attested Ex. F as a witness also. It is not unreasonable to suppose that in giving their opinion and advice they were mindful of the legal question involved in a transaction with a pardanashin lady who was a limited owner and on whose behalf the negotiation to borrow money had been opened. But there is no evidence on the record that these gentlemen had any personal knowledge of the financial condition of Sheo Koer at the time. They no doubt believed what had been represented to them. This is not sufficient to absolve the defendant from the obligation to have made a proper and reasonable inquiry. He has failed to prove his contention. I therefore agree with my Lord, the Chief Justice, in the decision arrived at by him in the disposal of this appeal.

V S./R.K. *Appeal partly allowed.*

(32) A. I. R. 1916 P. C. 110=44 Cal. 186=43 I. A. 249=36 I. C. 420 (P. C.).

(33) [1917] 3 P. L. J. 199=45 I. C. 749.

A. I. R. 1918 Patna 563

IMAM, J.

Guyan Dhanger — Plaintiff — Appellant.

v.

Gonder—Defendant—Respondent.

Second Appeal No. 585 of 1917, Decided on 23rd April 1918, from a decision of Sub-Judge, Purnea, D/- 28th February 1917.

Benamidar—He cannot sue for possession of immovable property.

A benamidar is not competent to maintain a suit for possession of immovable property.

[P 564 C 1]

Siva Narain Bose—for Appellant.

S. N. Sahay—for Respondent.

Judgment.—The plaintiff preferred this suit for the declaration of title to and recovery of possession of the land in suit. The lower appellate Court has reversed the decision of the Munsif and has held that the plaintiff could not maintain the suit as he was only a benamidar. It appears that the plaintiff in his evidence had admitted that it was his father who had purchased the property, but in the plaintiff's name. On the strength of this admission the lower appellate Court had held that the plain-

tiff was a benamidar. In appeal it is contended on his behalf that on the authority of *Upendra Nath Nag* v. *Bhupendra Nath Nag* (1), the subsequent conduct of the parties and the surrounding circumstances should have been taken into consideration by the lower appellate Court before coming to a finding on the question of benami. On the other hand reliance is placed on *Gopeekrist Gosain* v. *Gungapersaud Gosain* (2) for the proposition that where purchase of real estate is made by a Hindu father in the name of his son the presumption of the Hindu law is in favour of its being a benami, and that the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. Attention is also drawn to *Moulvie Sayyud Uzhur Ali* v. *Mt. Bebee Ultaf Fatima* (3) and *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (4). The admission of the plaintiff that the land in suit was purchased by his father is clear and unequivocal. The point was not left in any doubt involving such investigation as was necessary for decision in the case reported as *Upendra Nath Nag* v. *Bhupendra Nath Nag* (1). The lower appellate Court was therefore right in holding that the purchase in plaintiff's name was benami.

It is however contended that even if the plaintiff is only a benamidar that ought not to stand in the way of his maintaining the suit. For this proposition reliance is placed on *Dagdu* v. *Baltion Ramchandra Natu* (5) and *Nandvant Kishore Lal* v. *Ahmad Ata* (6). Mr. S. N. Sahay, counsel for the defendant, meets this contention by quoting the ruling reported as *Atrabannessa Bibi* v. *Safatulla Mia* (7). The present suit is for possession of land and he contends that on a review of a very large number of decisions referred to in that case, the Calcutta High Court regards it as a doctrine well settled in that Court that a benamidar is not competent to maintain a suit for possession of immovable property. I accept the contention of the defendant on this point and hold that a benamidar cannot succeed in his suit for possession of immovable property. The learned vakil appearing on behalf of the plaintiff-appellant further contends that even if the plaintiff is a trespasser he can maintain the suit on the authority of *Sahodra Kuer* v. *Gobardhan Tiwari* (8). This contention, if accepted, involves a complete change of the entire frame of the plaintiff's suit. He rested his claim in the plaint on the allegation that he was purchaser of the land in suit and that he had a good title thereto, but was wrongfully dispossessed by the defendant. To allow the contention of the learned vakil to prevail would be to transform the entire case of the plaintiff. Moreover the present case is distinguishable from the case referred to above. I am unable therefore to attach any importance to the point raised. As a last resort it is urged on behalf of the plaintiff-appellant that the decree of the Munsif should not have been reversed on account of the father of the plaintiff not having been made a party to the suit. This contention is without any substance inasmuch as the plaintiff, who had been held to be only a benamidar, cannot maintain a suit for possession of immovable property. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(1) [1916] 32 I. C. 267.
(2) [1854-57] 6 M. I. A. 53 (P.C.).
(3) [1869-70] 13 M. I. A. 232 (P.C.).
(4) [1869-70] 13 M. I. A. 395 (P.C.).
(5) [1898] 22 Bom. 820.
(6) [1896] 18 All. 69.
(7) [1916] 43 Cal. 504=31 I. C. 189.
(8) [1917] 2 P. L. J. 280=39 I. C. 458.

A. I. R. 1918 Patna 564

ROE AND COUTTS, JJ.

Rameswar Misser and *another*—Appellants.

v.

Sureshwar Misser and *others*—Respondents.

Appeal No. 35 of 1916, Decided on 17th May 1918, from original decree of Sub-Judge, Durbhanga.

(a) Hindu Law—Joint family—Specification of shares of members—Separation need not be presumed—Circumstances should be investigated and intention of members ascertained.

Mere specification of shares among members of a joint family does not amount to an assertion that the family has ceased to be joint.

In order to ascertain whether there has been a separation or not, the whole circumstances of each particular case must be investigated and the intention of the parties ascertained.

[P 566 C 1]

(b) Hindu Law—Joint family—Separation of some members—Remaining members joint

in mess and property—Jointness should be presumed to have continued.

Where after the separation of certain members of a joint Hindu family, the remaining members messed together, kept house together and held their property jointly:

Held: that they must be presumed to have continued joint. [P 566 C 1]

Shorashi Charan Mitra—for Appellants.

Chandra Sekhar Banerjee—for Respondents.

Roe, J.—The plaintiffs in this case are sons of Madhab Missir, who was the son of Bisseswari Dutt Missir by his second wife: the defendants are the sons of Keshab Missir. He and Damodar Missir were the sons of the same Bisseswari Dutt by his first wife. In 1879 Madhab Missir instituted a suit for partition of the family property. Joined with him were his mother and an unmarried sister. The defendants to the suit were Damodar and Keshab and their mother. A decree was finally made for partition. whereby Madhab and his mother took one share equal to 2/5ths of the property and Damodar Missir, Keshab Missir and their mother took another share equal to 3/5ths of the property. In course of time Keshab Missir died leaving two sons who are the defendants. It is admitted by the plaintiffs that they were joint with Damodar Missir at the time of his death. Damodar Missir died childless leaving a widow, defendant 3. Madhab Missir was then alive. The plaintiffs claim that their father Madhab Missir was preferential heir of Damodar Missir and that therefore they are entitled for various reasons to succeed to his estate. It is however conceded at the Bar that if it be found that there was never any separation between Keshab Missir and Damodar Missir, the case of the plaintiffs must fail. The learned Subordinate Judge has found as a fact that there was no such separation and has therefore dismissed the plaintiffs' suit. We may concede for the purpose of argument that where there is a disruption of a joint family status as a whole, the burden of proof is on those members who allege that they elected at the time of the disruption to remain unaffected by it. We do not go so far as to state definitely that this is the law, but for the purposes of this case we may accept it as a proposition, for we are of opinion that the weight of proof adduced by the defendants is sufficient to support the contention that Keshab and Damodar elected to remain joint. Our chief reason for coming to this conclusion lies in paras. 10 and 11 of the plaint itself, which run as follows:

"That the plaintiffs respectfully submit that the effect of the said partition decreed was a disruption of the entire joint family, and a separation of the same into five different units, holding separate possession of the specific, distinct and divided lands as regards some properties and as regards other properties not capable of such partition in defined and specific share. "That the plaintiffs have been informed and believe that thereafter Damodar Missir, Keshab Missir and Bilasbati Missrain continued in joint mess as before and soon after partition Damodar Missir and Bilasbati Missrain for their ownselves and on behalf of Keshab Missir-reunited and held possession and enjoyed their properties as reunited co-parceners."

The oral evidence given on the plaintiffs' side is that this period of separation lasted from the date of the visit of the Amin to make the partition which had been decreed by the Subordinate Judge to the date of his second visit to amend that partition in accordance with the decree made by the High Court. Keshab Missir was at the time a minor. It is admitted that he remained joint throughout in mess with his brother. It is not suggested that he drew separately any profits from the property or that his mother drew separately any profits from the property. These three, the mother and the two sons, were eating together, living together and treating the property allotted to them as one undivided share. We are asked however to say that the mere fact that statements were made in pleadings and in the decrees of the Courts to the effect that the individual members of this family were entitled to specific shares in the property to be divided, destroyed the whole basis of the Hindu joint family, which is that each member of it regards himself as owning not a specific share in the property but an undefined share. This was precisely the suggestion made by the learned Judicial Commissioner of the Hyderabad Assigned Districts in a case which came before their Lordships of the Judicial Committee, *Balabux* v. *Rukhmabai* (1). The learned Judicial Commissioner's words were:

"For defendant it is argued, and authorities are shown to prove that it has been determined, if one out of several brothers (co-parceners) be

(1) [1903] 30 Cal. 725=30 I. A. 130 (P.C.).

separated from the rest, it is virtual separation at all."

This Lord Davey discarded as a complete fallacy. He said:

"In many cases it may be necessary in order to ascertain the share of the out-going member to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all."

Throughout the decision of the Judicial Committee it is clear that the mere specification of shares among members of a joint family does not amount to an assertion that the family has ceased to be joint. The first case to this effect is *Appovier* v. *Rama Subba Aiyan* (2) quoted with approval in the case of *Baboo Doorga Pershad* v. *Mt. Kundun Koowar* (3) and invariably followed. In order to ascertain whether there has been a separation or not, the whole circumstances of each particular case must be investigated and the intention of the parties ascertained. The learned Subordinate Judge has rejected with contempt the evidence given that there was any division by the Amin beyond that which he was told to make, that is to say, a separation of the property of the family into two shares. Reliance is placed upon a petition filed by Damodar Missir, Ex. 13; it is suggested that in this petition itself there is an admission that the said property was divided into five parts. Such an interpretation could only be put on this partition by a deliberate misreading of it, for he particularly says that when he talks of the property being divided into five parts he means that two parts were allotted to Madhab Missir and three parts to his own party, indicating clearly that the division was into two parts and not into five parts. There has never been any division as between Damodar, Keshab and their mother. They have messed together, kept house together and held their property together. They remained throughout joint. The sons of Keshab Missir were therefore entitled to succeed to Madhab Missir's property by survivorship and the plaintiff has no cause of action. The appeal is dismissed with costs.

Coutts, J.—I concur.

V.S./R.K. *Appeal dismissed.*

(2) [1866-67] 11 M. I. A. 75.
(3) [1873-74] 1 I. A. 55=13 Bom. L. R. 235=21 W. R. 214 (P.C.).

A. I. R. 1918 Patna 566

DAWSON-MILLER, C. J. AND MULLICK, J.

Kesho Prasad Singh — Defendant — Appellant.

v.

Shiva Saran Lal — Plaintiff — Respondent.

Privy Council Appeal No. 50 of 1917, Decided on 12th February 1918, from a decision of Chamier, C. J., and Sharfuddin, J. in First Appeal No. 358 of 1914, D/- 27th July 1917.

Civil P. C. (1908), S. 110 — Suit to recover arrears of pension with interest valued at Rs. 5,445 decreed in appeal—Leave to appeal to Privy Council — Interest payable until realisation cannot be added nor arrears accrued due since decree can be taken into consideration.

Plaintiff brought a suit to recover arrears of pension from September 1911 to July 1912 together with interest therein and valued his suit at Rs. 5,445. His suit was dismissed by the first Court but was decreed by the High Court. The defendant applied for leave to appeal to the Privy Council:

Held: (1) that the subject-matter of the suit was not above Rs. 10,000, nor did the decree involve a claim to or question respecting property of the value of Rs. 10,000: [P 568 C 2]

(2) that in determining the value of the subject-matter of the suit the interest payable until realisation of the decree could not be added to the amount claimed, nor could the arrears of pension accrued due since the decree be taken into consideration: [P 567 C 2]

(3) that no question respecting future payment of the pension was involved in the decree: [P 569 C 2]

(4) that the value of the properties to be attached in execution of the decree could not be said to have even an indirect connection with the decree. [P 570 C 1]

Hasan Imam, Krishna Sahai and *Nirsu Narain Sinha*—for Appellant.

S. Sinha, R. B. Lal and *S. N. Palit*—for Respondent.

Dawson-Miller, C. J.—In this case the defendant applies for certificate that the case complies with the requirements of S. 110, Civil P. C., and is a fit one for appeal to His Majesty in Council. The facts may be shortly stated. The plaintiff Babu Shiv Saran Lal was appointed in 1902 to act as Manager of the Dumraon Raj by the late Maharani Beni Prasad Koeri, who under her deceased husband's will had a life-interest in the estate. In 1906 the Maharani executed an ekrarnama in favour of the plaintiff granting him a pension of Rs. 500 per month from the date when he should retire from the management of the estate. The Maharani died in December 1907. After some litigation defendant 1 the Maharaja Kesho

Prasad Singh succeeded in proving his title to the estate. In March 1908 the plaintiff ceased to be Manager of the estate and was paid his pension until September 1911, when defendant obtained possession of the Raj. In August 1912 the plaintiff instituted the present suit claiming the pension from September 1911 to July 1912 and interest on unpaid arrears. He failed before the Subordinate Judge of Shahabad, but on appeal to this Court he obtained a decree against defendant 1 for Rs. 5,445 together with interest at six per cent. per annum until realisation. By the terms of the decree it was ordered that the decree should be executed only against the property of the late Maharani in the hands of defendant 1 and which had not been duly administered by him.

The judgment was based upon the findings that although she could not bind the estate, the Maharani as tenant for life had power to dispose of her own acquisitions and that these did not form part of the estate at her death and that there was prima facie evidence to show that defendant 1 came into possession of property both moveable and immovable, which the late Maharani might have disposed of if she pleased. There is no finding either as to the exact value of such property, although there was evidence to shew that it was considerable, amounting to some lakhs of rupees, or as to whether it had been duly administered by defendant 1. It was but faintly argued that the amount or value of the subject-matter of the suit amounted to Rs. 10,000 within the meaning of para. 1, S. 110, Civil P. C. but it was contended that the decree of this Court involves directly or indirectly a claim to or question respecting property of that amount or value within the meaning of para. 2 of the section. It was urged in support of the second contention that the decision arrived at by the judgment from which the defendant seeks to appeal involves a claim to have the accrued and future instalments of pension paid out of the Maharani's estate and as the instalments which are now due but still unsatisfied amount to considerably more than Rs. 10,000 the requirements of the part 2 of the section are fulfilled. In my opinion neither of these contentions can succeed.

The first can be shortly dealt with. The plaint does not claim anything beyond the sum of Rs. 5,445 made up of pension and interest to July 1912 and further interest until realisation. No claim is made for a declaration that the plaintiff is entitled to future pension or to a charge on the property for such pension although it is true there is a general claim for any other relief to which the plaintiff may be entitled without specifying its nature. That interest payable until realisation cannot be added in ascertaining the amount of the subject-matter of the suit in the Court of first instance was definitely determined in the case of *Moti Chand* v. *Ganga Prasad Singh* (1), where their Lordships of the Privy Council rejected this contention and refused leave to appeal. But two decisions of the High Court at Calcutta were referred to where a claim for future mesne profits was allowed to be taken into consideration in estimating the amount of the subject-matter of the suit in the Court of first instance although the addition of mesne profits at the date of the decree in such Court did not bring the total up to the appealable amount. [see *Dalgleish* v. *Damodar Narain Chowdhury* (2) and *Basanta Kumar Roy* v. *Secretary of State* (3)] How far these decisions are consistent with the principle which guided their Lordships in *Moti Chand* v. *Ganga Prasad Singh* (1) (ubi sup.) or how far their authority may have been shaken by the more recent decision of the Madras High Court in *Subramanya Aiyar* v. *Sellammal* (4), it is not necessary to determine. It is sufficient to say that in the present case the subject-matter of the suit in Court of first instance amounts to nothing more than the sum claimed and there is no claim for mesne profits or anything analogous thereto. It follows therefore that the case does not fulfil the requirements para. 1 of the section.

The second contention, viz., that the case fell within para. 2 of the section led to some argument before us as to the class of cases to which paaa. 2, S. 110, is meant to apply. The case of *Subramania Aiyar* v. *Sellammal* (4) (ubi sup.) was relied on by the respondent who opposed the application. In that case the subject-matter of the suit including mesne profits in the Court of first instance was

(1) [1902] 24 All. 174=29 I. A. 40 (P. C.).
(2) [1906] 23 Cal. 1286.
(3) [1910] 6 I. C. 792=14 C. W. N. 872.
(4) [1915] 39 Mad. 843.=31 I. C. 296

under Rs. 10,000, but by the addition of mesne profits for the period between the institution of the suit and the date of the petition for leave to appeai to His Majesty in Council the value of the subject-matter in dispute exceeded that amount. It was there decided, in a judgment reviewing at length the earlier decisions, that para. 2 of the section applied only to cases involving some claim or question to or respecting property other than that in respect to which the claim is brought and which may be taken into account therewith in making up the appealable value, or that it may possibly also apply to cases involving claims incapable of a money valuation, such as claims to easements and the like, but apart from this, if nothing beyond what is in one of the judgments in that case described as the object matter in dispute is involved, para. 1, S. 110, alone applies. This decision was at variance with the view expressed by Sir Francis Maclean at the end of his judgment in *Dalgleish's* case (2), although this part of his judgment was not necessary for the determination of the case, he having already held that para. 1 of the section had been complied with. Were it necessary for us to choose between these authorities, I should be inclined to give more weight to the reasoned decision of the Madras High Court than to the dictum of Sir F. Maclean in the earlier case, but a further point which, in my opinion, concludes the case against the petitioner was raised and argued before us.

It was contended by the respondent that the petitioner had failed to show that there was any property of the value of Rs. 10,000 or upwards in respect to which any claim or question was involved, as the petitioner's case was and always had been that there was no property belonging to the late Maharani in his hands and not only administered against which alone under the form of the decree the respondents's claim could be executed. In the petition praying for a certificate that the case fulfils the requirements of the section, the grounds of appeal are set out and under the headings (n) to (s) the petitioner disputes the contention that any property of the late Maharani came into his hands or that she ever had any separate property. It seems to me that whether any property such as that mentioned in the decree exists is a matter at present undecided and one which can only be finally determined in the execution proceedings now pending, in which proceedings the petitioner is vigorously contesting the existence of such property and has all along refused to pay the decretal amount, although his application to stay execution pending the appeal to His Majesty in Council has on a previous occasion been rejected by this Court. In these circumstances I think that even if the second alternative in S. 110 is applicable, the petitioner has failed to show that the decree involves a claim or question to or respecting property of the requisite amount of value. The petition will therefore be dismissed with costs. Hearing fee five gold mohurs.

Mullick, J.—I agree that leave should be refused, but as both sides have sought to draw an analogy from certain cases relating to mesne profits I think it is necessary to make some reference to them. The first case on which the defendant petitioner for leave relies is *Dalgleish* v. *Damodar Narain Chowdhury* (2). There the plaintiff sued for recovery of possession of land of the value of Rs. 5,400 and claimed mesne profits till possession was delivered. The suit was decreed in favour of the plaintiff and in the execution proceedings he put in a claim for mesne profits for over Rs. 30,000. The defendant appealed to the High Court, and the execution proceedings were stayed. The appeal was allowed and the plaintiff applied for leave to appeal to His Majesty in Council. It was contended that the case did not fall within part 1 of S. 596, Civil P. C., 1882, which corresponds to S. 110 of the present Civil P. C., because although the claim in the appeal exceeded Rs. 10,000 the value of the subject-matter of the suit was below that sum. Maclean, C. J., and Holmwood, J., held that mesne profits could be taken into account in estimating the value of the subject-matter of the suit. They also expressed the opinion that even if part 1, S. 596, was not applicable, still the decree involved directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000, or upwards within the meaning of Cl. 2, S. 596.

The defendant next draws cur attention to *Basanta Kumar Roy* v. *Secy. of State* (3). That was a suit for possession of land with mesne profits. The

value of the land as stated in the plaint was Rs. 6,156. In the application for leave to appeal to the Privy Council mesne profits and interest down to the date of the High Court decree were estimated at Rs. 5,607. It was admitted that the value of the matter in dispute on appeal was over Rs. 10,000, but it was contended that the value of the subject-matter in the Court of first instance was less. Jenkins, C. J., in holding that mesne profits and interest thereon could be taken into account in estimating the value of the subject-matter of the suit made the following observations:

"Seeing that under the Code of Civil Procedure of 1882, the Court could provide in the decree for the payment of mesne profits in respect of the property from the institution of the suit until the delivery of possession or until the expiration of three years from the date of the decree with interest, such mesne profits and interest can, I think, be legitimately regarded as part of the subject-matter of the suit."

The applicability of part 2, S. 596, Civil P. C., was not considered. On the other hand, the plaintiff relies on *Subramania Aiyar* v. *Sellammal* (4). There the value of the land was under Rs. 10,000 but by the addition of mesne profits the value of the matter in dispute at the time of the application for leave to appeal to His Majesty in Council exceeded Rs. 10,000. The Court held that mesne profits could not be added for the purpose of calculating the value of the subject-matter of the suit. The Court also observed that part 2, S. 110, Civil P. C., did not apply and that the decree for mesne profits could not be said to involve directly or indirectly some claim or question to or respecting property of value exceeding Rs. 10,000. There is therefore a clear conflict between the views of the High Courts of Calcutta and Madras, but in my opinion it is unnecessary for the disposal of the application now before us to decide which of these views is correct.

Here the first question is whether the value of the matter in dispute on appeal to His Majesty is Rs. 10,000. Admittedly it is not, even if interest up to the date of the High Court decree is taken into account. But it is suggested that in calculating the value of the matter in dispute on appeal as well as the value of the subject-matter of the suit we should include arrears of pension which may have become due since the trial Court's decree with interest thereon. In my opinion this suggestion cannot be accepted. I think it is quite clear that the subject-matter of the suit was only the specific and ascertained sum of Rs. 5,445 due on account of arrears of pension and interest thereon. The suit did not in any way concern itself with any future arrears of pension. The plaintiff made no claim for them and it is not known whether he intends to bring future suits in respect of them. How then can anything which the plaintiff does not claim and which has not and could not have been given by the decree be the subject-matter of the suit or be in dispute on appeal? No analogy can be drawn from the practice of the Calcutta High Court in respect of mesne profits which the Civil Procedure Code compels the Court to grant if claimed in the plaint.

At the same time I prefer not to rest my decision on the view of their Lordships of the Madras Court and I am satisfied without any reference to the decision in *Subramania Aiyar's case* (4) that the present application does not come within part 1, S. 110, Civil P. C. The next question is whether the decree involves a claim directly or indirectly to property of the value of Rs. 10,000. It is contended that the decree involves a claim to subsequent arrears of pension which have by now amounted to more than Rs. 10,000. The answer to this is that the decree does not involve either directly or indirectly a claim to anything more than the sum decreed and the interest thereon. According to the decided cases it might have been otherwise if the plaintiff had brought suits for these subsequent arrears, but it seems clear that while such suits are in gremio futuri part 2, S. 110, Civil P. C., does not apply. The next question is whether the decree directly or indirectly involves a question respecting property of the value of Rs. 10,000. It is contended that it does, because the arrears of pension which have become due subject to the decree are the property of the plaintiff just as much as the arrears already decreed. The reply to this is that such arrears do not become the plaintiff's property till he has obtained a decree from Court or till the defendant has admitted liability for the same.

Finally it is contended that the decree involves indirectly the question whether property of the value exceeding Rs. 10,000 is liable to attachment in execution of the decree. The answer to this is that it has not been found by any Court whether the defendant has in his hands any property of which attachment can be made in execution of the decree. That matter was expressly left open in the appellate judgment of the High Court, and the defendant's case before us is that he has no such property in his hands. Moreover, the question as to what properties can be attached in execution of the decree cannot, in my opinion, be said to have even an indirect connection with the decree itself. The decree-holder may attach property or may not; if he does attach property the value of such property may be over Rs. 10,000 or it may not. It does not necessarily follow that any question as to title to property is directly or indirectly involved in the relief which the Court has here given to the decree-holder. In this view of the case it is unnecessary to discuss the correctness of the opinion which has been expressed in *Subramania Aiyar's case* (4) to the effect that the property referred to in part 2, S. 110, Civil P. C., must be property other than the subject-matter of the suit. Such a view might, I apprehend, lead to difficulties in drawing the line between property which is the subject-matter of the suit and property which is not. In my opinion the legislature has expressly enacted Cl. 2 in wide terms, so that each case may be dealt with upon its own facts. In the present case giving the words of part 2, S. 110, Civil P. C., the most liberal construction, it does not seem to me possible to say that the decree involves a claim to or question respecting property of the value of Rs. 10,000.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 570

DAWSON-MILLER, C. J. AND MULLICK, J.

Nathe Pujari and *others*—Appellants.

v.

Radha Binode Naik—Respondent.

Letters Patent Appeal No. 86 of 1917, Decided on 25th February 1918, from a decision of Roe, J., in Second Appeal No. 2532 of 1915, D/- 20th March 1915.

(a) Hindu Law — Religious endowment—Trustee cannot alienate office or trust property — He cannot create life-interest of shebaiti right.

A trustee of a public religious endowment cannot alienate his office and duties or the possession of the trust property at his own will either by sale or gift, so as to create a valid title in the transferee. He cannot even create a life-interest in favour of the donee in respect of the shebaiti right. He has no beneficial interest beyond what may be expressed in the trust and has no powers of alienation beyond what may be necessary or beneficial for the purposes of the trust. [P 571 C 1; 573 C 1]

(b) Limitation Act (1908), S. 10—Applicability of—Person performing duties of shebait of idol and applying trust funds to proper purposes and claiming right to hold office and perform duties—S. 10 does not apply—Right can be acquired by adverse possession against original shebait.

Section 10 applies only where the person setting up adverse possession claims adversely to the beneficial owner. Where however a person has been performing the duties of a shebait of an idol and applying the trust funds to the other purposes of the trust and claims the right to hold that office and to perform those duties, S. 10 has no application and he can acquire that right as against the original shebait by adverse possession. [P 575 C 1]

(c) Limitation Act (1908), Arts. 124, 134 and 135—Suit for possession of hereditary office is governed by Art. 124—Arts. 134 and 135 do not apply.

By Art. 124 a suit for possession of an hereditary office is barred after 12 years from the time when the defendant takes possession adversely to the plaintiff. Arts. 134 and 144 do not apply to such cases. [P 573 C 2]

Sushil Madhub Mullick—for Appellants.

Hasan Imam and *Achalendra Nath Das*—for Respondent.

Dawson-Miller, C. J.—In this case the appellants (plaintiffs 2 to 24) seek for a declaration that certain lands in Mauza Brahmeswarpur in the Puri district are the debutter bazyafti of Sri Brahmeswar Deb who was the plaintiff 1 in the suit and that they, the remaining plaintiffs, are the marfatdars on his behalf. They also seek for possession of the said lands as against the defendants, who themselves claim to be the marfatdars on behalf of the idol. The appellants base their claim upon the fact that they are the descendants of the original marfatdar of the idol and say that in the year 1879 their ancestors, the then marfatdars or shebaits, appointed one Rashbihari Naik, the father of the defendants, to act as manager or agent on their behalf and that on his death, which occurred some two or three years before this suit was instituted, all right or title, if any which

he may have had in the lands or in the office of marfatdar or shebait of the deity came to an end and did not devolve upon his heirs. They further contend that the late Rashbihari Naik did not and never could acquire any legal right in the marfatdar title, as such title could not lawfully be transferred. The defendants' case as originally pleaded was that their father Rashbihari Naik acquired a valid title from the plaintiffs' ancestors by a deed of gift dated 25th April 1879 to the marfatdari rights in respect of the lands in dispute, for the management of the same on behalf of the deity and that they succeeded by inheritance to the same on their father's death. They further say that if the deed of 1879 was by Hindu law invalid then their father acquired by adverse possession for more than 12 years a good title and that the plaintiffs' suit is barred by limitation.

If the deed of 1879 in fact purported to transfer the absolute interest in the marfatdari rights to Rashbihari Naik, and was not merely the appointment of an agent to act for the marfatdars who retained the title in themselves, then there can be little doubt that such a transaction, is according to Hindu law invalid. In S. 439 of Mayne's Hindu law and usage the learned author. in dealing with the devolution of the trust created by religious endowments of this description says :

"In no case can the trustee sell or lease the right of management though coupled with the obligation to manage in conformity with the trusts annexed thereto nor is the right saleable in execution under a decree."

This summary of the law would appear to be in conformity with a long series of decisions which it is unnecessary to refer to. Whatever contention the respondents may have urged in the Courts below, it was conceded before us that the trustees of a public religious endowment such as this is admitted to be, could not alienate their office and duties or the possession of the trust property at their own will either by sale or gift so as to create a valid title in the transferee. The appellants' contention was that the deed in question did not purport to transfer either the office or the property of the trust but merely appointed Rashbihari Naik to act as agent during his lifetime for the trustees, the office and possession of the property being retained in the latter ; or at most that the transfer was that of a life-interest only to the donee and that the office and right to possession of the estate reverted on his death to the appellants as heirs of the donors, and that in these circumstances no title by adverse possession could arise either in Rashbihari Naik or his children, the respondent.

Two translations of the document of 25th April 1879 were produced and submitted to us, but they did not differ in any material respect. I take that which was checked by the officer of this Court, who was conversant with the language of the original. It is executed by 12 persons and recites that the lands scheduled at the end of the document forming *mans* 61. 17. 2 of naik and nanaik land belong to Sri Brahmeswar Deb installed in Brahmeswarpur Mauza and were settled by their ancestors (4 in number) who paid the bazyafti jama to the Government and with the remainder of the produce managed the festivals of the aforesaid Deb and that after their death four of the signatories were carrying on the management. It then proceeds as follows:

"But in the recent mutation of names we being the relatives and cosharers of the above-mentioned reportdars, our names have been entered in respect of the said land. Under the circumstances as we the cosharers are many, and we could not collect and realise the rent appertaining to the koth kismat of the afofesaid Deb from the mufassil in time and as we are unable to manage the festivals, etc., regularly, we, in a sound condition of mind and of our own free-will, without any coercion make over the aforesaid *mans* 61'17'2 of koth kismat and the temple, trees thereon and moveable property of the aforesaid Deb to Babu Rashbihari Naik, son of Minaketan Naik, inhabitant of Berboi Mauza, Pargana Limbai, who pays much attention to the affairs of the aforesaid Deb, as marfatdars, and specially because the aforesaid Deb is the family god of the said Babu.

We do hereby execute and agree that from this day forth the said Babu, as marfatdar, shall remain in possession, shall collect and realize the produce of the said land and the arrears of dues from the raiyats and the future dues from them and shall pay the Government dues according to the kists and carry on the festivals, etc , of the Thakur with the balance of the income and shall credit the

balance to the kotha chandar of the aforesaid Thakur. With that he will make improvement of the temple and the property of the Thakur in the future. He shall bring the pattas and kabuliyats into force with the raiyats. He shall carry on the festivals and bhogs and shall pay the customary dues to the other sabaks, pujaris and sankhuas. If after this, they do not attend to their duties then he shall settle it in consultation with us, and we shall continue to get what we have been getting out of the khanja bhog in the festivals. He will act according to conditions mentioned in the old patta of the koth kismat or according to the conditions to be laid down in the future settlement. He will get the marfatdari report of the said land duly recorded in his name. We give up our right and possession which we had in the koth kismat of the aforesaid Deb and in the above-mentioned land which we had till to-day and cease to have any concern in them in all respects. Neither we nor our heirs or relations have or will have, or will prefer any claim or objection from to-day and if preferred it will not be accepted in any Court. We execute this deed of gift so that it may be useful when necessary. We agree to this deed of gift. 14th day of Mesa 1286 V. S., corresponding to 25 4-1879.

"It may be noted that we have borrowed Rs. 200 for the management of the sebi and puja of the aforesaid Deb from Gauranga Naik, Taraboi, Pargana Limbai, and Gangadhar Swayin of Rencho, Pargana Limbai, and Babu Bhagirathi Naik of Berboi, Pargana Limbai, and Babu Rashbihari Naik. Babu Rashbihari Naik will pay the amount to the mahajans out of the property of the aforesaid Deb. Date and year as above." Then follows a schedule of the properties referred to. It appears from the evidence that in accordance with the provisions made in the deed Rashbihari Naik got his name recorded as marfatdar and took over possession of the property, and until the time of his death in 1911 carried out the duties of his office apparently with credit to himself and satisfaction to every body concerned. It seems almost impossible to contend after reading this document that it was not intended to invest Rashbihari Naik with the office of marfatdar or shebait of the idol and to put him in possession of the property as trustee to perform the duties incidental to that office. All right and possession of the donors as marfatdars in the property in question is expressly handed over and all right to interference by them or their heirs for the future is in terms abandoned. The only reservations were that the donors should continue to get what they had all along been getting, viz., their share in the khanja bhogs at the festivals, a thing which they were entitled to in any event, and a somewhat nebulous right to be consulted in the event of the sabaks, pujaris or sankhuas failing to perform their duties after being paid their customary dues. It does not even appear that any advice that might be tendered, if the occasion contemplated should arise, was bound to be followed, and indeed from the later portion of the document it would appear that the new marfatdar would be within his rights in refusing to tolerate any interference in his conduct of the affairs of the office so long as those affairs were administered in accordance with the terms of the trust. In my opinion the deed purported to transfer both the office and the possession of the properties to Rashbihari Naik and to install him as marfatdar with all the rights and duties appertaining to the office in place of those by by whom he was appointed. The appellants contended however that what was transferred was a life-interest only and not an estate of inheritance and relied on the case of *Kalidas Mullick* v. *Kanhaya Lat Pundit* (1). Although it is true that the deed under consideration in that case was in many respects similar to the present document the circumstances were entirely different. The donor in that case was a Hindu widow who had a life-interest only in the property transferred and after the death of the transferee she executed a further deed of gift to the wife of the appellant. It was found by their Lordships that the first deed conveyed a life interest only to the grantee. The only principle of construction to be derived from that case is that although the general rule is that indefinite words of gift are calculated to convey all the interest of the grantor, it is nevertheless necessary to read the whole instrument to gather the intention. According to the general rule a grant without words of limitation conveys an estate of inheritance. and I can find nothing in

1. 11 Cal 121=11 I A 218 (P C).

the present deed to indicate a different intention. On the contrary, I think the latter part of the instrument which purports to bind not only the grantors but also their heirs and relations, seems to indicate an intention to transfer the possession of the property and the rights and duties of the office to the grantee in perpetuity. Assuming however that the intention was to convey an estate for life only to Rashbihari Naik, the case of *Kalidas Mullick* v. *Kanhaya Lal* (1) is no authority for the proposition that the trustees of a public religious endowment have power to grant away even a life estate in the shebaiti rights attending the worship of the idol. Unless the appellants can establish this it follows the grant to Rashbihari Naik, whether for his lifetime only or for the larger estate would be invalid and his adverse possession would begin from the moment he assumed the duties of the office and took over possession of the property. In the case relied on no question was raised as to the validity of the document affecting the transfer to Rutton-moni. And although it is stated in the judgment of the Privy Council that the property had been dedicated by the deceased father-in-law and husband of the grantor to the service of the two idols, it appears that in the High Court and in the Privy Council the case was argued upon the assumption that the grantor had full powers of alienation. The case appears to have been one where the beneficial ownership was retained, the property being subject to a trust only to apply part of the income for the support of the worship of the idol and the performance of religious festivals and not as in the present case where the whole property was transferred in perpetuity to the deity for religious purposes. In the former case the land is alienable (see Mayne's Hindu Law and Usage S. 438). In a case like the present it is clear that the trustee has no beneficial interest beyond what may be expressed in the trust and has no powers of alienation beyond what may be necessary or beneficial for the purposes of the trust. It was not contended before this Court that the transfer was necessary for the benefit of the trust. In *Ayancheri Kovilagath Rama Varma Tambaran* v. *Acholathil Varikoil Raman Nayar* (2) it was held that a lease for a term of years of the management of a temple and its properties in consideration of an advance made for the purposes of paying off debts said to have been contracted for the purposes of the temple was invalid. I can see no material distinction between such a case and the transfer of the office for the life of the transferee and in my opinion whether the deed of 1879 purported to convey the whole estate or a life-interest only the transaction was in either case invalid. It remains to consider whether Rashbihari Naik, and through him the respondents, acquired by adverse possession a right to the office of marfatdars and to possession and management of the trust property so as to bar the appellants' claim. Rashbihari Naik was in undisturbed possession from 1879 until the date of his death in 1911, a period of over thirty years. By Art. 124, Sch. 1, Lim. Act, a suit for possession of an hereditary office is barred after twelve years from the time when the defendant takes possession adversely to the plaintiff, and Art. 144 would cover the case of the possession of property not coming within Art. 134 or any of the other Articles. It was contended that S. 10, Lim. Act, applies so as to remove the bar. In my opinion, this section has no application to the present case. The respondents are not seeking to set up an adverse title to the beneficial owner, the plaintiff 1, nor is there any question as to the misappropriation or improper use of the trust property. The possession of Rashbihari Naik and his successors has been that of trustees, and the claim of the appellants is not founded on a breach of trust. It is a claim to dispossess the respondents from an hereditary office and to have it declared that the appellants are the rightful owners of that office. Had the respondents been claiming the land as their own property or had they been applying the proceeds to purpose not sanctioned by the trust, possibly S. 10 might have been prayed in aid so as to deprive them of any benefit they might claim to derive from long possession.

The case of *Akhiram Goswami Mohant* v. *Shyama Charan Nandi* (3) relied on by the appellants was a case where the Mohant of a temple granted to a company called the Barakar Brick and Tile Co., Ld., a mokarrari lease of debutter lands

2. (1882) 5 Mad 89.

3. (1909) 36 Cal 1003=36 I A 148 (P C).

dedicated to the worship of an idol, thereby depriving the endowment of all further benefit in the property except the fixed rent. It was found that there were no circumstances of necessity to justify the grant. The grant itself was a breach of trust interfering with the rights of ownership vested in the deity. It was held that Art. 134, Lim. Act, did not apply as there was no "purchase" within the meaning of the Act, a lessee not being a purchaser. A passage in the judgment of their Lordships in that case, which says: "The operation of this Art. 134 is controlled by S. 10 of the Act" was relied on by the appellants and by the learned Munsif before whom the present case originally came, but the mischief aimed at by S. 10 was present in the case just cited whereas it does not exist in the present case. This distinctiou is made clear by a reference to the judgment of the Subordinate Judge. On pp. 11 and 12 of the paper-book he discusses the question of the cause of action of the plaintiff 1 (the deity) whom the plaintiffs 2 to 24 (the present appellants) enlisted on their side in support of their claim. After finding that Rashbihari Naik had faithfully carried cut all the duties imposed upon him by his office, he says:

"It is therefore clear that in so far as the deity is concerned he has no cause of action against the defendants",

and dismissed his claim. In the appeal from that judgment to the High Court the plaintiff 1 takes no part, the appellants being the remaining plaintiffs 2 to 24, and it is not contended that the judgment of the learned Subordinate Judge erred in so far as it decided against the claim put forward in the name of the deity. The cases of *Kannan* v. *Nilkandan* (4) and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (5) afford instances of the propcsition contended for by the respondents that although the shebaits or managers of a temple may not be able legally to transfer the shebaiti right or the possession of the lands of the endowment, such rights can be acquired by adverse possession as against the original shebaits or their heirs. The former case was almost identical in its main features with the present. The defendant purchased from one of two co-trustees or Uralans of a temple the right to manage the affairs of the temple and was put in possession of the property of the endowment. After more than 12 years had elapsed, the other co-trustee brought a suit to recover the property and the trusteeship on the ground that the purchase was invalid. It was nct shown that the defendant had misapplied the temple property. It was held by Sir C. Turner, C. J., that the transfer was invalid. He intimated that if the defendant had committed a breach of trust he could have been removed from his office and held accountable for profits if not properly applied, but such a claim was not made and he dismissed the suit on the ground that it was barred by Art. 144, Limitation Act. The second of the above cases was one where hereditary managers of the endowed properties of a religious foundation had purported to sell and assign the management and lands to the representatives of another institution. The Limitation Act, of 1877 was then in force. The transfer was not valid and the only question before their Lordships of the Privy Council was whether the suit to recover the office of manager and possession of the lands was barred by limitation. It was held that Art. 124, Limitation Act, applied to the suit brought for possession of the office. Sir Richard Couch in delivering the judgment of the Board said:

"Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other but if there is, Art. 144. of the same Schedule is applicable to the property."

The case of *Jagamba Goswamini* v. *Ram Chandra Goswami* (6) was relied by the appellants but that was a case where the defendants were claiming the property as their own freed from the uses created by the trust. The plaintiff was the shebait of a temple and claimed the land as part of the endowment made in 1771 for religious purposes. The defendant denied that the land in question was debutter property or that the profits were ever used for the worship of the deity, and claimed it as her own brahmotter property under a gift made by a former shebait to her late father-in-law. The Court found that the property was debutter property and was of opinion that S. 10 would have been applicable but for the fact that the gift to the defendant's predecessor was made many years before 1871 when S. 10 was first enacted

4. (1884) 7 Mad 337.
5. (1900) 23 Mad 271=27 I A 69 (P C).
6. (1904) 31 Cal 314.

and it was held that the suit was barred by limitation. It is clear that that case is no authority for the proposition that the hereditary office of shebait of a temple cannot be acquired by adverse possession so as to bar a claim by those previously exercising that office or their heirs claiming through them. In my opinion the right to administer the trust property of a public religious endowment within the limits imposed by the trust, and for that purpose the right to possession of the property as against those previously administering the trust or others claiming through them can be acquired by adverse possession and in trusts of this nature it is only where a claim is set up adverse to the rights of the deity to whose worship the property is dedicated that S. 10, Limitation Act, could have any application so as to deprive the defendant of the rights conferred by the remaining portions of the Act.

The cases already referred to appear to me amply to support this view but the case of *Balwant Rao* v. *Puran Mal* (7), would appear to settle the question beyond all doubt. There the effect of S. 10 was fully discussed by Sir A. Hobhouse, who indelivering their Lordships' judgment in the Privy Council says:

"Their Lordships are of opinion that the expression used by the legislature 'for the purpose of following in his or their hands such property' means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trust in question it may be recovered without any bar of time from the hands of the persons indicated in the section. But here there is no question of recovering the property for the trust of the endowment, because the defendant admits that he is a trustee and says he is applying the property to the trusts of the endowment ..... The plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within S. 10, Limitation Act."

Every word of the passage just quoted might have been written in reference to the present case and it seems to me to be conclusive of the question under discussion. As in this case the adverse possession began in the year 1879 when Rashbihari Naik first took over the office of marfatdar and got possession of the property it follows that long before the present suit was instituted he had acquired an indefeasible title and that the suit is consequently time-barred. The appeal accordingly will be dismissed with costs.

Mullick, J. — I agree. Not claiming as strangers the defendants would not even if they had established adverse possession for 12 years be entitled to plead Art: 144, Sch. 2, Limitation Act, as a bar to the suit. Nor could they plead Art. 134 as they do not claim to be purchasers for value. Whether they had notice of the trust would in either case be immaterial. Indeed being volunteers under a conveyance from trustees they could not by reason of the provisions of S. 10, Limitation Act, plead limitation at all in a suit by the cestui que trust to follow up trust property in their hands which means a suit to recover trust property held otherwise than for the purposes of the trust. But here the defendants are holding property in suit for the benefit of the trust; therefore S. 10 has no application and the learned Subordinate Judge has rightly held that the cestui que trust has no cause of action. As against the trustee plaintiffs however the defendants have validly acquired by adverse possession the status of trustees in respect of the property in suit.

V.S./R.K. *Appeal dismissed.*

7. (1884) 6 All 1=10 I A 90 (P C).

A. I. R. 1918 Patna 575

CHAPMAN AND ROE, JJ.

Satyabadi Gountia and *another* — Plaintiffs—Appellants.

v.

Bediadhar Bar Panda and *others*— Defendants—Respondents.

Appeal No. 21 of 1917, Decided on 17th April 1918, from appellate decree of Sub-Judge, Sambalpur, D/- 5th December 1916.

(a) Civil P. C. (1908), S. 11—Dismissal for proper frame of suit is not res judicata—Suit dismissed for want of evidence—Decision is res judicata.

If a suit is dismissed on the ground that as constituted it cannot succeed, the dismissal is not res judicata however erroneous may be the idea that the frame of the suit bars a decision. If it is dismissed for want of evidence, the decision is final. [P 577 C 2]

(b) Practice—Appeal—Appeal must be disposed of on merits

An appellate Court has no jurisdiction to dispose of s suit properly constituted otherwise than on the merits. [P 577 C 2]

(c) Civil P. C. (1908), O. 23, R. 1—Withdrawal of suit with leave to bring fresh suit on ground of insufficiency of evidence—Subsequent suit is barred.

Plaintiff's suit was dismissed by the trial Court on the ground that the evidence on the

record was not sufficient to prove his case. In appeal the appellate Court allowed the plaintiff to withdraw the suit with liberty to bring a fresh suit on the ground that he had not been able to adduce evidence necessary for the substantiation of his claim:

Held: that a subsequent suit by the plaintiff on the same cause of action was barred by the rule of res judicata. [P 577 C 2]

B. N. Misra—for Appellants.

Biswa Nath Sinha—for Respondents.

Roe, J.—The plaintiffs in this case, Satyabadi Gountia and Udaikar Gountia, sued the defendant, Bediadhar Bar Panda, and others for recovery of possession of 14-32 acres of raiyati land. The defendant put in a plea that the suit was barred by the rule of res judicata by virtue of

"the decree in Civil Suit No. 5 of 1908 of the Court of the Subordinate Judge, Sambalpur, as the presiding Judge of the appellate Court, passing order in Appeal No. 1 of 1909 allowing withdrawal of the suit".

Suit No. 5 of 1908 was a suit between the same parties. For purposes of the argument it may be taken that the matters now in issue were substantially in issue in the former suit. The case of the plaintiffs now is that the land sued for formed part of their raiyati holding and that the defendants were their underraiyats upon these lands. The defence set up was that the defendants were never the sub-tenants of the plaintiffs but that the plaintiffs had surrendered their holding to the defendants, who, as zamindars of the village, had entered into possession on the basis of that surrender. These were the allegations in the plaint of Suit No. 5 of 1908 and if indeed, there was actually a decision in the former suit, it must be said that the present suit is barred by the rule of res judicata. The learned Subordinate Judge has held that the suit is so barred, his decision being based on *Kali Prasanna Sil* v. *Panchanan Nandi* (1). That case is not distinguishable from the present case. There had been a decision on the merits in the Court of first instance and on appeal the plaintiffs as appellants had made an application under S. 373, Civil P. C., 1882 for leave to withdraw from the suit, inter alia, on the ground of their inability to produce the necessary evidence in time, whereupon the appellate Court made an order to this effect:

"the appeal is dismissed with costs and the plaintiffs' suit allowed to be withdrawn with leave for fresh action for the same subject matter, if not barred".

1. (1917) 44 Cal 367=33 I C 670.

The Calcutta Division Bench held that the order of the lower appellate Court was made without jurisdiction and upon this point followed the decisions in *Kharda Co Ltd.* v. *Durga Charan Chandra* (2) and *Mabulla Sardar* v. *Hemangini Debi* (3), and concluded the judgment with the following words:-

"Consequently that order having been made without jurisdiction a fresh suit should never have been brought, and the defendant was perfectly competent and was within his right when he raised the point that the matter was res judicata"

In the case before us the suit was dismissed upon its merits. The Court of first instance had held that

"no evidence had been given that the pattah of Russel's Settlement corresponds to the numbers in dispute".

In the petition to withdraw the appeal and the whole suit this omission was described ss a formal defect. An order was made upon this petition that the appeal might be withdrawn and the suit dismissed with permission to bring a fresh suit. It was not definitely stated in that order that the defects referred to in the petition were to be regarded as formal defects. The facts seem to be widely different from those of the case of *Robert Watson & Co.* v. *Collector of Zillah Rajshahye* (4). At the same time the principle on which that case was decided affords good authority for the view taken in the case of *Kali Prasunna Sil* v. *Panchanan Nandi* (1). The plaintiffs had brought a suit to establish their title to a patni taluk. The first issue framed was on the question of the locus standi of the plaintiffs and upon this question a commission had been issued. That commission had been returned with a certificate that the witnesses had not been presented for examination, and the Judge finding no excuse for the plaintiff's neglect had dismissed their suit for want of evidence, but at the same time had recorded that the order was not intended to bar the plaintiffs from proceeding as if the action had not been brought. The plaintiffs had appealed to the Saddar Court of Calcutta, and their Lordships of that Court had stated:

"It appears to us that we must look upon the judgment of the lower Court as determining that the plaintiffs had failed to establish their title

2. (1910) 5 I C 187.
3. (1910) 6 I C 629.
4. (1869-70) 13 M I A 160=12 W R 43=3 Ben L R 48 (P C).

to sue; and that an order of dismissal was pronounced upon the evidence".

The appeal was heard as a regular appeal. The Court was unanimously of opinion that the plaintiffs had entirely failed to make good their grounds of appeal, as to inability to produce their witnesses. The appeal was therefore dismissed. A fresh suit was brought, resulting in an appeal to the Privy Council. The Judicial Committee were of opinion that the decree in the former suit was in effect a dismissal of the suit upon the merits notwithstanding the reservation contained in the original decree. The ground for so holding was that there was no provision in the Indian law for what is known in England as a non-suit. "In all those cases," their Lordships say:

"the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them".

The case which gave rise to the plea of res judicata had been decided in 1856. The first Civil Procedure Code is dated 1859. The provision for withdrawal with permission to bring a fresh suit was in that Code even more widely framed than S. 373 of the Code of 1882. Nevertheless the Judicial Committee held that the dismissal of a suit for failure to bring the necessary evidence was in fact a failure on the merits notwithstanding a reservation made that a fresh suit might be brought. The more recent decisions on the question of res judicata seem to depend more closely on the question whether the point in issue has been previously decided or not. The leading case is that of *Sheosagar Singh* v. *Sitaram Singh* (5). At p. 58 their Lordships said:

"To support a plea of res judicata it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided'. If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885, was, no decision ought to have been pronounced on the merits."

In referring to the history of the previous litigation at p. 54 their Lordships have pointed out that:

"though the learned Snbordinate Judge had made a decree upon the merits, the judgment of the appellate Court had proceeded expressly on the footing that it was not necessary to come to a decision on the question at issue and so the appeal was dismissed".

To even stronger effect is the decision of the Judicial Committee in *Parsotam Gir* v. *Narbada Gir* (6). At p. 513 it is said:

"The question is not whether the judgment of the High Court in 1886 was right, but whether it did or did not finally decide the present question as between Nepal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left 'untouched' ".

As I understand these two decisions there has been no attempt therein to modify the decision in the case of *Robert Watson & Co.* v. *Collector of Zillah Rajshaye* (4). If a suit is dismissed on the ground that as constituted it could not succeed, the dismissal is not res judicata, however erroneous may be the idea that the frame of the suit barred a decision. If it is dismissed for want of evidence, the decision is final. As held in the case of *Kharda Co., Ltd.* v. *Durga Charan Chandra* (2) and *Mabulla Sardar* v. *Hemangini Debi* (3), the Court of appesl has no jurisdiction to dispose of a suit properly constituted otherwise than on the merits. In the case before us the petition of the appellant in the previous action, asking leave to withdraw the appeal on the ground that he had not been able to adduce evidence necessary for the substantiation of his case, was a clear admission that the decision of the lower Court could not on the merits be assailed. The suit finally stood dismissed not on the ground that there was any formal defect in the pleadings, but on the ground that the Court below could not on the evidence before it have made a decree in the plaintiffs' favour. I am not prepared to hold that the decision of the Subordinate Judge may be ignored as being without jurisdiction for, if that beso, the appeal has not in fact been heard, and there has been no decision at all, and the point in issue is still open between the parties. I am of opinion that the appeal was heard, and that the decision of that appeal was that the evidence on the record was not sufficient to support the plaintiffs' case. In this view of the matter I concur in the view taken by the Court below that the question in issue

5. (1897) 24 Cal 616=24 I A 50 (P C).

6. (1899) 21 All 505=26 I A 175 (P C).

has been decided in a previous suit, and would dismiss this appeal with costs.

Chapman, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 578

JWALA PRASAD, J.

Ram Sahai Chowdhury and *others*—Petitioners.

v.

Deonandan Prasad—Opposite Party.

Criminal Revn. No. 341 of 1917, Decided on 8th November 1917, against order of Magistrate, Bhagalpur, D/- 23rd February 1917.

(a) Criminal P. C. (1898), S. 145 (3)—Want of notice is grave irregularity.

Want of service of notice under S. 145 (3), is a grave irregularity which vitiates the proceedings. [P 581 C 2]

(b) Criminal P. C. (1898), S. 145 (4) (3)—High Court can revise order under Cl. 4 if Cl. 3 is not complied with and parties are prejudiced.

The High Court has jurisdiction to set aside an order under S. 145, Cl. (4) where the provision in Cl (3) of that section is not complied with and the parties are prejudiced thereby. [P 581 C 1]

S. A. Ashgar, *Lalit Mohan Ghosh*, *D. N. Sirkar* and *Banarsi Prasad Jhunjhunwala*—for Petitioners.

Fakhruddin and *Amir Hossain*—for Opposite Party.

Judgment. — This is an application against an order of the Magistrate of Bhagulpur, dated 23rd February 1917, under S. 145, Criminal P. C., declaring the first party to be in possession of the property in dispute. The main contention of the petitioners is that the order under S. 145 is bad inasmuch as no notice of the proceedings or a copy of the order made under S. 145 (1), Criminal P. C., was served upon them.

Upon the report of the police the Magistrate drew up proceedings under S. 145, Criminal P. C., on 8th January 1917. The order sheet shows that on that date he ordered the proceedings to be drawn up and to issue notice fixing the 22nd January 1917. The proceeding was accordingly drawn up and the petitioners along with one Chulai were arraigned in that proceeding as second party. The property in dispute was also attached by the order of the Magistrate on the same date, as in his opinion there was an imminent danger of a breach of the peace and the matter was one of emergency. This order of attachment was under S. 145, Cl. 4, proviso. A copy of the proceeding with a notice under Cl. (3), S. 145, was as a matter of fact issued against all the parties. The notices of the proceedings were howerer returned by the peon on 17th February 1917, with a report that the notices were refused by one Sarat Chandra Roy, pleader as he said that he was not the general guardian of the minors. Out of the ten petitioners Nos. 1 to 4 are majors; the other petitioners are minors. In the petition presented to this Court they were represented by petitioner 3, Udit Narayan Chowdhury. The pleader's note upon the notice is as follows:

"I am not the general guardian of the minors, so I refuse to take the notice. Sd. S. C. Roy, Pleader, 15-1-1916."

Upon that notice at the bottom there also appears a writing to the following effect:

"Forwarded to the Magistrate of Monghyr for favour of service and return. Sd. . . . . Deputy Magistrate, 7-2-1917."

This does not appear to have been signed by any Magistrate. There is an initial of some one on the left of the date below the words "Deputy Magistrate." This may be the initial of the clerk or the peshkar who wrote the aforesaid writing quoted above. But this notice, which was returned unserved, was somehow or other either by mistake or negligence not put up to the Deputy Magistrate for his signature and for issue. The result has been that no notice was as a matter of fact served upon petitioners 5 to 10, who are minors. As regards the other petitioners 1 to 4, I do not find any service return showing that the notices were served upon them. In the petition that they have presented to this Court, which has been sworn to before the Commissioner of Oaths here, the petitioners have specifically stated that no notice was served upon them of the proceedings under S. 145. The learned Government Pleader appearing in support of the Magistrate's order under S. 145 has not been able to show that any notice was as a matter of fact served upon any of the petitioners, either major or minor.

Looking into the order sheet of the case, there is nothing to show that the Magistrate was as a matter of fact satisfied that the notices were served upon the petitioners. Chulai, one of the members of the second party, did appear in the case and files a written statement. His written statement is dated 5th Febru-

ary 1917, on which date the case was made over to the file of the trying Magistrate for disposal. On 16th February 1917 witnesses were examined and written statements on behalf of the parties who appeared in the case were filed. Upon that date an application was filed by Chulai, one of the second party, bringing to the notice of the Magistrate that no notice of the proceedings was actually served upon any of the other members of the second party, petitioners in this case. It was specifically mentioned in the petition of Chulai that the notices were sent to Babu Sarat Chandra Roy, the pleader mentioned above; that he declined to receive the notices on behalf of the petitioners, and it was prayed in that petition that steps be taken by the Court to have the notices properly served upon the petitioners. This application was not taken notice of. The order upon that petition is "File." The case was again taken up on 19th February and was again postponed to 23rd February, the date on which the Magistrate made his order under S. 145 declaring the first party to be in possession.

Four witnesses were examined on behalf of the first party, but no witness was at all examined on behalf of the second party. The result has been that the case under S. 145 was decided ex parte against the petitioners for no fault of theirs but on account of the notices not having been served upon them. It has been contended on behalf of the petitioners that the omission to comply with Cl. 3, S. 145, in not having served upon the petitioners the copy of the order vitiated the whole proceedings and thereafter the Magistrate's action, in proceeding with the case and in deciding possession of the first party, was under Cl (4) without jurisdiction or was affected by material irregularity, whereby the petitioners had no fair trial of their case. It appears to me that the contention of the learned counsel for the petitioners should prevail.

I would like to mention the history of how Cl. 3 came to be enacted in S. 145. In the Code of 1882 there was no express provision requiring a copy of the order to be served upon the parties. Under Cl. (1), S. 145, of the Code of 1882, all that was required was that the Magistrate, on being satisfied that there was an imminent danger of a breach of the peace, was to draw up an order in writing stating the grounds of his being so satisfied, and

"requiring the parties concerned in such dispute to attend his Court in person or by a pleader within a time to be fixed by the Magistrate."

There was no provision similar to that in Cl. (3) of the section in the present Code, requiring a copy of the order to be served upon the parties on a conspicuous part at or near the subject of dispute. Cl.(3),S.435 of the Code,1882,declared that orders under Ss. 143 and 144 and proceedings under S. 176 were not proceedings within the meaning of S. 435; so that proceedings under S. 145 and the order made thereunto were subject to the revisional powers of the superior Courts given by Ss. 438 and 439. In 1898 when the present Code was enacted, Cl. (3) of S. 435 went through very material alteration and the words "proceedings under Chap. 12" were added to the clause thus taking away the revisional powers of the superior Courts with respect to proceedings under Chap. 12 in which S. 145 occurs. When this power of revision was curtailed, it was thought desirable to entail upon Magistrates exercising jurisdiction under S. 145 the duty of giving the parties full opportunity of putting in their claims by enacting a mandatory clause in S. 145, which is the present Cl. (3) to that section. The clause runs as follows:

"A copy of the order shall be served in manner provided by this Code for the service of summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject-matter of dispute."

The existence of a dispute causing imminent danger of a breach of the peace gives jurisdiction to the Magistrate to institute proceedings under S. 145; and this is provided for in Cl. (1) of that section. After having made an order under Cl. (1), S. 145, the Magistrate is required to comply with the express provision in Cl. (3) of the section, which makes it imperative upon Magistrate to serve a copy of the order on the parties concerned. Thereafter the Magistrate is to enter into an enquiry under Cl. (4) of the section as to the possession of the parties in the disputed property. That clause opens out in the following words :

" The Magistrate shall then hear the parties . . . . . receive the evidence . . . . . decide whether any of the parties was at the date of the order

in such possession as is mentioned in that section ''

It would therefore appear that the addition of the provision in Cl. (3) to S. 145 was a necessary result of the curtailment of the power of the superior Courts to call for and to reverse the proceedings and orders under that section. What is contemplated by Cl. (3) is that full opportunity should be given and that the Magistrate, before holding an inquiry the result of which will be final and conclusive between the parties should satisfy himself that proper notice of the proceedings was served upon the parties concerned. Since the present Act of 1898, this question has been before the Courts several times. In the case of *Sripati Charan Mundle* v. *Ram Kumar Bagdi* (1), Ghose and Stephen, JJ., held that when a party raises a question as to the non-receipt of notice it is the duty of the Magistrate to investigate as to the truth or otherwise of the allegations; and that the Magistrate is bound to be satisfied that notice of the proceedings and a copy of the order drawn up by him were duly served upon the parties.

In that case the first party against whom the order under S. 145 was made was actually present before the Court and presented an application stating that he had no notice of the date fixed for the trial and that no copy of the order was served upon him. The Magistrate ordered the petition to be filed but made no investigation. He then proceeded with the inquiry and on evidence declared the second party to be in possession. The order was set aside as being without jurisdiction and in direct contravention of the provisions of Cl. (3), S. 145. In the case of *Janu Manjhi* v. *Maniruddin* (2) Ameer Ali and Handley, JJ., held that failure to publish a copy of the order on a conspicuous part of the disputed property in accordance with the latter part of Cl. (3), S. 145, affected the jurisdiction of the Court and that the order under S. 145 declaring the party to be in possession was without jurisdiction. In the case of *Nawab Khajah Solemollah Bahadur* v. *Ishan Chandra Dass Sarkar* (3). Pargiter and Woodroffe, JJ., held that the publication of a notice locally under sub-S. 3, S. 145, Criminal P. C., was a consideration precedent to the exercise of a Magistrate's jurisdiction in an inquiry as to possession under Cl. (4) of that section.

The view taken in the aforesaid rulings in *Janu Manjhi* v. *Maniruddin* (2) and *Nawab Khajah Solemollah Bahadur* v. *Ishan Chandra Dass Sarkar* (3) was dissented from in a Full Bench of the Calcutta High Court in *Sukh Lal Sheikh* v. *Tara Chand Ta* (4), where Maclean, C. J., and Rampini, Ghose, Henderson and Pratt, JJ., held that non-compliance with Cl. (3), S. 145, was an irregularity and unless there was material prejudice to any of the parties caused by the irregularity an order under S. 145, Cl. (4) declaring a party to be in possession was not without jurisdiction. In that case also the omission was the non-publication of the copy of the order on a conspicuous part at or near the subject matter of dispute. The parties in this case appeared and filed written statements and contested the case without taking any objection to the want of publication. After a full inquiry, the examination of witnesses on both sides and the hearing of argument, the case was decided ultimately by the Magistrate and an order was made under Cl. (4). At a later stage of the case by fishing out from the record it was discovered that there was no report as to the service of the notice upon a conspicuous part of the disputed property according to the latter part of Cl. (3).

Ghose, J., however held in the Full Bench case that non-compliance was not merely an irregularity but also an illegality. But he agreed with the other Judges of the Full Bench in holding that the order was not without jurisdiction and that the order would be set aside only when there was prejudice to any of the parties concerned.

In the case of *Ahmed Chowdhry* v. *Parbati Charan Roy* (5) Rampini and Sharfuddin, JJ., held that for want of personal service of notice on the parties there was a grave irregularity, so grave as to amount to a want of jurisdiction of such a kind as would justify an interference of the High Court. Thus we have eight Judges of the Calcutta High Court holding that non-compliance

1. (1904) 8 C W N 76=1 Cr L J 44.
2. (1904) 8 C W N 590=1 Cr L J 530.
3. (1905) 9 C W N 909=2 Cr L J 569.
4. (1906) 33 Cal 68=2 Cr L J 618.
5. (1908) 35 Cal 774=8 Cr L J 119.

with the requirements of Cl. 3, S. 145, vitiates the proceedings and takes away from the Magistrate his jurisdiction to hear further the claims of the parties and to decide under Cl. 4, whereas four of the Judges are of opinion that non-compliance with the provision is a mere irregularity and the order would only be set aside when it occasions a failure of justice or prejudice to any of the parties. Ghose, J., was of opinion that it was an illegality, but that prejudice was required to be shown in order to set aside the order. But all the Judges have agreed at least in this that the High Court had jurisdiction to set aside an order under S. 145, Cl. (4), when the provision in Cl. (3) was not complied with and the parties were prejudiced thereby. It must be remembered that in the Full Bench case *Sukh Lal Sheik* v. *Tara Chand Ta* (4), referred to above, the omission was with regard to the service of notice on the locality — whereas the parties were properly served and contested their claim, offered their evidence, and had no grievance of their not having had a fair trial. While interpreting the Statute, it is necessary to look into the spirit of it. The first portion of the clause requires that notice must be personally served on the parties concerned, and the latter portion requires that the notice should be served on the locality as well with a view to giving general notice to persons not before the Court at that stage, who might be interested in the property and thus might choose to be made parties and to have their claims investigated.

In the present case the petitioners, who according to the report of the police were contesting the claim of the first party, were actually made parties in the case and were ordered by the Magistrate to be served with notice. But as a matter of fact no notice was at all served upon them, in spite of the report of the peon and the application of Chulai. Whatever be the reason why the petitioners had not got notice, the fact remains that no notice was served upon them and that they did not enter appearance in the case. There was no trial of their claim, what to speak of a fair trial. The Full Bench case of this Court decided no doubt that the irregularities in the procedure under S. 145 would not take away the jurisdiction of the Court and would not be subject to revision by the High Court, except on an occasion of failure of justice to the party affected by not having a fair trial of his case. When no notice was given and as a matter of fact we find that no witnesses were examined by the second party and nothing appears to have been done on behalf of that party, it can hardly be contended that there was any trial of their case. I therefore think that in the circumstances of this case whether the non-compliance of the requirements of Cl. 3, S. 145, took away the jurisdiction of the Court or not, it was a grave irregularity which vitiated the trial. The order of the Magistrate under S. 144 was a great prejudice to the petitioners and it must be set aside. No doubt in this case the petitioners appear to have come after a very long delay and the explanation offered by them is not convincing. I am however not prepared to throw out this application for revision, when the Magistrate failed to comply with the requirements of the section and to serve the petitioners with a copy of the order under Cl. (3) of that section. I would set aside the order of the Magistrate, dated 23rd February 1917, directing the first party to be in possession and would remand the case to the Court below to serve the petitioners with proper notices, and thereafter to hold an enquiry in their presence if they so choose to appear.

V.S./R.K. *Case remanded.*

A. I. R. 1918 Patna 581

CHAPMAN AND ROE, JJ.

Jagannath Prasad Sahu—Appellant.

v.

Mt. Kuadari Sahu—Respondent.

Appeal No. 587 of 1915, Decided on 28th February 1917, from the original order of Dist. Judge, Bhagalpore, D/- 11th January 1915.

Succession Certificate Act (1889),—Allegation of reunion cannot be inquired into.

An allegation of reunion is not an allegation which is suitable for inquiry in a summary proceeding under the Succession Certificate Act.

(P 582 C 1)

Gour Chandra Pal—for Appellant.

Sailendra Nath Palit and *Baikuntha Nath Mitter*—for Respondent.

Chapman, J.—This was an application for a Succession Certificate in respect of debts due to one Mt. Mutto, deceased. The woman's husband, Ram Pershad Sahu, appears to have had four sons and

one infant daughter. These children predeceased Mt. Mutto, leaving only one son, Bansi Lal Sahai alive at her death. The result was that Bansi Lal Sahai who had separated, inherited his mother's stridhan. The debt in respect of which succession was applied for appears to have been admittedly stridhan. The application for Succession Certificate was by Bansi Lal's daughter; the objector was the son of Dwarka Lal, who had died in the lifetime of Mt. Mutto, and therefore prima facie he had no title superior to Mt. Kuadari, who succeeded through her father Bansi Lal who had survived Mt. Mutto. The objector put forward a very improbable case that he was reunited with his uncle Bansi Lal in such an exceptional manner that this stridhan property, which Bansi Lal had inherited, was thrown again into hotch-pot. This objection was taken on 23rd September. Apparently on 11th November the District Judge disposed of the matter without taking evidence. The learned vakil for the appellant is not able to say that the evidence of witnesses was actually tendered. Even if that were so, I am of opinion that this allegation of re-union was not an allegation which was suitable for inquiry in a summary proceeding under the Succession Certificate Act. The appeal is dismissed with costs.

Roe, J.—I agree.

V.S./R.K. *Appeal dismisssd.*

A. I. R. 1918 Patna 582 (1)

ROE AND JWALA PRASAD, JJ.

Malhiuddin Ahmad—Defendant—Appellant.

v.

Athar Hossain — Plaintiff— Respondent.

Civil Revn. No. 257 of 1917, Decided on 13th February 1918, from order of Munsif, Sasseram.

Civil P. C. (1908), O. 39, R. 2 — Court cannot issue injunction against person not party to suit.

A Court has no jurisdiction to issue an injunction against a person not a party to the suit, or to summon before it any person not a party to the injunction. [P 582 C 2]

A. Sharfuddin and *Amir Hussain* — for Appellant.

Fakhruddin and *Mohammad Hasan Jan*—for Respondent.

Judgment.— We are of opinion that the order of the learned Munsif, so far as it, affects Shah Malhiuddin, must be set aside under our powers of superintendence as being entirely without jurisdiction. The learned Munsif had no authority to summon before him any person not a party to the injuuction and he had no authority to issue an injunction against any person not a party to the suit. The application is therefore admitted. The order of the learned Munsif directing Malhiuddin to appear before him to show cause why he should not be punished under O. 39, R. 2 (3), is set aside. The plaintiffs- opposite party before us will pay the costs of this application, hearing fee two gold mohurs.

V.S./R.K. *Order set aside.*

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* A. I. R. 1918 Patna 582 (2)

CHAMIER, C. J. AND SHARFUDDIN, J.

Bhaso Singh and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 209 of 1916, Decided on 27th July 1917, against order of Sess. Judge, Monghyr, D/- 29th May 1916.

*** Criminal P. C. (1898), Ss. 423 and 428 —Appeal—Re.trial ordered —Evidence already on record ordered to be treated as evidence in second trial—Order is illegal.**

Where in an appeal from a conviction for rioting and causing simple hurt the Sessions Judge set aside the conviction and ordered a re-trial but at the same time directed that the evidence already on the record should be treated as evidence in the case:

Held: that the order was contrary to the provisions of Ss. 423 and 428 and was therefore illegal. [P 583 C 1]

Pugh and *Amir Hassan* —for Petitioners.

Government Advocate—for the Crown.

Judgment.— This is an application for revision in a criminal case, which was instituted by complaint made as long ago as 13th February 1915. Shortly stated the complaint was that the accused had been guilty of rioting and causing simple hurt to members of the complainant's party. The Magistrate convicted the applicants on 29th November 1915, so that the proceedings lasted no less than nine months in the first Court. There was an appeal and the Sessions Judge, not being satisfied with the trial of the case by the Magistrate set aside the conviction and ordered a re-trial, but at the same time directed that the evidence already on the record should be treated as evidence in the case. His order was a curious mixture of an order under S. 423 and an order under S. 428, not unlike

that which we had to consider in the case of *Gajanand Thakur* v. *Emperor* (1). Since the case just referred to another case has been before this Court in which the same sort of irregular order was passed by a Sessions Judge, and we take this opportunity of saying that we hope that the provisions of these sections will be more carefully observed in the future. The result of the order passed by the Sessions Judge in this case was that some sort of further enquiry took place and the Magistrate again convicted the applicants and bound them over to keep the peace. Again there was an appeal to the Sessions Judge and that appeal was dismissed. The applicants then applied to this Court in revision. On their application the District Magistrate was called upon to shew cause why the convictions and sentences should not be set aside on the ground that the order of the Sessions Judge was contrary to the provisions of Ss. 423 and 428, Criminal P. C., and consequently all subsequent proceedings were void. Cause has been shown by the Magistrate and the Government Advocate has appeared to represent his views. There can be no doubt that the first order passed by the Sessions Judge was irregular. In order to ascertain whether the applicants have been prejudiced by the irregularity, it would be necessary for us to go into the merits of the case.

We have neither the time nor the inclination to do this. It is primarily the duty of the Courts below to find the facts. The first order of the Sessions Judge and all subsequent proceedings must be set aside. The only question is whether further proceedings should be permitted. On behalf of the applicants stress is laid down on the fact that they have in various instalments served something over a month's rigorous imprisonment under one or other of the convictions recorded against them and we are urged on this account to disallow further proceedings. On behalf of the Crown it is urged that the case is one of some importance and that the applicants should not be acquitted merely on account of the irregularities which have taken place. It is said that there was a serious riot but apparently no serious injury was done to any one. As already stated these proceedings have been pending since February 1915. In view of this fact and in view also of the fact that the applicants have been in jail for a considerable period we think that we ought not to allow further proceedings to take place. We therefore allow this application and we set aside the convictions of the applicants and direct that they be relased.

V.S./R.K. *Convictions set aside.*

(1) (1916) 1 P. L. J. 99=35 I. C. 508=17 Cr. L. J. 382.

A I. R. 1918 Patna 583

JWALA PRASAD, J.

Deo Nath Misra and *others*—Plaintiffs —Appellants.

v.

Amar Singh and *another*—Defendants —Respondents.

Appeal No. 446 of 1917, Decided on 6th March 1918, from appellate decree of Addl. Dist. Judge, Gaya, D/- 30th January 1917.

(a) Bengal Tenancy Act (1885), S. 116—Khudkasht does not necessarily mean zerait land.

Khudkasht does not necessarily mean zerait or private lands of the proprietor within the meaning of S. 116. [P 584 C 1]

(b) Bengal Tenancy Act (1885), S. 181—Words "Jagir khudkahst land" do not necessarily mean service tenure.

The words "jagir khudkasht land" do not necessarily mean a service tenure within the meaning of S. 181. [P 584 C 1]

Kailaspati—for Appellants.

Siva Nandan Roy—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs to recover possession of the land in dispute from the defendants, on the ground that the said land is the plaintiffs' private or zerait land and that the lease on the basis of which the defendants held the land has expired. The defendants-respondents on the other hand claim to hold the land as occupancy tenants thereof. It is not disputed that the defendants were inducted on the land by virtue of two leases, first, dated the 15th August 1904, which expired in 1314 and the second, dated 2nd September 1912, which expired in 1322. Both the leases were for three years. The plaintiffs' case is that the land was held khas in the interval, i. e., between 1315 to 1319.

The present suit was instituted after the expiry of the second lease. The Courts below have held and it is not disputed in this Court that the defendants are settled raiyats in the village and their status has also been so recorded in the survey papers. The Courts below have

also held that the lands in dispute are not the zerait land of the plaintiffs and that hence the defendants have acquired occupancy rights in the said lands, although they were brought on the land by means of a temporary lease. The finding of the Court below regarding the character of the land as being not zerait has been disputed by the appellants in this Court. The contention rests upon the description of the land in the kabuliyat as khudkasht land. The oral evidence of the plaintiffs as to the khudkasht and the zerait being synonymous has been disbelieved. No authority has been shown as to khudkasht necessarily meaning zerait or private lands of the proprietor. Such a description, namely, khudkasht in the lease referred to in *Ajodhya Prosad Singh* v. *Ram Golam Singh* (1) was not accepted as sufficient to mean that the land was the zerait land. The word 'khudkasht' does not occur in S. 116, Ben. Ten. Act, where the words expressly mentioned are khamar, nij, nij jcte zerait, sir or khamas, as denoting the proprietor's private lands. It cannot, therefore, be accepted without any express authority that the word khudkasht necessarily means 'zerait'. This contention of the learned vakil for the appellants, therefore, fails. The survey record of right has entered the land as the kayemi or occupancy holding of the defendants and the Courts below have concurred in the finding that the entry is correct. The only ground upon which the decree of the Court below is assailed is that the land in dispute forms part of the jagir lands of the plaintiffs and as such it was service tenure and hence under S. 181 the defendants could not acquire an occupancy right in this land. It is true that the land in the kabuliyat has been described as the "jagir khudkasht land."

The plaintiffs have also described it at one place as their exclusive jagirdari land and at another place as khudkasht jagir land. It must therefore be accepted that the land was known as jagir khudkasht land of the plaintiffs, but there is nothing to show on the record that this was a service tenure as mentioned in S. 181. Hence the section has no application. It is not asserted that the land was a ghatwali tenure. A jagir tenure may be a service tenure or may be an ordinary tenure or holding. Appendix. 4, which contains a list of tenures or holdings, attached to Finucane and Amir Ali's Bengal Tenancy Act, p. 868. Apart from what has been said in that appendix, personally I am of opinion that the jagir tenure is not necessarily a service tenure. This was not the point taken in the Courts below and as a matter of fact this is not the basis of the claim of the plaintiffs. Although the land is described as jagir in para. 1 of the plaint it was meant nothing more than a mere description of the land. This was not the ground upon which the claim was based. Having failed upon the principal grounds taken in the grounds of appeal, the learned vakil with admirable ingenuity has tried to apply S. 181 on account of the mention of the word 'jagir' in the lease and in the pleadings. He certainly would have been entitled to win the case, provided the word 'jagir' was mentioned in S. 181, Ben. Ten. Act, or there was a clear authority showing that the general acceptance of the word 'jagir' was that it was a service tenure. For the reasons given above the appeal must fail. The appeal is therefore dismissed with costs.

V.S./R.K. *Appeal dismissed.*

1. (1909) 4 I C 529.

* A. I. R. 1918 Patna 584

CHAPMAN AND JWALA PRASAD, JJ.

Chatru Gope and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 184 of 1917, Decided on 7th November 1917, against decision of Sess. Judge, Monghyr, D/- 6th June 1917.

*** Penal Code (45 of 1860), S. 107—Abetment—Presence at commission of offence does not constitute abetment unless there is duty to prevent commission of offence.**

Mere presence on the occasion of the commitment of an offence does not amount to abetment within the meaning of S. 107, unless there is an obligation cast by the law upon the persons present to prevent the commission of the offence.

[P 587 C 2]

Sakti Kant Bhattacharji—for Appellants.

Government Pleader—for the Crown.

Jwala Prasad, J.—This is an appeal by the seven accused, namely, Chatru Gope, Doman Gope, Girdhari Gope, Bahadur Gope, Meghan Gope, Kherwa Gope and Goma Gope against the conviction and sentences passed by the Sessions Judge of Monghyr, dated 6th June 1917.

The appellants Chatru and Girdhari were tried on a charge under S. 376, I. P. C., but were acquitted of that charge. Chatru has been convicted under S. 376/511, I. P. C., and sentenced to three years' rigorous imprisonment, of an attempt to commit rape upon a girl named Jasoda Gwalin. The other five accused and Girdhari were tried on a charge under S. 376/114, but have been acquitted of this charge and convicted under S. 376/511 read with S. 109, I. P. C., for abetment of an attempt by Chatru Gope to commit rape upon Jasoda Gwalin. Girdhari has been sentenced to two years' rigorous imprisonment and the other five each to one year's rigorous imprisonment. The scene of occurrence is a place marked "A" in the police map near Naya Dih-Jore. The appellants Chatru Gope and Goma Gope are residents of a village called Naya Dih, about 500 paces north of the place of occurrence. The other five accused and the complainant Jasoda Gwalin are residents of a village called Bariarpur, north-east of the scene at a quarter of a mile from Nayadih-Jore. The appellants are young men. Goma aud Girdhari are aged 21 and 22 respectively and the others are of age between 15 to 18. The victim Jasoda Gwalin is a girl of about 15 to 16 years of age.

The occurrence is said to have taken place on 17th March 1917 between 10 and 11 p. m. The complainant and the seven accused used to work as coolies in the Mica Mine at Chatakaram, which belongs to one Babu Gayan Chandra Chatterji P. W. 4. This mine is at a distance of a mile to the south-west of the place of occurrence. Nayadih is 500 paces north-east of the place of occurrence. South of the place of occurrence at about 400 paces is a hamlet called Budhwa Tanr, where four other girls Gangia, Hirya P. W. 6, Koshalya P. W. 5 and Jogia, who also used to work at the Mica Mine, live. The place of occurrence would be on the way to the respective homes of the complainant, the seven accused and the four girls named above. The day of occurrence was the day for the distribution of the wages of the coolies, which finished at about 10 p. m. The coolies had to wait till 10 p. m. in order to receive their wages at the Chatakaram Mine. The case for the prosecution is that the complainant Jasoda, the seven accused and the four girls Gangia, Hirya, Koshalya and Jogia received their wages and started together for their homes at about 10 p. m. The night was dark and they had no light with them. The seven accused are said to have started together and followed the girls at a distance of a rassi. When the five girls reached Budhwa Tanr, marked "B" in the police plan, four of them, namely, Gangia, Hirya, Koshalya and Jogia parted from Jasoda the complainant and went towards the direction of their homes. The complainant Jasoda Gwalin then went alone to the east in the direction of her village Bariarpur. It is better to narrate the subsequent events in her own words as deposed by her in Court. She says:

"When we reached Budhwa Tanr the four girls left me and went to their villages. I went alone towards the east (east is a mistake for north). When I reached Naya Dih-Jore, Chatru (accused 1) pushed me from behind and I fell down on the ground and got myself hurt in my lip. I got up and began to run, when Meghan (accused 5) asked Chatarva to seize me. The seven accused pursued me. Chatru seized me and threw me down on the ground. Girdhari got hold of my legs and Goma got hold of my hands. I was lying on my back upon the ground. Chatru removed my cloth from my person and began to rape me, I scratched his face and nose with my nails. I felt pain in my private parts. Some blood oozed out and soiled my cloth. Chatru thrust his penis into my female organ and had sexual intercourse with me. The other accused surrounded me at the time. Chatru was in a kneeling posture when he committed the act of rape. The ground on which I lay and was raped was bare ground. Nothing was discharged by Chatru into my private parts. After Chatru released his grasp, Girdhari came on me and attempted to commit rape. Chatru caught hold of my legs at the time. I screamed aloud and on hearing my cries Alam, Budhan, Bhutan and people of Nayadih came there. I had been screaming also when Chatru was committing rape. After the villagers came there the accused left me and ran away. When Girdhari attempted the rape the other accused except Chatru and Goma were around me. I had no talk with Alam and others. As soon as the accused ran away, I went home crying and related the whole thing to my mother and showed the cloth with the blood stains on it. The blood stains were then washed by my mother at night as I had only one cloth and could not wear such a soiled cloth. My mother informed my brother. My brother, my mother and I went to Gayan Babu. We met Alam, Bhutan and Budhan at the Alang and they also accompanied us. I was crying and they asked me why I was crying. I narrated the whole story to them. After that we went to Gayan Babu. I told him what had happened that night. He asked us to come the next morning Gayan Babu sent a letter through the chowkidar the next morning at about a pahar after sunrise. The daroga came: he recorded my statement and took my cloth. I showed my injuries to the daroga and also the spot where

I was ravished. The daroga sent me to Jamui to the doctor. The lady doctor of Jamui and also of Monghyr examined me."

Gayan Babu lives at Kasayia where he has another Mica Mine. The girl Jasoda is said to have gone with her mother and brother to Gayan Babu at Kasayia and to have roused him from his sleep at between 1 and 2 a. m. Gayan Babu (P. W. 4) says that the girl said to him that

"while she was going home from the Mine and when she had come to Ajore after passing Budhwa Tanr, Chatru Gope caught hold of her forcibly and did rape upon her. She did not tell me anything then as regards the other accused. I told them to come the next morning. The next morning they came again. In the morning she told me that Chatru had committed the rape and there were six men with him."

Gayan Babu says that he saw injuries on the person of Jasoda Gwalin, one on her chin and one or two on her arms. Gayan Babu sent a letter to the Sub-Inspector of Police Station Nayadih, 10 miles north of the place of occurrence. The letter reached the Sub-Inspector on 18th March at 6 p. m. In this letter he describes the occurrence as stated to him by Jasoda Gwalin in the following terms:

"One of the coolies Chatru Gope by name arriving at the bed of a small rivulet forcibly caught hold of a minor girl Jasoda Gwalin by name and did rape on her, and the seat of occurrence is over a mile away from the mine. It is stated by the girl that some six more coolies were the accomplices of the miscreant and caught hold of the hands and legs of the girl to fulfil the said wicked act. The marks on the body of the girl and also of the said cooly Chatru Gope support the fact that the girl was unwilling and fought bravely to protect her character."

In his evidence Gayan Babu says that the six coolies referred to in the letter are the six accused other than Chatru Gope (accused 1). This letter was treated by the Sub-Inspector as the first information. On 19th the Sub-Inspector went to the spot and saw the place of occurrence as pointed out by the complainant, Jasoda Gwalin. He found marks of injury on the chin and on both sides of the nose of the complainant Jasoda Gwalin, and took her statement and sent her to Jamui Hospital for medical examination. He also took the cloth that the complainant was wearing at the time of the occurrence and sent it to the Chemical Examiner. He did not find any stain on the cloth which the complainant explained by saying that she had washed it at night. He found injuries on the face of Chatra Gope as well and sent him to Jamui Hospital. Chatru was sent to the Subdivisional Magistrate, Jamui, to record his confession. On the 19th the names of the other accused were ascertained by the Sub-Inspector who were arrested and challaned.

The Assistant Surgeon of Jamui (P. W. 11) examined Chatru Gope on 20th March and found superficial scratches on his right cheek, nose, left cheek, right side of the neck, in front of the left axilla and on the outer side of the right knee. In his opinion the scratches were caused probably by nails and were probably of 4 days' duration, which would be about the 17th March. The lady doctor of Jamui, who first examined the complainant, has since resigned her post and her whereabouts are not known and hence she has not been examined in this case. The lady doctor of Monghyr, Miss Wells, who examined the girl on 7th April has been examined. She found the hymen of the girl intact. In her opinion the girl had not sexual intercourse with anyone before and she did not find any signs of injury old or new, on the private parts of the girl though she gathers from expert opinion in medical books that in the case of young girls sexual intercourse is sometimes possible without rupture of the hymen. She says however that she never had a case of sexual intercourse unaccompanied by the rupture of the hymen before in her experience. According to her the girl was about 15 years of age and that she had menstruated and attained puberty. The Assistant Surgeon (P. W. 9) is of opinion that the girl is of 16 years of age. The chemical analysis showed that there was no stain or spermatozoa on the cloth worn by the complainant.

There can be no doubt that the story told by the girl is in the main true so far as Chatru is concerned. The learned Sessions Judge has for excellent reasons given by him convicted him of an attempt to commit rape under Ss. 376/511, I. P. C. The injuries found on the cheek, nose, neck, and in front of the left axilla and on the outer side of the right knee of the accused Chatru considered with the injuries on the chin and both sides of the nose of the girl clearly show that there was a struggle between the complainant Jasoda Gwalin and Chatru, accused, and that the accused had thrown the girl down and was trying to outrage her modesty and she struggled hard to prevent her being outraged. It

is also clear that Jasoda was not a consenting party to the outrage. But as no injury was caused to the 'private parts of the girl, nor was the hymen broken nor was there any sign of actual penetration he has rightly been acquitted by the Sessions Judge of the offence of actual rape under S. 376. It is useless to repeat all the reasons given by the Sessions Judge. Suffice it to say that we entirely agree with him in holding that Chatru Gope is guilty of an attempt to commit rape under S. 376 read with S. 511.

The girl just on arrival at her village related the story to her mother and they went straight to Gayan Babu, the owner of the mine, and roused him at the dead of night and told him the story. This clearly points to the truth of the occurrence. The conviction against Chatru is therefore upheld. The sentence of three years is not severe and is therefore maintained. The case against the other six accused requires a careful consideration. As regards them the girl says in evidence that Meghan asked Chatru to seize her and the seven accused pursued her. Chatru threw her down; Girdhari and Goma caught hold of her legs and hands: Chatru did the rape; Girdhari came on her and attempted to commit rape; Chatru caught hold of her legs at the time she screamed aloud and on hearing her cries, the witnesses came and the accused left her and ran away and while Girdhari attempted to rape her, the other accused except Chatru and Doma were around her. The learned Sessions Judge believes that Girdhari and Goma caught hold of her in the manner stated by her. He finds Girdhari and Goma to be guilty of the abetment of the offence to commit rape by Chatru. As regards the other four accused, namely, Doma, Bahadur, Meghan and Khirwa, the learned Sessions Judge says as follows :

"They are also, in my opinion, guilty of abetment. They were also undoubtedly with Chatru, Girdhari and Goma, and I fully believe the evidence of Jasoda that they stood by surrounding her while Chatru committed the outrage . . . That they returned from the Mine together at night following Jasoda and her companions at a distance of half a rassi . . . .They are in fact all related to one another and the other accused and the probabilities are all in favour of the prosecution. Jasoda was thrown and pushed immediately after she reached Nayadih Jore and then Girdhari and Goma caught hold of her and got upon her. There cannot be any doubt therefore that all the accused were in the conspiracy and that they were all there in order to assist one another."

For the above reasons the learned Sessions Judge finds the accused Girdhari, Goma, Bahadur, Doma, Meghan and Khirwa Gope guilty of the abetment of the offence under S. 376/511, namely, of the offence under S. 376/511, I. P. C., read with S. 109, I. P. C., and convict them of the said offence. The learned Sessions Judge however finds that they are not guilty of the offence under S. 375/114, I. P. C., and acquits them of that offence. The six accused persons are said to be present at the time of the commission of the offence by Chatru and were surrounding the complainant. They would therefore, if there was an abetment by them under the definition of S. 107, I. P. C., be guilty of the offence committed by Chatru read with S. 114. and not read with S. 109, I. P. C., They have been acquitted under S. 376/114. The conviction S. 376/511 read with S. 109 cannot be maintained.

Now as to whether the aforesaid six persons could be convicted of an abetment of the offence committed by Chatru, the learned Sessions Judge says that there was a conspiracy among all the accused and that they were all there in order to assist one another. There is no evidence on the record that there was any combination or agreement by the aforesaid six persons for the commission of the offence by Chatru. There is no evidence at all of anything said or done by the aforesaid persons prior to the commission of the offence by Chatru. All that is said is that the complainant Jasoda with four other girls was going ahead and the seven accused were coming behind her at a rasi off and chatting among themselves, but what they were talking has not been proved. Chatru is said to have first attacked Jasoda. Nothing is said as regards the three accused Doma, Bahadur and Khirwa as having been done by them, except being present at the time of the outrage attempted by Chatru. This itself is not sufficient to convict them of any abetment of the offence, as there was no overt act by them and there was no legal omission of an act which they were bound to do. Mere presence on the occasion is not an abetment under S. 107, I. P. C., unless there was an obligation under the law for these persons to prevent the commission of the offence by Chatru. Besides, the act is said to have have taken place suddenly of which there

is no evidence that they had cognizance. They had to go along the same way and at the same time to the village and their presence at the spot is but natural. These accused persons have therefore been wrongly convicted and should, in my opinion, be acquitted.

As regards accused Girdhari, the case sgainst him as laid in Court by the complainant was that he actually came upon her and attempted to commit rape after Chatru had done. This has been disbelieved by the Court and he therefore also has done nothing more than being present at the occurrence and for the reasons for which the others are held by me to be not guilty, Girdhari is also entitled to an acquittal.

As regards the two others, Meghan snd Doma, Meghan is said to have asked Chatru to seize her while she fell and got up and tried to run away, and after the first attack by Chatru Goma is said to have held one of her hands. This is a specific act alleged by the prosecutrix against these persons and if true they are surely guilty of an abetment of the offence committed by Chatru. The question is whether there is satisfactory evidence to believe this story told by the girl in Court. The girl has been held by the Court below to have exaggerated her story and has not been believed on many material points. The evidence against these two persons as regards specific acts complained of consists of that of the girl herself.

There is indication in this case that the girl and her mother have very much improved and added to the original story and have tried to exaggerate the true and real occurrence. They have been disbelieved by the learned Sessions Judge as regards the story that blood oozed out and soiled the cloth, and as a matter of fact the learned Sessions Judge has suspected that the girl and the mother falsely told the police that the cloth was stained aud that it was washed. The story that Girdhari also attempted to commit rape has been disbelieved. There is no reason to believe her when she says that Girdhari and Goma caught hold of the hands and legs in order to help Chatru in committing the rape. Girdhari is a man of 22 years of age and Goma is of 21 years; Chatru is only 17. Gayan Babu says that nothing was said to him by the girl that night at 1 or 2 a. m. as regards the other accused except Chatru, It is difficult to act upon the subsequent statement of the girl implicating these accused. It is hard to believe that these two grown up people would take the minor part in the offence attempted to be committed by Chatru. Meghan and Goma are therefore entitled to the benefit of the doubt in this case and they should also be acquitted. It is not safe to convict them on the evidence of the girl and the mother.

The result is that the conviction and sentence of Chatru are upheld and the conviction and sentences passed upon the remaining six accused persons are set aside. The Sessions Judge in this case has very carefully gone into it and appears to have taken very great and commendable pains in summarising the evidence, which has been of great assistance to us. We agree with him in the view that he has taken of the main case, but we simply differ with him as regards the view that he has taken regarding the guilt of the six accused persons. We have been influenced to a great extent by the attempt on the part of the girl to exaggerate the story and to implicate the companions of Chatru. It is more likely that Chatru alone was ahead and finding the girl separated from the four other girls, her companions, and going alone, forcibly tried to outrage her and the girl screamed and the other accused persons came up, but did not do anything to help the girl. The occurrence is in the main true.

Chapman, J.—I agree.

V.S./R.K. *Appeal partly accepted.*

A. I. R. 1918 Patna 588

JWALA PRASAD AND IMAM, JJ.

Bipin Bihari Mukerji —Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 455 of 1917, Decided on 1st February 1918, from order of Dy. Magistrate, Purneah, D/- 3rd October 1917.

(a) Criminal P. C. (1898), Ss. 435 and 439 —High Court having concurrent revisional jurisdiction with subordinate Court—Aggrieved party should first go to subordinate Court.

In cases where the High Court has concurrent revisional jurisdiction with a subordinate Court the aggrieved party should in the first instance seek his remedy before the subordinate Court.

[P 589 C 2]

(b) Criminal P. C. (1898), Ss. 125, 435, 438 — Revisional jurisdiction of Sessions Judge or District Magistrate under Ss. 435 and 438 is not trenched by S. 125.

There is no ground for holding that the revisional jurisdiction of a Sessions Judge or of a District Magistrate under Ss. 435 and 438 is in any way trenched upon by the provisions of S. 125 of the Code. [P 590 C 1]

(c) Criminal P. C. (1998), Ss. 435 and 438 —Jurisdiction of Sessions Judge or District Magistrate under S. 435 is concurrent with that of High Court even where former cannot pass formal order.

The jurisdiction of the Sessions Judge or a District Magistrate under S. 435 is concurrent with that of the High Court even where the Sessions Judge or the District Magistrate cannot pass a formal order but can only refer the matter to the High Court under S. 438 of the Code. [P 589 C 2]

Hasan Imam and *Lal Mohan Ganguly* —for Petitioner.

Assistant Government Advocate — for the Crown.

Judgment. — The petitioner Bipin Bihari Mukherji, has been bound down hy Mr. E. A. Guest, Deputy Magistrate of Purnea, under S. 107, Criminal P. C., to keep the peace for a period of one year and in default to undergo simple imprisonment for that period. The learned Assistant Government Advocate has raised a preliminary point objecting to the hearing of this petition by us. The ground of objection taken by him is that the petitioner had a remedy under S. 125, Criminal P. C., and should have applied to the District Magistrate of Purnea for cancelling the order passed by Mr. Guest. He relies on two decisions of the Allahabad High Court given by Knox, J., *Emperor* v. *Abdur Rahim* (1) and the case cited therein No. 114 of 1905.

The learned counsel appearing on behalf of the petitioner resists this contention on the ground that the powers exercisable by a District Magistrate under S. 125 of the Code are within his original jurisdiction, and although this is the section on which the two Allahabad cases have rested yet there is a point of principle involved in that the Calcutta rulings as well as other rulings of the Allahabad and Bombay High Courts have allowed such a preliminary objection to prevail only in cases where the jurisdiction of the High Court was concurrent with the revisional jurisdiction of subordinate Courts and that therefore the rulings of the High Courts of Calcutta, Bombay and Allahabad, except the two rulings given by Knox, J., do not support the view that S. 125, Criminal, P. C., is a section that can be allowed to stand in the way of the hearing of the petition by this Court. The learned counsel on behalf of the petitioner also contends that the dictum laid down by Knox, J., is by a single Judge and unless there is a decision of a Divisional Bench holding S. 125 of the Code as a ground of objection we should not refuse to entertain the application before us.

In *Musan Rai* v. *Birich Roy* (2) a Division Bench of this Court has held that in cases where the High Court has concurrent revisional jurisdiction with a subordinate Court the aggrieved party should in the first instance seek his remedy before the subordinate Court. In this view it would appear that the High Courts of Patna, Calcutta, Allahabad and Bombay are in full agreement: vide *Bhuyan Addus Sobhan Khan, In re* (3), *Shafaqatullah* v. *Wali Ahmad Khan* (4), *Emperor* v. *Kali Charan* (5) and *Queen-Empress* v. *Chagan Dayaram* (6). Even if it be conceded that the two decisions given by Knox, J., are in excess of the principle laid down in the other decisions, the preliminary objection taken by the learned Assistant Government Advocate must prevail inasmuch as the revisional jurisdiction of this Court under S. 435 of the Code is shared by the subordinate authorities and there is nothing to show that the Sessions Judge and the District Magistrate of Purnea are precluded from dealing with the present case. The jurisdiction of the Sessions Judge and the District Magistrate is concurrent with that of the High Court even where they could not pass formal orders but only could refer to the High Court under S. 438: *Queen-Empress* v. *Reolah* (7) and *Bhuyan Abdus Sobhan Khan, In re* (3).

The learned counsel on behalf of the petitioner contends that as a matter of practice cases under S. 107 of the Code are generally dealt with by the District Magistrate under S. 125, Criminal P. C. This may be so and probably it is due to the fact that acting under S 125 the Dis-

(1) [1905] A. W. N. 143=2 Cr. L J. 335.

(2) [1917] 41 I. C. 831.
(3) [1909] 36 Cal. 643=2 I. C. 846=10 Cr. L. J. 190.
(4) [1908] 30 All. 116=7 Cr. L. J. 48.
(5) [1904] A. W. N. 232=1 Cr. L J. 614.
(6) [1890] 14 Bom. 331.
(7) [1887] 14 Cal. 887.

trict Magistrate may himself deal with a case like this without referring it for orders to the High Court under S. 438, but this is no ground for holding that the revisional jurisdiction of a Sessions Judge or a District Magistrate under S. 435 and 438 of the Code is in any way trenched upon by the provisions of S. 125. It is evident therefore that the application before us is one with reference to which the revisional power of the Sessions Judge and the District Magistrate of Purnea is exercisable. There is nothing therefore to distinguish the present case from the principles laid down in the decisions of the four High Courts referred to above. In the circumstances we must allow the preliminary objection taken by the learned Assistant Government Advocate and decline to entertain the application but we do so without any prejudice to the right of the petitioner to move this Ccurt in case he fails to receive satisfaction from the Sessions Judge or the District Magistrate of Purnea. With these remarks the petition is rejected.

V.S./R.K. *Petition rejected.*

A. I. R. 1918 Patna 590 (1)

ROE AND COUTTS, JJ.

Sheobaran Mahto and *others*—Appellants.

v.

Mt. Bhogea and *others*—Respondents.

Appeal No. 596 of 1917, Decided on 18th July 1918, from appellate decree of Sub-Judge, Shahabad.

Hindu Law—Widow—Re-marriage forfeits life-estate even of mother.

A Hindu widow on re-marriage forfeits the life-interest which she holds as the mother of a deceased son who survived her husband. [P 590 C 1]

Krishna Sahay and *Sunder Lal*—for Appellants.

Kulwant Sahay—for Respondents.

Judgment.—The only question for decision in this case is whether a Hindu widow on re-marriage forfeits the life-interest which she holds as the mother of a deceased son who survived her husband. The point seems to us to be conclusively determined in the affirmative by the decision in *Matungini Gupta* v. *Ram Rutton Roy* (1) and we are especially pressed by the argument of Banerji, J., in that case. The principle is further established in another case in the Calcutta High Court, *Rasul Jehan Begum* v. *Ram Suran Singh* (2), in which judgment was delivered by Ghose, J.; and in the Full Bench case of Bombay High Court in *Vithu* v. *Govinda* (3), in which the judgment was delivered by Ranade, J. The same view was taken in *Nitya Madhav Das* v. *Srinath Chandra Chuckerbutty* (4) and *Gouri Charn Patni* v. *Sita Patni* (5). The Madras Court has taken a similar view, but we are not concerned with the conflicting line of decisions of Madras and Bombay as opposed to Allahabad. We have only to say that for the last twenty years there has been a constant cursus in one direction in the Calcutta High Court and we are bound by that. We would also add that we entirely agree with the principles of Hindu law upon which these decisions have been based. The decree made by the learned Subordinate Judge must be set aside and the decree of the learned Munsif restored. The respondents will pay the costs of this litigation throughout.

V.S./R.K. *Appeal accepted.*

(1) [1892] 19 Cal. 289 (F. B.).
(2) [1895] 22 Cal. 589.
(3) [1898] 22 Bom. 321.
(4) [1908] 8 C. L J. 542.
(5) [1910] 14 C. W. N. 346=5 I. C. 710.

A. I. R. 1918 Patna 590 (2)

JWALA PRASAD, J.

Damri Ram and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 433 of 1917, Decided on 11th December 1917, from order of Dist. Judge, Gaya.

(a) Criminal P. C. (1898), S. 476—Person proceeded against is not accused.

In proceedings under S. 476 the person against whom the proceedings are instituted is not an accused person: 10 *I. C.* 740, *Rel. on.* [P 592 C 1]

(b) Criminal P. C. (1898), S. 94—Accused can be called on to produce documents in his possession.

Under S. 94 an accused person can be called upon to produce documents in his possession: 37 *Mad.* 112, *Rel. on.* [P 592 C 1]

(c) Penal Code (1860), S. 175—Disobedience to unnecessary order to produce document is no offence under S. 175.

Where the production of a document is not necessary for the decision of the case in which the document is called for, the person failing to produce the document cannot be convicted under S. 175: 5 *I. C.* 17, *Rel. on.* [P 593 C 1]

Kurshed Husnain—for Petitioners.

Judgment.—This is an application on behalf of the petitioners, Damri Ram and Khub Lal, against an order of the District Judge of Gaya, dated 17th July 1917.

convicting the applicants under S. 175, I. P. C., read with S. 480, Criminal P. C., for their intentionally omitting to produce the bahi which they were legally required to produce under S. 94, Criminal P. C. The petitioners have been sentenced each to a fine of Rs. 200. Khub Lal is the son of Damri Ram. Both the petitioners besides others were defendants in a rent suit brought by one Kailas Nandan Lal and others in the Court of the Munsif of Gaya. On behalf of the defendants a bahi or account book was filed as evidence in that case. The suit was decreed both by the Munsif and by the District Judge in appeal. On 20th April 1917 after the decision of the District Judge in appeal, the plaintiff applied for sanction in the Munsif's Court to prosecute the petitioners for producing forged account books and for having made false statements to prove the plea of payment. The Munsif, by his order of 12th May 1917, refused to give sanction for the prosecution of the petitioners: the reason given for rejecting the application of the plaintiff may be quoted hereunder:

"What can be gathered from the two judgments of this Court and of the appellate Court, which are the only evidence in this case, is that the defence was not believed and the circumstances led to an inference that perhaps a new sheet might have been inserted in the cash book. It is nowhere said that the statements of the opposite party were false or that the document was fabricated. The observations made in the judgments do not bring home the offence to the opposite party and there is no evidence of positive facts to prove that any criminal offence was actually committed by the opposite party."

The plaintiff then appealed to the District Judge for setting aside the order of the Munsif referred to above and for granting sanction to prosecute the petitioners. Notice of this appeal was served upon the petitioners on 2nd May 1917. On 4th May the pleader on behalf of the defendants applied for the return of the account books that were filed in the case before the Munsif. The order of the Munsif on that petition as usual was "return if no objection." The cash books were accordingly returned to the pleader of the defendants on the same day. On the 23rd May the plaintiffs, who were the appellants before the Judge in the miscellaneous case regarding the sanction for the prosecution of the petitioners, applied to the District Judge that the account books taken by the petitioners pleader might be called for from them. Thereupon under S. 94, Criminal P. C., the petitioners were required to produce the said account books. The petitioners did not produce the books, and on 29th June pleaded that they were not bound to produce the books as they were accused persons and relied upon the ruling reported as *Ishwar Chandra Ghoshal* v. *Emperor* (1). This contention of the petitioners was overruled by the District Judge and a warrant of arrest was issued against them. On 13th July the petitioners did appear before the District Judge and orally showed cause. It was alleged by them that the bahis in question were lost, and that they were not therefore in a position to produce them. This was disbelieved by the District Judge, and he accordingly drew up proceedings against the petitioners under Ss. 480 and 481, Criminal P. C. The Judge in the order sheet mentions that he asked Damri Ram in whose possession the book was, to which the Judge says that Damri Ram replied that:

"it was in no one's possession, but lay on a shelf within the house of the two petitioners."

The District Judge thereupon asked certain questions from Damri Ram and Khub Lal and recorded their answers. It is well to reproduce the questions and answers of both the petitioners.

Damri Ram.—The question was:

"you are charged under S. 175 with failing to produce the bahis which you were legally bound to produce; do you wish to say anything?"

Answer:—Madan Mohan Lal had the bahis removed from our possession; this was about the time—I have already told the Court—now within 32 or 33 days.

To Khub Lal the question was the same: and the answer was almost the same with the following addition: "I suspect him (Madan Lal), but have no proof." The Judge disbelieved the petitioners as to the book having been lost, for the reasons given by him in his order, and convicted them as already mentioned under S. 175, I. P. C., read with S. 480, Criminal P. C. It is needless to refer to the points raised in the Court below as to the proceedings being irregular or illegal. They have been disposed of by the learned District Judge. The same points were raised before me and after having given my best consideration to them, I feel inclined to agree with the view taken by the District Judge. So

(1) [1908] 12 C. W. N. 1016=8 Cr. L J. 224

far as the legal aspect of the case is concerned, there is no doubt that under S. 94, Criminal P. C., the District Judge was authorized to call upon the petitioners to produce the books in question. The contention that the petitioners were in the position of accused persons and that they were not bound, therefore, to produce papers or evidence that would incriminate them does not appear to be at all tenable. The trend of the authorities appears to be that in proceedings under S. 476 the person against whom the proceedings are instituted is not an accused person—vide the case of *Ram Nihore Umar* v. *Emperor* (2).

The case of *Surey Kondareddi* v. *Emperor* (3) goes further and holds, disagreeing with the case of *Ishwar Chandra Ghoshal* v. *Emperor* (1), that under S. 94, Criminal P. C., an accused person can also be called upon to produce documents in his possession. I am however satisfied on other grounds that the order of the District Judge should be set aside. I assume for the purpose of my decision that the proceedings adopted by the District Judge were legal. The reason for the conviction of the petitioners may be given in the words of the District Judge himself:

"It is clear here that an inquiry is necessary inasmuch as it is the burden duty of the Court to inspect the bahi before the passing any order as to sanction. So the inspection of the bahi being necessary the Court was empowered to issue processes under S. 94, Criminal P. C."

The learned District Judge had therefore apparently in his mind at that time that in order to convict the petitioners under S. 175 for the non-production of documents called for from them, it is necessary to show that the production of the books was material for the decision of the sanction matter pending before him in appeal. I agree with the view of the District Judge and I am supported in my view by the authority of *Mithan Lal* v. *Emperor* (4). In that case the accused who was a witness was called upon to produce certain books, he refused to do so, and for this he was convicted under S. 175, I, P. C. by the District Magistrate. The conviction was set aside by Tudball, J., upon the sole ground that the Court did not think that the production of the document was necessary for the decision of the case in which the document was called for.

Let us see whether this document was at all considered to be material for the purpose of the miscellaneous case; that is the sanction matter which was pending before the Munsif and the Judge. The Munsif refused the sanction upon the ground:

"that there was no evidence in the case to show that any forgery or perjury was committed; and that the observations made in the judgments of both the Courts do not bring home the offence to the opposite party."

The concluding words of the Munsif on this point are

"that there is no evidence of positive facts to prove that any criminal offence was actually committed."

The Munsif did not at all consider the inspection of the document necessary for disposing of the application of the plaintiff for sanction. The document was not produced before the District Judge and the District Judge convicted the accused on the 17th July when the appeal from the order of the Munsif refusing to grant sanction was pending before him. The sanction matter was disposed of on the 20th July by him ,that is, subsequent to the order convicting the petitioners. In this order he does not at all refer to the document; he says:

"I have considered the case. The applicant for sanction admits that he has no more evidence than I saw in the appeal but calls attention to the bad faith of the opposite party in taking back the book and the form of his petition for its return. Unless there were more evidence forthcoming than I saw in the appeal I certainly should not grant sanction as for a prosecution some positive evidence other than suspicious circumstances would be necessary."

But the learned District Judge does not say that the inspection of the document was at all necessary for the purpose of the decision or that the non-production of it in any way affected the decision in the sanction matter. It appears that on the 8th June during the absence of Mr. Foster on leave a petition was filed by the opposite party for the postponement of the case till Mr. Foster returned as the bahi was seen by him and was not then in Court. This petition was granted so that the petition was disposed of by Mr. Foster himself who had seen the book during the hearing of the rent appeal. No doubt the learned District Judge says in his order of the 17th that the inspection of the bahi was necessary for the adjudica-

(2) [1911] 12 Cr. L. J. 231=10 I. C. 740.
(3) A. I R. 1915 Mad. 17=37 Mad. 112=15 I. C. 493=13 Cr. L. J. 493.
(4) [1910] 11 Cr. L. J. 20=5 I. C. 17.

tion of the miscellaneous appeal pending before him. This order was passed before the appeal was heard and was apparently based upon the application of the opposite party and upon the assumption that in an application for sanction for forgery the inspection of the document would be necessary. But actually when the sanction matter was heard the application for sanction was refused because there was no evidence at all and the inspection of the document was not considered necessary. If the order convicting the accused was passed after the order in the sanction matter I think that the learned Judge would himself not have convicted the accused for then it would have been apparent to him that the inspection of the bahi was not at all essential for the disposal of the appeal before him.

I therefore in terms of the authority in *Mithan Lal* v. *Emperor* (4), hold that the non-prcduction of the document does not bring the accused within the purview of S. 175, I. P. C. I now go to another important point in this case. Both the petitioners have been convicted, father and son. The document was taken back by a pleader who was engaged on behalf of several defendants including the two petitioners. It is not at all shown as to which of the defendants took the document from the pleader. It is still doubtful as to whether it was in the possession of Khub Lal or Damri Ram. The learned Judge has not definitely come to any finding as to the actual possession of the document. At one place he says that "Damri managed to withdraw the bahi from the rent suit record." If so what is there to show that Khub Lal was in possession? From the different statements made by them it cannot be conclusively held that both or any one of them in particular was in actual possession of the book. There is therefore a reasonable doubt as to the actual person who was in possession of the document. Upon this ground also the conviction. is bad. I therefore set aside the conviction. I direct that the fines if realised be refunded to the petitioners.

V.S./R.K. *Application allowed.*

1918 P/75 & 76

A. I. R. 1918 Patna 593

ROE AND IMAM, JJ.

Raghubir Prasad and *others*—Appellants.

v.

Misri Kahar and *others*—Respondents.

Second Appeal No. 959 of 1917, Decided on 21st March 1918, from a decision of Dist. Judge, Patna.

(a) Civil P. C. (1908), S. 100—Intention is question of fact.

The question with what intention a person did a certain act can hardly be said to be anything but a question of fact. This question must be examined with reference to the subsequent acts of the person alleged to have a certain intention. [P 594 C 1, 2]

(b) Specific Relief Act (1877), S. 42—Trespasser cannot sue for declaration that he is trespasser.

Section 42, does not contemplate an action by a person having no title. A trespasser cannot therefore sue for a declaration that he is a trespasser. [P 595 C 1]

Pugh, Abani Bhushan Mukerji and *Saroshi Charan Mitter*—for Appellants.

P. K. Sen, Bankim Chandra Mitter and *Sona Lal Bose*—for Respondents.

Judgment.—The appellants in this case are the heirs of one Kali Prasad. The defendants respondents are the sons of one Mt. Jitni who as has been found concurrently by the Courts below was Kali Prasad's mistress. In 1884, Kali Prasad bought a house in Patna. It is found as a fact that he paid the purchase-money out of his own pocket. It is admitted by both sides that the title-deeds were made out in the name of Jitni and it is found as a fact that the title-deeds remained in the possession of Jitni and her heirs up to the time of the institution of the present suit. On the death of Jitni in 1898, Kali Prasad appears to have continued to use this house as a resting place whenever he visited Patna. On his death in 1905 his heirs took possession. In 1915 the defendants instituted a suit in the Small Cause Court claiming three years rent from the plaintiffs at Rs. 10 a month. The learned Small Cause Court Judge decided the issue of the relationship of landlord and tenant in favour of the defendants and gave them a decree.

The plaintiffs therefore instituted the present suit for a declaration firstly that the house in dispute was not the house of the defendants secondly for a declaration that the decree passed in the Small Cause Court suit is ineffective and inoperative; thirdly that it be declared that defendants

have no right to execute this decree and in the alternative that if it be held that the rent decree resulted in a legal dispossession of the plaintiffs the plaintiffs should be restored to possession. The suit was dismissed by the learned Subordinate Judge and on appeal to the District Court the learned Judge stated that the only issue involved was that of the intention of Kali Prasad in making out the title-deeds in the name of Jitni. He accepted it as good law that the consideration money having come from Kali Prasad's pocket, the presumption was that Kali Prasad made the purchase himself. But in view of the fact firstly that the house was one such as a man of Kali Prasad's position would not buy for himself and in view of the fact that the title deeds remained in the possession of Jitni and in view of the fact that when Jitni died Kali Prasad entered not his own name in the Municipal Register but those of Jitni's sons he held that the presumption arising from the payment of the purchase money by Kali Prasad had been rebutted and that it must be decided that the intention when making the purchase was that the purchase should be for the benefit of Jitni.

In appeal to this Court the first proposition advanced by Mr. Pugh is that he is not limited by the finding of fact for the reason that all questions of intention must be regarded as mixed questions of fact and law. In support of this contention reliance is placed on a series of decisions which deal mainly with the existence of a custom. He might perhaps have also relied upon Criminal Bench rulings of the Calcutta Court in which it has been decided that where the question of intention is in issue a Court in revision is entitled to scrutinize the evidence and to decide for itself whether the facts proved establish the intention. The existence of a custom is undoubtedly to some extent a question of law for custom is in many instances itself law; where the existence of a law is in issue the question upon that issue must be to that extent a question of law, but the question with what intention a person did a certain act can hardly be said to be anything but a question of fact. Inasmuch as the question has been argued fully before us we propose to deal briefly with it and say that in the circumstances of the case there was ample reason for holding that the purchase was in the first instance made for Jitni's benefit. If Kali Prasad had wished to buy a house for himself it is tolerably certain that he would have bought a house more suitable to his position than the house in question. If he intended it to be his own property he would as the learned Judge suggests have kept the title deed in his own possession and not made it over to Jitni and in all probability would not have allowed the title deed and the receipts for Municipal taxes which he had himself paid to pass into the possession of Jitni's sons on her death. The question of intention must be examined with reference to subsequent acts of the person alleged to have that intention. Kali Prasad's acts during his life were all consistent with a desire that the house should be considered to be the property of Jitni and inconsistent with a desire that it should be considered his own property. What happened subsequent to Kali Prasad's death cannot affect the question of Kali Prasad's intention. It may be that his heirs were able to oust the heirs of Jitni from this property but that would merely give rise to a period of limitation. It cannot affect the main issue before us.

As further points of law Mr. Pugh suggests firstly that from the moment Kali Prasad paid the purchase money himself the house was his and that he could not transfer it to the lady merely by making out the title-deed in her name, it would require a registered document to complete any such transfer. With this contention we are not in agreement. It would be immaterial whether Kali Prasad went through the form of handing the money to Jitni. So that Jitni's hands might be used for the payment of the money. If he intended to buy the house for the lady and throughout his negotiations represented that he was buying the house for the lady the house as soon as the contract with the vendor was completed became the property of the lady. As a last resort Mr. Pugh suggests that the alternative prayers asked for in the plaint should be granted. There is no suggestion whatever that the rent decree was obtained by fraud. We have therefore no jurisdiction to say that the rent decree was inoperative or void or incapable of execution. And if indeed we are asked to make a declaration that the plaintiffs are in possession not as tenants of the defendants but by virtue of some

right not specified, it is sufficient to say that the Specific Relief Act does not contemplate an action by a person not having a title. A trespasser cannot sue for a declaration that he is a trespasser. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 595

ROE AND JWALA PRASAD, JJ.

Mt. Ramdei and *others*—Appellants.

v.

Chandrabali Bibi and *others*—Respondents.

First Appeals Nos. 141 and 163 of 1916, Decided on 14th February 1918, from decision of Sub-Judge, First Court, Mozafferpur.

(a) Registration Act (1908), S. 28—No fraud or collusion on part of parties—Transferor not having title to portion of property situated within jurisdiction of Registrar—Registrar's jurisdiction to register is not barred.

In the absence of fraud on the part of the transferee and collusion between him and the transferor, the mere fact that the transferor has no title to that portion of the property which is situated within the jurisdiction of the Registrar is no bar to the Registrar's jurisdiction to register the document. [P 596 C 2]

(b) Evidence Act (1872), S. 101—Allegation by party that document signed by him does not contain correct statement of facts and of intention of parties—Burden of proof lies on such party.

Where a party alleges that a document to which he put his signature in token of resigning an interest does not contain a correct statement of the facts and of the intention of the parties, the burden of proving his allegation lies on such party. [P 596 C 1]

Pugh, P. R. Dass, Chandra Sekhar Bannerjee, Rai Tribhuan Nath Sahai, Murari Prasad and *Mohammad Hussain*—for Appellants.

Hasan Imam, Mohammad Mustafa Khan and *Bunwari Lal*—for Respondents.

Judgment.—The facts of these cases have been fully and clearly stated in the judgment of the learned Subordinate Judge. It is sufficient for the purposes of the appeals to reproduce only a part of the narrative given in his judgment. The appellants in Appeal No. 141 are Mt. Ram Dei and her lessees proprietors of Motipur concern. The respondent is Chandra Bali Bibi, who derives her interest from a deed of sale executed in her favour by Jeona Bahu. Ram Kishen Joshi and others are the appellants in Appeal No. 163. Mt. Ram Dei is the widow of Radha Kishen. Radha Kishen was the son of Bal Kishen. On the death of Bal Kishen there was a dispute regarding the succession and this, so far as Mt. Jeona Bahu, the widow, and Radha Kishen, the son, were concerned, was settled in 1889 by an agreement by which four annas of the villages in dispute was given to her absolutely and three annas given to her as life estate. A payment in cash was also to be made by Radha Kishen. Before this payment in cash was made Radha Kishen died A new agreement was then executed in 1890 between Ram Dei and Jeona Bahu, whereby the payment which was to have been made by Radha Kishen was abandoned and the widows took to themselves each an absolute interest in four annas of the property in dispute. On the death of Jeona Bahu Ram Dei claimed to be the heir-at-law under the Mayukha School. The Joshis claimed to be her heirs under a will executed by her. Under the former claim Ram Dei executed a mukarrari patta of the eight annas of the villages in dispute in favour of the Motipur concern. Chandra Bali's kobala is limited to a four annas share of villages in dispute. The remaining four annas is claimed by the Joshis. The whole eight annas is in the possession of the Motipur concern. Chandra Bali and the Joshis therefore instituted separate suits each in respect of the four-annas share alleged to be theirs.

The issues framed in the Court below were eleven in number. The contest in this Court centres round two issues only. Firstly whether the ekrarnama or agreement made between Ram Dei and Jeona Bahu was intended to be an operative transaction or was a mere device to defeat the claim of third parties and not intended to be operative. Secondly whether by reason of a substantial flaw in registration the deed of sale executed by Jeona Bahu in favour of Chandra Bali is void as against the party in actual possession. The learned Subordinate Judge decided that the agreement made in Ram Dei's favour was intended to be operative and conveyed a title in four annas of the property. He also decided that there was no flaw in the registration of the deed in favour of Chandra Bali He therefore declared her entitled to the remaining four annas of the property. Ram Dei and the Motipur concern therefore appeal against that part of the decree which maintains Chandra Bali's title, and the Joshis ap-

peal against that part of the decree which maintains Ram Dei's title. On the first point the burden of proof in cases such as this is on the litigant who alleges that a document to which he put his signature in token of resigning an interest does not contain a correct statement of the facts and of the intentions of the parties. The same rule applies to a representative-in-interest of a signatory to such a document. The first link in the chain of evidence on such a question of fact is a set of circumstances showing that the transferor had a motive for making an ostensible abandonment of a part of his rights without consideration. The next link is a relationship between the parties to the document, and the probability that a fictitious transfer should be made in favour of the ostensible transferee. It is certain that the quarrel between Radha Kishen and Jeona Bahu was a real quarrel. There is no reasonable probability that a wholly fictitious agreement was made between Radha Kishen and Jeona Bahu. It is not reasonable to suppose that the widow of Radha Kishen would on his death have abandoned all benfits that might be derived by her from this agreement. Nor is it reasonably probable that Jeona Bahu would have put into the hands of the widow of one who had formerly been her enemy, who herself might at any time again be her enemy, a weapon which could be used against her.

There could be no reason for any deliberate cloud upon the title of Jeona Bahu to the property affected by the agreement for at that time Jeona was undoubtedly in possession of the whole of that property and her title has never since been contested. On the outstanding probabilities of the case it is unlikely that this agreement was fictitious. There is moreover a very considerable body of evidence to show that Jeona Bahu intended it to be operative. As the learned Subordinate Judge has pointed out there is no reason to doubt that Jeona Bahu herself, both in 1901 and in 1902, eleven and twelve years after the agreement, made statements on oath admitting Ram Dei's title in this property. She also wrote letters which he believed to be genuine to Ram Dei again admitting her title in 1904 and 1905. The arguments adduced on behalf of the Jcshis to support the theory that the agreement was not a genuine agreement have in them little substance when weighed against the general probabilities and these direct admissions. We are of opinion that Suit No. 278 was rightly dismissed and dismiss Appeal No. 163 with costs.

The ground upon which it is urged that there was a flaw in the proceedings in the registration of Chandra Bali's document is that it was registered at Benares and contains in the schedule of properties conveyed a garden in Benares which was not at the time of the execution of the document the property of the transferor. The learned Subordinate Judge does not seem to us to have considered the issue whether as a fact this garden house was in Jeona Bahu's possession at the time of the registration . He finds only that the existence of the garden has been clearly proved and that it was at one time in Jeona Bahu's possession. He oonsiders this finding to be sufficient to ensure the jurisdiction of the office at Benares to register the document. We agree with the finding that the garden was in existence at the time of the registration. We agree also that it was at one time a part of the property of Jeona Bahu, but from the evidence of the witness called by Chandra Bali to prove specifically the possession of Jeona Bahu at the time of registration there can be no doubt that before that registration the properties had passed out of the possession of Jeona Bahu. Damodar Bhardoaji, witness 12 for the plaintiffs, says that all Bal Kishen's properties in Benares were sold off before he attained discretion. His age is now 42. We do not understand the decision in *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi* (1) to be authority for the proposition that a flaw in the vendor's title in the only part of the property in the jurisdiction of the Benares office would be a bar to its registration there. The decision was based on the finding that the only property purporting to give the Registrar jurisdiction had no existence at all. The decision in *Broja Gopal Mukherjee* v. *Abinash Chandra Biswai* (2) is direct authority for the proposition that in the absence of fraud on the part of the transferee, and collusion between transferor and transferee, the mere fact that the transferor had no title would not be a bar to the Registrar's jurisdiction. With this decision we are

1. A I R 1914 P C 67=41 Cal 972=23 I C 637 (P C).
2. (1910) 6 I C 127.

in agreement. There is nothing to indicate any fraud on the part of Chandra Bali, or collusion between her and Jeona Bahu to deceive the Registrar. We therefore hold that Suit No. 276 was rightly decreed and that Appeal No. 141 should be dismissed with costs.

v.s./R.K. *Appeals dismissed.*

A. I. R. 1918 Patna 597

SHARFUDDIN AND ROE, JJ.

Gurubari Behera and *others*—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 224 of 1917, Decided on 22nd June 1917, against order of Sess. Judge, D/-1st June 1917.

Criminal P. C. (5 of 1898), S. 421—Summary dismissal—No judgment is necessary—But in deciding appeal under S. 421 reasons should be given—It must be sufficient to satisfy High Court that all questions have been considered.

An appellate Court is not required by law to write a judgment when dismissing an appeal summarily, but it is desirable that in dealing with an appeal under S. 421 the Court should give some reason for dismissing the appeal summarily. It should record at least so much as would satisfy the High Court, when an application for revision is made, that it had fully considered all the questions in issue and had appreciated the simplicity or gravity of the case. [P 597 C 2]

Gour Chandr Pal—for Petitioners.

Fakhruddin—for the Crown.

Judgment.—The applicants before us were convicted by a Magistrate holding first class powers for offences under S 323 and 325, I. P. C., and sentenced as follows: Gurubari to rigorous imprisonment for one month and Sham Sahu to rigorous imprisonment for three months and to pay a fine of Rs. 50. On appeal to the Sessions Court the learned Judge recorded an order in the following terms: "I have heard a pleader. Appeal summarily dismissed." The case has now come before us in revision. Three grounds are urged on behalf of the petitioners: (1) That there is nothing on the record to show that the pleader had a fair chance of puting his whole case before the Sessions Judge. (2) That on the facts of this particular case the appeal should not have been summarily dismissed. (3) Even if it was a case which might have been dismissed summarily the judgment of the Sessions Court is not in accordance with law. Upon the first ground urged we can only say that there is nothing to suggest that the pleader was not fully heard. The learned Judge has said that he was heard, and we accept that statement as correct. Upon the third ground argued there is ample authority for the proposition that an appellate Court is not required by law to write a judgment when dismissing an appeal summarily [*Rash Behari Das* v. *Balgopal Singh* (1), *Queen Empress* v. *Warubai* (2) and *King Emperor* v. *Krishnayya* (3)]. On the second ground we have to look at the facts of this particular case in order to decide whether or not the action of the learned Judge was proper. The general basis upon which cases such as the one before us have been decided is that where the question in issue is a plain and simple question of fact, as, for instance, whether *A* struck *B*, and the case is one in which upon the judgment of the Court below it is obvious that *A* did strike *B*, the case should be dealt with under S. 421 of the Code. The case before us was one of this nature. At the same time it has been so frequently held [*Queen Empress* v. *Nanhu* (4), *Ekcowri Mukerjee* v. *Emperor* (5) and *Amanat Sardar* v. *Nagendra Biswas* (6)] that it is desirable that in dealling with an appeal under S. 421 the Court should give some reason for dismissing an appeal summarily, that we feel it necessary to impress upon Sessions Courts the obvious advantages of recording reasons for summary action. The omission to do so gives this Court a large amount of unnecessary trouble and occupies a considerable amount of public time, if the Court finds it necessary to send for a record and go through it to see if there has been any injustice done.

In the second place, the learned Judge himself runs the risk of having the case remanded to him for a further hearing to the further waste of public time. There is nothing which can be construed into a hardship upon Sessions Courts to require them to record at least so much as will satisfy us, when an application for revision is made, that they have fully considered all the questions iu issue and have appreciated the simplicity or gravity of the case. We have been through the judgment of the learned Deputy Magis-

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(1) [1894] 21 Cal. 92.
(2) [1896] 20 Bom. 540.
(3) [1902] 25 Mad. 534.
(4) [1895] 17 All. 241 (F. B).
(5) [1905] 32 Cal. 178=2 Cr. L. J. 170.
(6) [1911] 38 Cal. 307=9 I. C. 65=12 Cr. L. J. 9.

trate and are satisfied that in the case before us there could be but one result of the appeal. The evidence that the accused struck the complainant is clearly convincing. In these circumstances we see no reason to interfere, and with these remarks reject the application for revision. The petitioners must surrender to their bail.

V.S./R.K. *Rule discharged.*

A. I. R. 1918 Patna 598

MULLICK AND ATKINSON, JJ.

Lal Mirtunjay Nath Sahi Deo—Judgment-debtor—Appellant.

v.

Panch Kauri Nath Sahi Deo—Decree-holder—Respondent.

Misc. Appeal No. 127 of 1917, Decided on 5th November 1917, from a decision of J. C. Ranchi, D/- 24th March 1917.

(a) Chota Nagpur Encumbered Estates Act (1876), S 3—Debt and liability is pecuniary liability and not contractual one.

The words "debt and liability" as used in S. 3, Chota Nagpur Encumbered Estates Act mean pecuniary debt and pecuniary liability and do not cover contractual liability. 33 *Cal* 1065, *Diss. from.* [P 599 C 2]

(b) Chota Nagpur Encumbered Estates Act (1876), S. 3—Liability in respect of which protection is granted is that to which holder of property is subject—Expropriated proprietor in possession as trespasser is not holder—Execution of decree for possession obtained against proprietor in respect of such property is not barred by S. 3

The liability in respect of which protection is acorded under the Chota Nagpur Encumbered Estates Act is a liability to which the holder of the property or his heir is subject.

An expropriated proprietor, who is in possession of a property as a trespasser, is not the "holder" of the property within the meaning of S. 3, Chota Nagpur Encumbered Estates Act, and therefore the execution of a decree for possession obtained against the proprietor in respect of such property is not barred by the provisions of that section. [P 599 C 1]

Uma Charan Lana—for Appellant.

Kulwant Sahai—for Respondent.

Judgment.—This appeal arises out of a decree made on 9th January 1909 against Lal Mirtunjay Nath Sahi, a proprietor who has been expropriated under the provisions of the Chota Nagpur Encumbered Estates Act of 1876. The decree was one declaring the title of the plaintiff in that suit in respect of a piece of land valued at Rs. 5000, and directing delivery of possession to him. There was a first appeal against the decree, which was disposed of on 29th June 1911. On the 13th of January 1914 a vesting order under the Encumbered Estates Act was made in respect of the properties of the judgment debtor. There was a second appeal to the High Court against the original decree of 1909, but on 26th May 1914 the judgment of the First Appellate Court was affirmed. An application was then made to the Subordinate Judge for execution of the decree of 1909 and by an order, dated the 2nd of October 1915, execution was allowed to proceed. The judgment-debtor thereupon preferred an appeal to the Judicial Commissioner and notwithstanding the protest of the plaintiff decree-holder, the learned Judicial Commissioner ordered the Manager of the Encumbered Estates to be brought upon the record and made a party to the appeal. In the result he came to the conclusion that notwithstanding the provisions of the Act execution was competent against the manager as representing the expropriated proprietor. He further held that the contention that all processes and attachments by way of execution were barred under the terms of S. 3 of the Act, was not maintainable.

The present appeal is preferred against the judgment of the learned Judicial Commissioner, dated the 24th March 1917. On behalf of the appellant it has been very forcibly argued that the liability to deliver possession under the decree of 1909 was a liability within the meaning of S. 3, Encumbered Estates Act, and that, therefore, all processes of executions and attachments in respect of that liability are null and void since the date of the vesting order. In this connexion reliance is placed on *Kamesher Prasad* v. *Bhikhan Narain Singh* (1), *Jagdis Chandra Deo Dhabal* v. *Satrughan Deo Dhabal* (2) and *Raja Satrughan Deo Dhabal* v. *Raja Jagadish Chandra Deo Dhabal* (3) It will be observed that in the first of these cases the liability was a pecuniary liability, in the second of these cases the liability was a contractual liability arising out of an agreement to lease a part of the property of which management had been taken under the Act—and the claim against the proprietor was one for specific performance and compensation for breach of contract. In the last of the cases cited the claim was also one arising out of an agreement to lease property. In each of these

1. (1893) 20 Cal 609.
2. (1906) 33 Cal 1065.
3. (1908) 7 C. L. J. 578.

cases the Court held that the liability was such as to come under the terms of S. 3 of the Act and that it was either barred or execution in respect of it was null and void. Now, without expressing any opinion at the present moment with regard to the scope of the words "debt and liability" as used in S. 3, it seems to me that the appeal must fail on a very simple ground. The liability in respect of which protection is accorded under Act is a liability to which the holder of the property or his heir is subject. If the proprietor is not the holder of the property which is the subject of the present, suit then he clearly does not come within the bar under S. 3 and other connected sections of the Act. Can it be said that in the present case the proprietor was the holder of the property in suit? In order to be the holder of the property, he must be either possessed of or entitled in his own right to the property. In the present case, so far back as 1909, it was declared by a competent Court that the proprietor was not the owner in his own right of the property in suit but that he was in possession as a trespasser.

The judgment of 1909 was affirmed in 1911 by the appellate Court and finally in 1914 by the High Court. In these circumstances it seems to me impossible to say that the proprietor was the holder of the property which is now in suit, within the meaning of the Act, and if he was not the holder of the property, clearly he is outside the scope of the Act so far as this action is concerned. Therefore, the decree-holder is competent to proceed to execute his decree against the proprietor, notwithstanding the bar contained in S. 3, Encumbered Estates Act. It may be said, in fact it has been argued, that the decree can only be executed against the proprietor and that the manager, if he is in possession, is in possession, as an independent trespasser. Mr. Kulwant Sahai on behalf of the respondent says that it will serve his purpose if he is given a decree against the proprietor alone; and that he will adopt his own remedy against the manager or any other person who may resist the order directing delivery of possession to be given to the decree holder. The order therefore which we will make, is that the decree of the lower appellate Court will be modified to this extent: The name of the proprietor will be restored as judgment-debtor and the name of the manager, which was substituted by the learned Judicial Commissioner, will be expunged.

The appeal is decreed in this modified form, but the appellant will pay the costs of the respondent, as he has accepted the position of guardian of the proprietor in all the proceedings since his name was substituted by the Judicial Commissioner. It is not necessary in the view that we have taken of the case to examine the judgments of the Calcutta High Court which have been referred to above but if it were necessary to consider the scope of the words "debt and liability" as used in S. 3 and connected sections of the Encumbered Estates Act, we would be inclined to say that these words, having regard to the scope and scheme of the Act, mean pecuniary debt and pecuniary liability and that the decision of their Lordships reported in *Jagdis Chandra Deo Dhabal* v. *Satrughan Deo Dhabal* (2) and *Raja Satrughan Deo Dhabal* v. *Raja Jagadis Chandra Deo Dhabal* (3), where the meaning of the words is extended to cover contractual liability relating to the property is one which does not commend itself to us. We think that their Lordships have taken too wide a view.

Atkinson, J.—I concur.

V.S./R.K. *Decree modified.*

A. I. R. 1918 Patna 599

CHAPMAN AND ATKINSON, JJ.

Mahabarat Dutta—Appellant.

v.

Surja Kanta De—Respondent.

Misc. Civil Appeal No. 246 of 1917, decided on 8th February 1918 against an order of Dist. Judge, Manbhum, D./-12th September 1917.

(a) Civil P. C. (1908), O. 21, R. 57—Sale set aside for reason other than default on part of decree-holder—Attachment obtained prior to first sale revives to support second application for execution—No fresh attachment is necessary.

Where a sale is set aside for any reason other than default on the part of the decree-holder, the attachment, which has been obtained prior to the first sale being set aside, revives to support a second or subsequent application for execution and no fresh attachment is necessary. In other words, once an attachment is properly and legally obtained and the property attached is put to sale and the sale is afterwards set aside, the antecedent attachment revives and by reason of its revival supports a second application for leave to issue execution, unless the ground upon which the sale was set aside was default on the part of the decree-holder. [P 602 C 1]

(b) Civil P. C. (1908), O. 21, R. 57—Parties at variance as regards valuation of property — Court must decide matter in judicial manner.

Obiter dictum.—When the parties are seriously at issue with regard to the valuation of the property offered for sale, it is the duty of the Court to go into the matter and determine the value in a judicial manner. [P 600 C 2]

Abani Bhusan Mukerjee—for Appellant.

Noresh Chandra Sinha—for Respondent.

Atkinson, J.—This application, by way of miscellaneous appeal and revision, comes before us from the order of the District Judge of Purulia, dated the 12th of September 1917. It is necessary shortly to state the facts for the purpose of considering the legal question which arises for determination. On the 19th of August 1912, the plaintiff obtained a money decree jointly against the defendant and others and on the 8th of October 1912, a portion of the defendant's property was attached, namely, a house in which the judgment debtor resided. On the 15th of May 1916, the judgment-debtor's house so attached was sold in execution of the decree. On the 27th of May 1916, an application was made to set aside the sale and the Subordinate Judge, before whom the application came, dismissed the application on the 29th of July 1916; and on the 10th November 1916 there was an appeal from the order of the learned Subordinate Judge. The sale was set aside by an order of the Appellate Court on the ground that the valuation had not been properly ascertained and stated in the sale proclamation. Subsequently a fresh application for leave to issue execution was presented and the same property was again offered for sale. With regard to this application two objections are urged.

One is that the second application for execution was illegal, inasmach as there had not been a second attachment of the judgment-debtor's property; that the first attachment had expired or elapsed and that before a second execution could issue there must be a new and fresh attachment of the property in suit. The second ground taken was that the valuation had been improperly stated. We are only concerned in this appeal with the first contention put forward by the learned Vakil for the defendant judgment debtor, namely, whether or not the first attachment expired and could not be revived by reason of the order of the Appellate Court setting aside the sale. No case has been cited before us to justify the proposition put forward by the learned Vakil for the judgment-debtor. There seems to be a great deal of authority strongly in favour of the view that the mere setting aside of a sale does revive an antecedent attachment and that it becomes unnecessary to issue a second attachment, and that a second execution can issue based upon the prior attachment made before the sale was set aside. It is necessary to consider what the law and the practice was before O. 21, R. 57, was enacted.

Prior to that time there was a doubt as to whether in the case of an application for execution being dismissed for default of the decree-holder the antecedent attachment was revived to support a second application for execution. O. 21, R. 57, has set that doubt at rest, because it expressly provides that where default is made by the decree-holder and the application for execution is dismissed by reason of such default, that then the attachment which has been made ceases to be of any force. In the present case, however, no default on the part of the decree-holder can be relied upon and the ground upon which the sale was set aside was, not by reason of any default on the part of the decree-holder, but by reason of the Court not having performed its duty in a judicial way, namely, having failed to assess the value of the property upon a right principle. The learned Judge in the lower Appellate Court has relied upon *Shiam Lal* v. *Roshan Lal* (1) for the purpose of showing that when the parties are seriously at issue with regard to the valuation of the property offered for sale, it is the duty of the Court to go into the matter and determine the value in a judicial manner. With that view we agree; but as the matter does not expressly arise for our decision, it is unnecessary to do more than to express our concurrence with the opinion of the learned Judge. What we have to consider in this case is the law with regard to the question whether upon the setting aside of a sale the antecedent attachment is revived so as to support a second application for execution.

In *Gunno Singh* v. *Muddun Mohan Singh* (2) it is distinctly laid down that where an attachment is once legally ob-

1 (1916) 35 I. C. 230.
2 W R (Gap) 26.

tained it revives upon the reversal of the sale in execution. The learned Judges who decided that case were Loch and Norman, JJ., and it is desirable to quote one or two passages from their Lordships' judgment; at page 23 their Lordships say;

"After considering the subject in all its bearings as put before us by the Pleaders of either party, we come to the conclusion that the effect of the later Sudder Court's decision of the 22nd of November 1857 was only to declare the sale to be null and void, but without prejudice to the attachment or other proceedings in execution which had been rightly and legally performed. We think that, by the setting aside of the sale, the parties were simply remitted to the position in which they stood immediately before the sale, and, therefore, that the attachment must be deemed to have revived."

Their Lordships then refer to a case of the Privy Council and quote from the judgment of their Lordships of the Privy Council a passage which seems to me to be very important. It runs as follows:-

"It would be contrary to general principles and a senseless addition to all the vexations and delay in the course of procedure to hold that, when for any reason, satisfactory or not, the execution of a final decree in a suit fails or is set aside, and the proceeding as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit."

Having quoted the above passage from the judgment of the Privy Council their Lordships proceed :

"And we think that, were it otherwise, great injustice would be done to the judgment creditor. For what is the position he would find himself in on the reversal of a sale, if all the steps he had properly taken in execution were to go for nothing? It would be this. The creditor, after publicly attaching the property and thereby declaring to all the world that he had made it legally liable for the satisfaction of his debt, and taking every necessary step for the sale of the property, would find, in the event of the sale being set aside for some flaw in the proceedings with which he had nothing to do and over which he had no control, that a third party, a stranger to him, had, with the view of assisting the judgment-debtor to set aside the sale, purchassd from the judgment-debtor the whole or a part of the property, and on the reversal of the sale holds him at arm's length and tells him: 'True, you made this property legally liable for your debt; but owing to a flaw in the subsequent proceeding, the sale was invalid; I took advantage of this defect, purchased the property, assisted in getting the sale reversed, and now you must look elsewhere than to this property for the satisfaction of your claim'."

These observations apply with equal force to the facts of this case. They clearly indicate the view which their Lordships took with regard to the revival of an attachment where a sale is set aside in an execution proceeding. Likewise the law will be found stated in *Gossain Munraj Pooree* v. *Deen Dyal Lall* (3). In that case Phear, J., a most distinguished and able Judge, stated as follows :

"At the time he attached (i. e., the properties), then his judgment-debtor had the rights of a mortgagor over it according to the very case of the present plaintiffs, i. e., he had an equity of redemption which it was competent to defendant 1 to sell after attachment. The attachment remained in being, and a sale of part of the property was held in December 1868. That sale was afterwards set aside on the ground of irregularity by a decree of the High Court. But obviously, as we think, the setting aside of that sale for irregularity under the circumstances which occurred did not displace the attachment. The property was still left in the condition of attached property and liable to be sold under the attachment if the judgment-creditor went regularly to work for that purpose."

So also in *Mahomed Warris* v. *Pitambur Sen* (4) the learned, Couch, C. J., dealing with this matter said:

"A suit was brought and the plaintiff obtained a decree establishing his right, namely a right to attach the property showing that the order for the release of the property from attachment was improper. The effect of that decree must be to revive the attachment, or rather not to revive the attachment, but to set aside the order of release which had been made, and therefore to make the property still subject to the attachment, to restore the state of things that had been disturbed by the order of release."

Although the term 'release' is used in that decision, its principle applies to the facts of the case before us. Another authority to which I desire to refer in this connexion is *Aziz Bux* v. *Kamiz Fatima Bibi* (5). In that case their Lordships were considering whether or not the case before them was within the provisions of O. 21, R. 57, and their Lordships there decided that the particular act by reason of which the sale was set aside in that case was not one due to the default of the decree-holder and that R. 57, O. 21 only had application to a case in which a sale is set aside or the proceedings in execution are dismissed by reason of the default of the decree-holder. Accordingly they held in that case that inasmuch as the proceedings were dismissed or set aside not by reason of default of the decree-holder, that therefore the prior attachment revived upon the sale being set aside. So far as we have been able to trace the

(3) [1873] 20 W. R. 19.
(4) [1874] 21 W. R. 435.
(5) [1912] 34 All. 490=15 I. C. 49.

authorities, it is quite clear that the law and practice has always been that where a sale is set aside for any reason other than default on the part of the decree-holder, the attachment which has been obtained prior to the first sale being set aside revives to support a second or subsequent application for execution and no fresh attachment is necessary.

In Woodroffe's Code of Civil Procedure there is a passage at p. 963 which says that:

"revival of execution proceedings will not revive the attachment so as to prejudice the rights of strangers who have in the interval acquired an interest in the property."

The only authority cited for this proposition is *Sasirama Kumari* v. *Meherban Khan* (6). This was a judgment of Mookerjee and Coxe, JJ., but that case. in our opininon, is essentially different in its facts from the present one. That case dealt with an attachment before judgment; and it seems to us ahat different considerations apply to an attachment before judgment and an attachment after judgment and decree. Moreover, so far as far as we can see, what that case decided was that no attachment shall revive so as to prejudice a third person, and that an itself clearly distinguishes that case from the one now before us.

We are of opinion that once an attachment is properly and legally obtained and the property attached is put up to sale, and the sale is afterwards set aside that then the antecedent attachment revives and by reason of its revival supports a second application for leave to issue execution, unless the ground upon which the sale is set aside is default on the part of the decree-holder. For these reasons we are of opinion that the learned Judge was right in arriving at the conclusions at which he has arrived and that he very properly dismissed the judgment debtor's objections. Accordingly we dismiss this appeal with costs. The Rule which was issued in this matter (namely Civil Revision No. 299 of 1917) is also discharged.

Chapman, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(6) [1911] 9 I. C. 918.

A. I. R. 1918 Patna 602

CHAMIER, C. J. AND SHARFUDDIN AND CHAPMAN, JJ.

Emperor

v.

Mathura Prasad and *another* — Accused.

Criminal Ref. No. 1 of 1917, Decided on 12th March 1917, by Dist. Judge, Mozafferpur. D/- 21st December 1916.

Legal Practitioners Act (18 of 1879), S. 14 —Misconduct—Mukhtear removing petition of complaint and substituting another in its place without complainant's consent is guilty of gross misconduct.

Where a Mukhtear conspired with a Magistrate's Peshkar to remove from the Court a petition of complaint which had been filed by the complainant and which charged the Peshkar with complicity in a certain offence, and to substitute therefor without the consent of the complainant another petition which omitted the charge against the Peshkar:

Held: that the Mukhtear was guilty of gross misconduct under S. 14. [P 604 C 1]

Sultan Ahmed—for the Crown.

Pugh, Haribhusan Mukerjee and *Rajendra Prasad*—for Accused.

Judgment.—This case comes before us upon a report made by a Subdivisional Magistrate under S. 14, Legal Practitioners Act, 1879, regarding the conduct of two Mukhtears named Mathura Prasad and Narayan Prasad. The Magistrate finds that they have been guilty of professional misconduct, in that they conspired with the Magistrate's Peshkar to remove from the Court a petition of complaint which had been filed by one Mani Dusadh and which charged the Peshkar with complicity in a certain offence and to substitute therefor without the consent of the complainant another petition which omitted the charge against the Peshkar. The findings of the Magistrate have been challenged by Mr. Pugh and Mr. Hari Bhusan Mukerji who have appeared in this Court on behalf of the Mukhtears, but after careful consideration of the evidence recorded by the Magistrate and the arguments addressed to us we are of opinion that the findings of the Magistrate are correct.

It is proved that Mani Dusadh, having been severely beaten by several persons, went to the Collectorate Nazir and told him about the affair. The Nazir told one Durbal, who appears to be a tout, to take Mani to the hospital, but Durbal took him first to the Mukhtear Mathura Prasad. A complaint was drafted by Mathura Prasad in which the Peshkar was accused of

having ordered Mani to be beaten by the other accused, but the name of the Peshkar was not entered in the column provided for the names of the accused. The petition was faired out by the Mukhtear's brother and is Ex. 1. It is common ground that Mathura Prasad advised Mani not to make any charge against the Peshkar. Mathura Prasad says that he agreed and that the alteration which now appears in Ex. 1 was made then and there. Mani says that he did not agree. We think that there can be no doubt that Mani's account is correct. Mathura Prasad refused to sign the petition as the Peshkar was his friend and told Mani to get the petition filed by some other Mukhtear. Mani went to the Court and got the petition signed by the Mukhtear Narayan Prasad. Mani says that after making it over to the Peshkar (the Magistrate was not in the Court then) he went outside the Court and lay down in the porch and that the Peshkar with the petition in his hand, and both the Mukhtears and some others went to him and offered Rs. 10 to cut his (the Peshkar's) name out of the petition. Mani says that he refused and they went away. We are inclined to think that this incident has been overcoloured, but we see no reason to doubt that an effort was made to induce Mani to agree to the petition being altered and that he refused to agree. At or about this time a fresh petition of complaint (Ex. B) was drawn up which is on the lines of Ex. 1, but omitted all mention of the Peshkar. The stamp on Ex. 1, which had been punched, was removed from Ex. 1 and affixed to Ex. B and the latter was signed by both the Mukhtears. Narayan Prasad for some unexplained reason told Durbal that Mani's petition had been changed. Durbal passed on the information to Sukhram, Mani's son, and Durbal with Sukhram went and told the Nazir. Soon after that the Nazir met Mathura Prasad, who had a petition in his hand.

The Nazir looked at the petition and after obtaining some kind of explanation from Mathura Prasad returned the petition to him. Immediately after that Durbal came up with Sukhram and snatched the petition out of Mathura Prasad's hand. It proved to be the second petition, Ex. B. That petition was ultimately presented by Mani to the Magistrate. Meanwhile the Peshkar had put up the original petition, Ex. 1, with a report which runs as follows:

"One of the complaints the stamp of which was punched was lost from the place where the punch is made. An inquiry was being made for this when Babu Mathura Prasad, Mukhtear, produced the complaint without stamp on it saying that he has got this from one Durbal Pandey, a tout who had taken away the stamp and attached it to another complaint which was brought to him for signature."

The body of Ex. 1 has been altered so as to exculpate the Peshkar, but the original words are merely crossed out and can be read quite easily. The alteration is initialed by Mathura Prasad and the petition is signed at the foot by Mathura Prasad besides being signed by Narayan Prasad. We have already rejected Mathura Prasad's story that he made the alteration at his house and we have no doubt that the alteration was made after the petition was filed by Mani. The second petition, Ex. B, as already explained, exculpates the Peshkar but the Peshkar's name has been added to the list of accused persons. The signature of Mathura Prasad has been struck out and an attempt has been made to obliterate the signature of Narayan Prasad. Mathura Prasad says that he dictated the second petition at the instance of Durbal who said that there were too many alterations in the first one and that he, Mathura, signed it, but crossed out his signature immediately after making it because he found that the petition bore a punched stamp. Narayan Prasad denies that he never signed that petition. Both statements are clearly false, though it is not certain how, when and where Mathura Prasad got an opportunity of scratching out his signature or Narayan Prasad got an opportunity of obliterating his signature. But it seems that Durbal and Sukhram allowed the Nazir to take the petition, Ex. B, into his office and there is some evidence that Narayan got hold of it there. The Nazir and the Peshkar seem to have been on bad terms with each other and the former was probably only too pleased to find that the Peshkar was likely to get into trouble. It is not unlikely that the Nazir allowed both Mukhtears to withdraw their signatures as he did not wish them to get into trouble.

On the evidence there can, we think, be no doubt that Ex. 1 was handed over to the Peshkar in Court without the alteration which now appears in it: that the

Peshkar finding that he was accused of taking part in the beating of Mani approached the two Mukhtears; that an attempt was made to induce Mani to withdraw the charge against the Peshkar. Mani refused and Mathura Prasad then made the alteration in the petition and initialed it and also signed the petition. Then it was seen that the plan was a bad one and Ex. B was drawn up and the court-fee stamp transferred to it. When Durbal snatched Ex. B away from Mathura Prasad, the latter returned the original petition Ex. 1 to the Peshkar who promptly put up a report that it had been removed from the Court by some one and that Mathura had produced it saying that he had obtained it from Durbal. The object of the report was obviously to turn the tables on Durbal, who had caught Mathura Prasad with Ex. B. It is quite clear that neither Narayan Prasad nor Mathura Prasad had received any authority from Mani to draw up a fresh complaint and that both the Mukhtears acted as they did with full knowledge that they were doing wrong and with the object of screening the Peshkar. Both were guilty of gross misconduct while acting as Mukhtears. We direct that the certificates of both be cancelled and that both be debarred ftom further practice.

V.S./R.K. *Mukhtears' certificates cancelled.*

A. I. R. 1918 Patna 604

ROE AND JWALA PRASAD, JJ.

Bochai Mahton — Judgment-debtor — Appellant.

v.

Isri Jaji — Decree-holder — Respondent.

Misc. Appeal No 156 of 1917, Decided on 12th June 1918, against order of Dist. Judge, Darbhanga, D/- 9th June 1917.

(a) Civil P. C. (1908), O. 21, R. 54—Attachment—Object is to keep property in tact for possible purchaser.

The primary object of an attachment is that pending the sale the right of the judgment-debtor in the property shall be kept intact for the benefit of any possible purchaser. [P 605 C 1]

(b) Execution — Attachment—Consent to attachment—Effect of.

Consent to attachment means only that the owner of the property attached accepts the limitation put upon his right to alienate the property pending the attachment. [P 605 C 1]

(c) Civil P. C. (1908), S. 47—Exparte decree against defendant—Defendant consenting to attachment pending re-hearing of case—Suit decreed—Plaintiff applying for sale—Objection by defendant that holding was not transferable and he had no saleable interest it—Court holding that holding could not be sold but right, title and interest of judgment-debtor could be—Order is appealable—Whole question in contorversy was whether judgment-debtor had any right in holding—Judgment-debtor is not estopped form objecting to sale.

Plaintiff obtained an exparte money decree against the defendant. The latter applied for a re-hearing of the case and pending the re-hearing consented to the attachment of an occupancy holding belonging to him. The case was again decreed against the defendant and the plaintiff applied to have the decree executed by sale of the attached holding The defendant objected that the holding was not transferable and that he had no saleable interest therein. The Munsif held that the holding could not be sold but that the right, title and interest of the judgment-debtor could be sold. On appeal the District Judge held that the defendant having consented to the attachment was estopped from objecting to the sale:

Held : (1) that the Munsif's order was appealable; (2) that it was idle for the Munsif to put up to sale the right, title and interest of the judgment-debtor when the whole question before him was whether the judgment-debtor had any right, title or interest in the holding at all. (3) that the defendant was not estopped from objecting to the sale by the fact that he had consented to the attachment. [P 605 C 1]

Sivanarain Bose for *Sharoshi Charan Mittra*—for Appellant.

Hasan Jan—for Respondent.

Roe, J.—(*9th January* 1918).—In this case the respondent before us held a money decree obtained ex parte against the appellant. The appellant had applied for a re-hearing of his case and consented pending the re-hearing to an attachment of an occupancy holding which, it is now alleged, was not transferable by custom. On the case being again decreed against the appellant, the respondents applied to have the decree executed by sale of the attached holding. The appellant objected on the ground that he had no saleable interest in the holding. The learned Munsif dealt with this objection in the following words:

"The defendant consented to the Kasht land in question to be attached in this very suit. There is no evidence of transferability of occupancy holding. So the holding itself cannot be sold. But the right, title and interest of the judgment-debtor will be sold."

On appeal to the District Court the learned Judge found in effect that the appellant having consented to the attachment was estopped from objecting to the sale. He therefore directed that the holding be put up to sale. The date of his order being 30th June 1917, an appeal

was filed to this Court on 3rd July 1917. It appears that pending the appeal to the District Judge the property was actually sold on 14th March 1917. On 30th June 1917 an order was made by the learned Munsif refusing a further objection to the sale that the valuation had been wrongly made and on 7th July the sale was confirmed.

The judgment-debtor now appeals to this Court. It is contended, firstly, that the order of the Munsif is not appealable. This, so far as the Calcutta Court was concerned, was definitely decided in *Majed Hossein* v. *Raghubur Chowdhry* (1), *Gahar Khalipa Bipari* v. *Kasi Muddi Jamadar* (2); and in *Wahidunnissa* v. *Dip Narain Pershad* (3) it was assumed that an appeal would lie against an order such as the one before us. Upon the merits of the case we are of opinion that it was idle for the Court of the Munsif to put up to sale the right, title and interest of the judgment-debtor when the whole issue before him was—Has the judgment-debtor any right, title and interest at all? It was merely an unnecessary postponement of a certain litigation to allow the property to go up for sale with the question undecided, and in regard to the order made by the learned Judge we cannot conceive how consent to attachment can amount to estoppel of the objection to sale. Consent to attachment means only that the owner of the property attached accepts the limitation put upon his right to alienate the property pending the attachment. The learned vakil for the respondent argues that the only possible object of attaching the property was that it might ultimately be sold. But in this suggestion he has omitted to note the fact that the primary object of an attachment is that pending the sale the right of the judgment-debtor therein shall be maintained intact for the benefit of any possible purchaser. We cannot see that any estoppel has arisen in the case. It is necessary that the question whether the judgment-debtor had any right, title and interest in the property should be investigated before the sale takes place.

We therefore remand the case for a decision upon this issue. Is there in the village in which this holding is situate any custom whereby such a holding is transferable? The record should be returned with the finding of this issue before the 1st March. It is contended as a last resort by the respondent that any order we may pass upon this appeal will be infructuous inasmuch as the sale has already been effected. On analogy with the case of *Wahidunnissa* v. *Dip Narain Pershad* (3) we are not at present inclined to take that view. The matter will however be considered when the issue returns from the Court below.

Finding:—On remand the learned District Judge found that "there is a custom in the locality according to which holdings are transferred without reference to the landlords, the purchasers subsequently obtaining recognition from the landlords by paying a salami." The appeal was then heard by Roe and Jwala Prasad, JJ, on 12th June 1911.

Judgment.—(12*th June* 1918).—On the facts found by the learned District Judge we have no doubt that there does exist a custom of transfer in this village, the salami paid in each case being merely a mutation-fee. The appeal is dismissed with costs both of this hearing and of the hearing upon which the case was remanded.

V.S./R.K. *Appeal dismissed.*

(1) [1900] 27 Cal. 187.
(2) [1900] 27 Cal. 415.
(3) [1916] 1 P. L. J .406=35 I. C. 873(FB).

A. I. R. 1918 Patna 605

ROE, J.

Chandradhari Singh and *others*—Appellants.

v.

Tipan Prasad Singh—Respondent.

First Appeal No. 56 of 1916, Decided on 7th March 1917.

Court-Fees Act. (1870), S. 7 (4) (c) and Sch. 2, Art. 17, (1)—Creditor of ostensible owner attaching property—Suit by real owner for release of property—Court fee payable is Rs. 10—Ostensible owner if made party and possession prayed for against him then valuation in S. 7 (4) (c) applies.

Where the plaintiff's property is attached at the instance of a creditor of its ostensible owner and the plaintiff asked only for the release of his property from attachment, the court-fee payable would be Rs. 10 under Sch. 2, Art. 17 (1), Court-Fees Act.

If the ostensible owner is also joined as a party to the suit and a prayer is made against him for recovery of possession, the court-fee payable would be calculated upon the value of the property in accordance with S. 7 (4) (c) of the Act

If in such a suit the plaintiff is defeated and he prefers an appeal he must pay court-fees on the value of the property plus Rs. 10 for declaration.

If the plaintiff succeeds in the suit and an appeal is preferred by the defendants, the court-fee to be paid must be regulated by a consideration of the relief sought in appeal.

If the attaching creditor appeals the court-fee payable would be Rs. 10 only.

If the ostensible owner appeals, the court fee payable would be the court-fee calculated upon the value of the property. [P 606 C 1]

Order—I have heard the learned Government Advocate and Mr. Ganesh Dutt Singh on this question. The rule in these cases may be stated as follows:

Where a plaintiff asks only for the release of his property from attachment after a claim made by him in respect of that property has been rejected, the court-fees payable are to be calculated in accordance with Sch. 2, Art. 17, Cl. (1) and fixed at Rs. 10. If the ostensible owner is joined as a party to the suit and a suggestion made in the plaint that that ostensible owner is in wrongful possession of the property and a prayer made for restoration thereto, the court-fee payable on that prayer being a prayer for a relief consequential to the declaration, must be calculated upon the value of the property in accordance with S. 7 (4) (c) of the Act. If the plaintiff is defeated he must again pay court fees upon the value of the property plus Rs. 10 for the declaration. But if the plaintiff is successful, the court-fee to be paid must be regulated by a consideration of the relief sought in appeal. If the attaching creditor only appeals the relief sought is against the declaration only. The court-fee payable by him would be Rs 10 only. If the ostensible owner appeals the court-fee payable would be the court-fee calculated upon the value of the property. The court-fee payable in the case before me is therefore fixed at Rs. 10. The Registrar may take such steps as are warranted by the Code for recovery of the deficit court-fee not paid by the successful plaintiff.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 606

ROE AND IMAM, JJ.

Harihar Prosad—Plaintiff—Appellant.

v.

Genai Lal and *another*—Defendants—Respondents.

Misc. Civil Appeal No. 40 of 1917, Decided on 19th November 1917, from order of Addl. Sub-Judge, Monghyr, D/- 5th February 1917.

Civil P. C. (5 of 1908), O. 22, R. 10—Interest referred to in R. 10 must be one which will be affected—Court has discretion to add party—Deliberate delay is ground for rejecting application for addition of party.

The interest contemplated in O. 22, R 10, is any interest which will be vitally affected by the suit. The addition of a party however to a suit under that rule is a matter within the discretion of the Court. Where a plaintiff is guilty of deliberate delay in applying for the addition of a party, the Court may in the exercise of its discretion, reject the application. [P 606 C 2]

Rajendra Prasad—for Appellant.

Ram Prasad—for Respondents.

Roe, J.—This appeal arises from an order of the Subordinate Judge of Monghyr refusing the application of a plaintiff to add certain parties to the record and to amend the plaint. This plaint was filed in 1914. The application which has been refused was filed in 1917. The plaintiff's cause of action is an execution sale upon a certificate. His case is that the party upon whom the certificate was served was not in fact the holder of the property but had fraudulently obtained entry of his name in the Collectorate registers. He alleged that he had never been dispossessed of the property and sued merely for a declaration that the certificates of sale did not pass any title. In para. 7 of the written statement it was definitely stated by the defendants that the property in suit had been and was still in possession of Mr. Holloway, Manager of the Manjhaul concern. Three years after the filing of this written statement the plaintiff applied to the Court to bring Mr. Holloway upon the record in accordance with the provisions of O. 22, R. 10, and to give leave to amend the plaint by the inclusion of a statement to the effect that since the institution of the suit Mr. Holloway had dispossessed him, ana the addition of claims for recovery of possession and mesne profits.

Though we may accept the argument that the view taken in *Ram Kumar Lal Bhagat* v. *Raja Mukund Sahi* (1) was that the interest contempted in O. 22, R. 10, is any interest which will be vitally affected by the suit, it is clear that the addition of parties under O. 22, R. 10, is a matter within the discretion of the Court. We find it impossible to say, having regard to the deliberate delay by the plaintiff in making this application for the addition of a party, that the learned Subordinate Judge was exercising his discretion intemperately in refusing it. The dismissal of this appeal does no

1. (1917) 1 P L J 596=38 I C 227.

injustice to the plaintiff. No evidence has been recorded. The court-fees paid on the suit as framed were Rs. 10 only. It is still open to the plaintiff either to withdraw his suit against the defendants now on the record with permission to bring a fresh suit in the form in which he now wishes to amend his plaint, or to bring a fresh suit forthwith against the lessees of those defendants and to ask that this new suit be tried with the original suit. I would dismiss this appeal with costs. Hearing fee one gold mohur.

Imam, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 607

ROE AND JWALA PRASAD, JJ.

Janki Kuer—Applicant.

v.

Kukur Dusadh and *others*—Opposite Parties.

Civil Revns. Nos. 202, 219 to 222 of 1917, Decided on 11th January 1918, from decision of Special Judge, Champaran.

Civil P. C. (5 of 1908), S. 115—Law in respect of discretion wrongly inunciated—Inadmissible evidence allowed or evidence misunderstood—These errors do not involve question of jurisdiction and S. 115 does not apply.

Section 115 does not apply to cases where the law enunciated by the lower Court is wrong with regard to the discretion vested in it or where the evidence adduced was inadmissible or was misunderstood, inasmuch as all those are errors affecting merely the result of the cogitation of the Court upon the facts submitted to it : they are not errors involving any question of jurisdiction. [P 608 C 1]

P. Kennedy and *Baikuntha Nath Mittra*—for Applicant.

Hari Bhushan Mukerji, for *Amtica Prasad Upadhya*, *Rajender Prasad*, *Tribhuan Nath Sahai* and *Krishna Sahay*—for Oppcsite Parties.

Judgment. — These five cases arise from a decision of the Special Judge of Champaran upon appeals from the Assistant Settlement Officer decreeing in a modified form suits for enhancement of rent upon holdings held under the Bettia Raj. The applicant before us is the Court of Wards acting for the Bettia Raj. The grounds taken in revision are that the limitations put by the Special Judge upon the enhancement applied for were based upon an unlawful exercise of the discretion vested in him by S. 35, Ben. Ten. Act, The learned Judge in dealing with these cases considered, firstly, the disparity between the prices of staple food crops for the ten years immediately prior to the application for settlement of rent and the prices of those crops during the ten years immediately prior to that period. He ascertained that if the disparity alone be considered, the Raj was entitled to an enhancement of 4½ annas in the rupee, but in view of the fact that the disparity was an abnormal disparity, considered that it would be unfair to give an enhancement of 4½ annas, and therefore gave an enhancement of three annas only. Objection is taken to this line of reasoning on two grounds, firstly, that under S. 32 it must be taken that the legislature had considered, before settling periods of ten years as the periods to be compared, all possibility of abnormal rises and falls in specific years. It is argued that the ten years' rule was inserted after full consideration by the legislative Council and that the discretion vested in the Judge under S 35 was not meant to extend to a modification of the provisions of S. 32. It is pointed out in this connexion that S. 32 itself makes provision for any abnormal rise or fall by giving the Court power to select any period of ten years it chooses as the period to be comparad with the period immediately prior to the suit.

The second ground taken upon which fhe proceedings of the Judge should be set aside is, that the whole basis of the argument that the latter years were abnormal years is based, firstly upon evidence not legally admissible, and secondly upon a complete misunderstanding of that evidence. With regard to both these points we are of opinion that S. 115, Civil P. C., does not apply. It may be that the law enunciated by the learned Judge was wrong with regard to the discretion vested in him. It may be that the evidence adduced was inadmissible. It may be that it was misunderstood. But these are all errors affecting merely the result of the cogitation of the learned Judge upon the facts submitted to him. They are not errors involving any question of jurisdiction. This seems to us to have been the view taken in *Madhavrav Ganeshpant Oze* v. *Gulabbhai Lallubhai* (1) and the date of that decision indicates that the interferences with the decisions of the Courts below quoted in *I. L. R.* 18 *Bombay* had not the approval

1. (1899) 23 Bom 177.

of the Divisional Bench responsible for the latter decision. The latest case upon the point is *Balakrishna Udayar* v. *Vasudeva Aiyar* (2), in which at p. 58 (of 22 *C. W. N.*) their Lortships of the Judicial Committee held that the section is not directed against conclusions of law or fact in which a question of jurisdiction is not involved. It is to be noted further that in *Sajivan Mahto* v. *Gulab Chand Lal* (3) the Hon'ble the Chief Justice was of opinion that the decision of the District Court upon a point of law was manifestly erroneous. He declined to interfere on the ground that no appeal lay, and contented himself with pointing out the error of the District Court in order that a similar error might not be committed in future. In the case before us we are not prepared to discuss the question whether there was any error of law in the decision of the Special Judge, but must draw attention to the danger of an implied promise to the tenants of the estate contained in the judgment before us. The learned Judge says:

"I may state here that I propose to follow this decision in all future appeals from the Battiah Subdivision, whether or not the Assistant Settlement Officer may have stated the case as he has done in the present judgment, unless special reasons for departing from it are made out. The reasons given for the present decision are of general application, and it would not be fair that decisions should vary because one Assistant Settlement Officer states the same case differently from another. If Second Appeal No. 13 of 1916 were now before me I should decide it differently on this point."

The Court of Wards naturally anticipates that the special reasons referred to in this passage must be reasons not hitherto advanced. We have no doubt that this is not the true meaning of the passage. Inasmuch as no appeal lies from the judgment of the Special Judge, we are confident that all further appeals will be heard upon their merits, and the arguments on the points urged again considered. The learned Judge has been moved to change his opinion already in one direction. It may be that on further consideration he may be moved to change it in another. We may note for instance that there is said to be authority for the proposition that Government publications are not admissible in evidence. This is a point which should be considered before quotations are allowed from administration reports. Further it is said that the Court of Wards will be able to put before the Court at the next hearing figures which will show that it is possible to divide the 30 years for which price lists have been kept in this province, into not less than twenty successive decennial periods. If it is shown as the result of the comparison of twenty successive decennial periods that the tendency in any given direction has been steady, it can no longer be said that there is in the conditions of any one period anything abnormal. These points no doubt will be regarded as special reasons for reconsideration of the judgment now before us. For the reasons stated the applications fail and are rejected with costs, two gold mohurs in each case.

V.S./R.K. *Applications rejected.*

2. A I R 1917 P C 71=40 Mad 793=40 I C 650 (P C).
3. (1916) 1 P L J 409=35 I C 678.

A. I. R. 1918 Patna 608

CHAMIER, C. J. AND SHARFUDDIN, J.

Mahadeo Pahan— Plaintiff — Appellant.

v.

Bissessar Ram and *another*—Defendants—Respondents.

Letters Patent Appeal No. 46 of 1916, Decided on 5th January 1917, aginst decision of Mullick, J., in Second Appeal No. 2810 of 1914.

Decree—Setting aside—Compromise—Successor of Judge cannot set aside decree simply because it refers to property not subject matter unless for fraud or collusion.

Apart from fraud or collusion a Munsif has no jurisdiction to set aside a decree passed by one of his predecessors merely because that decree embodied a compromise which went beyond and was intended by all parties to go beyond the lands in dispute in the suit. [P 609 C 1]

Ray Guru Saran Prasad—for Appellant.

Atul Krishna Roy—for Respondents.

Judgment.—This appeal against the decision of Mullick, J., in Second Appeal No 2810 of 1914 arises out of suit No. 1263 of 1912 in the Court of the Munsif of Ranchi. In that suit the appellant before us was the plaintiff. He prayed for a declaration that a decree passed by a previous Munsif of Ranchi in suit No. 441 of 1908—*Bissessar Ram* v. *Mahadeo* and others—on 11th December 1908, was illegal and should be set aside as having been obtained collusively and fraudulently. The allegations of collusion and fraud have been negatived by the findings and may be disregarded. The decree which the appellant sought to have set aside

was one passed upon a compromise made between himself and one Bissessar. The compromise went beyond the property in dispute in the suit and amongst other things contained an admission on the part of Mahadeo that certain lands including plots Nos. 827, 831 and 834, were in the possession of the defendant Bissessar and his son Sukhan and that he, Mahadeo, had no claim to those plots. The allegations of collusion and fraud having been negatived, it is clear that Suit No. 1263 of 1912 should be dismissed. The present Munsif of Ranchi has obviously no jurisdiction to set aside the decree passed by one of his predecessors, merely because that decree embodies a compromise which went beyond and was intended by all parties to go beyond the land in dispute in the suit. It may be that the Munsif who tried the suit of 1908 should not have incorporated in his decree those portions of the compromise which did not relate to the lands in dispute before him but that does not entitle the present Munsif of Ranchi to set aside the decree. In my opinion the judgment of Mullick, J., so far as it directs the dismissal of Suit No 1263 of 1912, is obviously correct. Letters Patent Appeal No. 46 of 1916 must therefore be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 609 (1)

MULLICK AND THORNHILL, JJ.

Mahanand Missir—Objector—Appellant.

v.

Dasrath Missir and *another*—Applicant and Objector—Respondents.

First Appeal No. 204 of 1917, Decided on 24th June 1918, from order of Dist. Judge, Shahabad.

Hindu Law—Guardianship—Minor member of joint family—Guardian cannot be appointed in respect of minor's property.

No guardian can be appointed in respect of the property of a minor who is a member of an undivided Mitakshara Hindu family: 25 *All.* 407, (*P. C.*), *Foll.* [P 609 C 2]

Permeshwar Dayal—for Appellant.

Ganesh Dutt Singh—for Respondents.

Mullick, J.—It appears that the learned District Judge appointed the appellant, Mahanand Missir, guardian of the property of the minor Ambika Missir on condition that he gave security. At the same time the learned District Judge appointed one Dasrath Missir guardian of the person of the minor. Since the order of the District Judge, Dasrath has died and consequently, so far as the guardian of the person of the minor is concerned, the office is vacant; but it is contended on behalf of Mahanand Missir, who appeals to us, that the order appointing a guardian in respect of the property of the minor was illegal inasmuch as the minor was a member of an undivided Mitakshara family and had no separate property of his own. This contention is correct: see the judgment of their Lordships of the Privy Council, *Gharitullah* v. *Khalak Singh* (1). The order therefore appointing Mahanand Missir as guardian of the property of the minor will be set aside. So far as the guardianship of the person is concerned, Dasrath being dead, no orders are necessary.

Thornhill, J.—I agree.

V.S./R.K. *Order set aside.*

1. (1903) 25 All 407=30 I A 165 (P C).

A. I. R. 1918 Patna 609 (2)

DAWSON-MILLER, C. J. AND MULLICK, J.

Latafat Hussain—Appellant.

v.

Kaliker Nand Singh—Respondent.

Letters Patent Appeal No. 92 of 1917, Decided on 4th March 1918, from decision of Atkinson, J.

Record of Rights — Effect of entry—Entries in two consecutive records — Party aggrieved can ask for declaration in respect of second record only.

Where there are two consecutive finally published Record of Rights, it is competent to a party aggrieved by the second to ask for a declaration in respect of the second record without first displacing any prejudicial entries in the first record. [P 611 C 1]

Where there was an entry in the Record of Rights prepared in 1888-89 against the plaintiff and then again there was a similar entry in the record prepared in 1906:

Held: that the entry in 1906 was fresh invasion of the plaintiff's right, so that the plaintiff was entitled to sue for the correction of the record within six years of the second entry.

[P 611 C 2; P 612 C 1]

Muhammad Mustafa Khan and *Amir Hossain*—for Appellant.

Muhammad Tahir—for Respondent.

Mullick, J.—On 10th June 1905 the 1st and 3rd party defendants made an objection before a Settlement Officer conducting a settlement under Ch. 10. Act 8 of 1885, to the effect that the lands in suit, measuring an area of 18 bighas, 3 cottahs 16 dhurs had been wrongly recorded as the lakhiraj estate of the plain-

tiffs. The objectors succeeded before the Settlement Officer, and on 12th January 1906 a final record was published containing entries in accordance with the Settlement Officer's decision. On 11th January 1907 the suit out of which the present appeal arises was instituted before the Munsif of Purnea, for a declaration that the entries in the finally published record with regard to the lands in suit were incorrect. The suit was decreed by the Munsif, but was dismissed on appeal by the District Judge on 30th November 1908. There was then a second appeal to the High Court of Calcutta, with the result that the case was remanded to the District Judge for a decision upon the merits. I have to explain here that the District Judge who disposed of the case on 30th November 1908 was of opinion that no civil suit for a declaration, such as had been given to the plaintiffs by the Munsif, would lie and that the proper remedy of the plaintiffs was by way of an application under S. 106, Ben, Ten. Act, for the settlement of a dispute to the revenue officer. The High Court of Calcutta held that this position of the law had been misconceived by the learned Judge and that a suit in the civil Court would lie to declare that the entries in the finally published record were incorrect. When the case went back to the District Judge on remand, the decree of the Munsif was confirmed.

The learned District Judge found that in regard to 9 bighas 10 cottahs 16 dhurs of the land in suit the plaintiffs had established a title by purchase made in 1885, shewing that this area was part of the lakhiraj estate of one Mr. Beaufort. As regards the remainder of the land the learned Judge found that the plaintiffs had been in adverse possession for more than 12 years and that they had, at the time that the finally published record of 1906 was published, acquired a complete title as against the de fendants. Against this decree of the learned District Judge a second appeal was again preferred to the High Court. That appeal came before a learned Judge of this Court sitting alone for the hearing of second appeals and the learned Judge of this Court, disagreeing with the learned District Judge dismissed the whole suit on the ground that it was barred by limitation. It appears that an issue on the question of limitation was raised in the Court of the Munsif, but there was no distinct finding upon it. In the Court of the District Judge who last heard the case it was raised somewhat faintly, and the learned Judge came to the conclusion that as the suit had been brought within 12 years of the disposal of the objection case before the Settlement Officer in 1905 the suit was within time. The learned Judge of this Court however has gone upon a different ground and in order to consider his objection to the plaintiffs' suit it is necessary to take it in two parts. With regard to that portion in respect of which the plaintiffs have established their title by purchase from the 4th party defendants, the learned Judge finds that in 1888 or 1889 a survey and settlement under Ch. 10, Bengal Tenancy Act, as it then stood was made by a Revenue Officer and that in the course of that settlement the land in dispute was recorded as belonging to the patni tenure of the first party defendants in Mauza Chandi Katwa and that it was in the actual possession of the second party defendants as occupancy raiyats. In the opinion of the learned Judge of this Court the plaintiffs having failed to bring a suit to correct the entry in the finally published settlement record of 1888-89 within six years of publication, it is no longer competent to them to bring a suit for a declaration that the record of 1906 is wrong.

The contention is that as the prayer in the present suit substantially involves a correction of the record of 1888 89, the plaintiffs cannot be indirectly allowed to obtain a declaration which is barred by the law of six years' limitation. Now this raises the question as to what is the precise scope of the present suit. The present suit does not in any way concern itself with the entry in the Record of Rights published in 1888 89. It in terms only seeks for a declaration that the record of 1905 6 is incorrect. S. 111-A of the present Bengal Tenancy Act clearly confers the right to the plaintiffs to obtain a declaration in the terms of S. 42, Specific Relief Act. Is there anything in the law which compels the plaintiffs to ask for a declaration in respect of the previous record before they can obtain the reliefs they now seek? The learned vakil for the respondents before us has been unable to show any direct authority in support of his contention, but he has

suggested that the case of *Akbar Khan* v. *Turaban* (1) is authority for the proposition that in the present case time began to run against the plaintiffs upon the publication of the first record. I have carefully examined this case and I can find nothing in it which supports the general proposition that where there are two consecutive finally published Records of Rights, it is incompetent to a party aggrieved by the second to ask for a declaration in respect of that second record without first displacing any prejudicial entries in the first record. On the contrary this case is authority for the proposition that a plaintiff seeking a declaration is entitled to sue upon each successive invasion of his right, and the learned Judges of the Allahabad Court cite with approval two other judgments of their Court recognizing this principle, namely, *Ilahi Bakhsh* v. *Harnam Singh* (2) and *Robert Skinner* v. *Shankar Lal* (3). The same principle has been recognized in this Court in *Brij Bihari Singh* v. *Sheo Shankar Jha* (4) and *Ramji Ram* v. *Sadhu Saran Lal* (5). In each case it must be seen whether the invasion upon which the plaintiffs seek to base their cause of action was in fact an invasion or not. In *Akbar Khan's* case (1) above cited their Lordships of the Allahabad High Court dismissed the suit on the ground that where an adverse entry was made in 1895 in a settlement record and the plaintiff in 1903 failed to get that entry corrected by the Revenue Officer, such subsequent failure did not constitute a fresh invasion of his right. But that is not the case here. Here it is clear that in 1906 a fresh invasion of the plaintiffs' right occurred. They may have had a number of reasons for not pursuing their remedies in respect of the previous entry.

The entry did not create or extinguish any rights. It did not affect their title. It is found that they were in possession and there was no reason whatsoever why they should put the law in motion, for an owner in possession is not bound to sue upon every challenge to his rights. On the other hand in 1906 if they were of opinion that it was to their advantage to rebut the presumption created by the entry adverse to them, then although that entry in terms repeated the contents of a previous entry, there does not seem to be anything in the law which debars them from counting time from the date of the second entry. It is admitted that the suit is within the period of limitation under Art. 120 if time began to run from 12th January 1906. The case is not similar to *Amir-ud-Din* v. *Saidur Rahman* (6), where it was held that a plaintiff cannot by changing the form of his suit count a fresh period of limitation if in fact the real object of his suit is to obtain a declaration such as is contemplated by S. 111-A, Ben. Ten. Act. That case has no bearing on the facts of the present case. Therefore if the plaintiffs' title is not extinguished and it being in possession they were not called upon to bring a suit to declare their possession, then I see no reason why they should not be allowed to get a declaration that the Record of Rights of 1906 was incorrect. The learned Judge of this Court has relied upon the case of *Reves* v. *Butcher* (7). That case followed *Hemp* v. *Garland* (8). Both those cases were based upon an English Statute of Limitation in regard to the recovery of debts the payment of which had been contracted for in instalments.

It was held that if the contract was that upon the failure to pay any instalment the whole debt would become due, then, if the creditor omitted to sue within the six years allowed by statute from the date of the first default his remedy to recover not only the instalments but also the whole debt would be barred. Art. 75, present Limitation Act, has made a slight change, but it also recognises the principle that omission to sue for the first default within the statutory period would ordinarily render the creditor incompetent to recover the whole debt. That principle has no bearing upon the case before us. Here time began to run against the plaintiffs upon the publication of each record, that is to say, upon each invasion of their right, and they do not seek to violate the principle that time must run from the earliest moment. So far there-

1. (1909) 31 All 9=1 I C 557.
2. (1898) A W N 215.
3. (1909) 31 All 10n. =1 I C 556.
4. (1917) 2 P L J 124=39 I C 85.
5. (1917) 2 P L J 493=41 I C 11.
6. (1916) 1 P L J 73=35 I C 433.
7. (1891) 2 Q B 509.
8. (1483) 4 Q B 519.

fore as that half of the land in suit which has been found to be situated within the plaintiffs' purchased lakhiraj estate is concerned, the suit is within time and the decision of Atkinson, J. is, in my opinion wrong. There remains the other half of the property. The position in regard to this is that the District Judge finds that the plaintiffs obtained possession in 1885 and that although the land is situated within the revenue paying mauza of the first party defendants, the plaintiffs have by adverse possession acquired a complete title. It is contended by the defendants that as that title matured not later than 1897, the plaintiffs were bound to bring a suit within six years of 1897 in order to obtain a declaration that they had acquired a prescriptive title by adverse possession.

It is therefore urged that as the present suit was brought in 1907 it is out of time. Now it is quite clear that the plaintiffs were not bound to bring any suit at all for a declaration that they had acquired a prescriptive title. Their suit in 1907 was for the purpose of dispelling the cloud which threatened their title in the shape of the entry in the Record of Rights of 1906. I see no reason why they should not be entitled to a declaration under S. 42, Specific Relief Act; for being in possession all that they could demand was a mere declaration. The learned vakil for the respondents is unable to cite any authority which requires every person who has acquired a title by adverse possession to bring a suit for a declaration that he has acquired such title. So far as the entry of 1888-1889 is concerned, the plaintiffs had not at that time perfected their title and consequently the entry, so far as it shewed the title of the first party defendants, was correct and the plaintiffs were not competent at that time to bring any suit for a declaration regarding the correctness of that entry. Here the cause of action in respect of the entry in the Record of Rights clearly arose when the record was finally published in 1906. The result, therefore is that with regard also to this second half of the land in suit the bar of limitation does not apply and the plaintiffs, having brought their suit within six years of the publications of the Record of Rights of 1906, are well within time. The result is that the judgment of the learned Judge of this Court will be set aside and the appeal decreed with costs in all Courts.

Dawson-Miller, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 612

CHAPMAN AND ATKINSON, JJ.

Jagdish Narain Prasad Singh and *others*—Plaintiffs—Appellants.

v.

Harbans Narain Singh—Respondent.

Civil Misc. Appeal No. 271 of 1916 Decided on 29th June 1917 from a decision of Sub-Judge, Patna, D/-24th July 1916.

Civil P. C. (1908), O. 9, R. 9—Order dismissing petition to restore suit dismissed for default is not appealable.

No appeal lies from an order passed under O. 9, R. 9, dismissing a petition to restore suit dismissed for default. [P 613 C 1]

Ganesh Dutt Singh and *Surendra Mohan Das*—for Appellants.

Gangadhar Das and *Sivanandan Ray*—for Respondents.

Atkinson, J.—This appeal comes before us at the instance of the plaintiffs. It appears that the plaintiffs instituted a suit on 27th June 1914. Various applications were made by the plaintiffs for time pending the date appointed for the final disposal of the suit. The suit was ripe for hearing on 22nd April 1915. Antecedent to this date the plaintiffs had obtained time on four separate applications specified in O. 14, 15, 16 and 17. On the date appointed for final disposal of the suit, the plaintiffs were not present. Their names were called out several times within the precincts of the Court, and the learned vakil who appeared on behalf of the appellants stated to the Court that he had no instructions. The vakils for the defendants were in attendance before the Court and the learned Subordinate Judge dismissed the suit for default of appearance. From that order there was no appeal. On 20th August 1915, the plaintiffs filed a petition before the Subordinate Judge seeking to set aside the order of dismissal of the suit and praying for the restoration of the case. An application by way of petition for time for the hearing of the aforesaid petition came before the learned Subordinate Judge on 8th January 1916, and the learned vakil for the plaintiffs attended before the Court and stated that he had no instructions. The defendants were duly represented before the Court and accordingly

the application was dismissed with costs to the opposite party. On 24th July 1916 the learned Subordinate Judge dealt with the application which had been made to him under O. 9, R. 9, Civil P. C. He set out fully the history of the case and the facts that had been established before him and he declined to grant the prayer set forth in the petition, and from that order this appeal has been taken by the plaintiffs.

It is argued by Mr. Das who appears on behalf of the defendants that no appeal lies, inasmuch as this is not an order dismissing a suit within the meaning of O. 43, R. 1, Cl. (c), Civil P. C; it is an order merely interlocutory in character and not an order dismissing a suit. Various authorities have been relied upon in support of that proposition, namely, the cases cited as *Jang Bahadur* v. *Mohadeo Prosad* (1) *Ningappa* v. *Gangawa* (2), *Ghasiti Bibi* v. *Abdul Samad* (3), *Charu Chandra Ghosh* v. *Chandi Charan Roy* (4). All these cases appear to be directly in point; and in addition they are fortified by the decision of two members of this Court to the like effect reported as *Ram Nandan Prasad* v. *Ramchandra Prosad* (5). Mr. Das refers us to S. 141, Civil P. C., which enacts that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of jurisdiction. But Mr. Das contends that that section does not confer a substantive right not otherwise given by the Code. Much stress is laid upon the fact that in S. 104, Civil P. C. it is expressly declared what orders shall be appealable and no others. Now the order made in this matter under O. 9, R. 9, is not within the category of orders against which an appeal lies as provided by S. 104, Civil P. C. No appeal would lie under S. 141, Civil P. C., having regard to the line of authority which had laid down what is the proper interpretation of O. 43, R. 1, Cl. (c), which applies to this case, and inasmuch as the order in this case was not an order dismissing a suit, but merely an order dismissing a petition to restore the suit, no appeal lies. We therefore on this ground dismiss this appeal with costs. We allow one set of costs measured at three gold mohurs to be paid to the clients represented by Mr. Das.

Chapman, J.—I agree.

V.S./R.K. *Appeal dismissed.*

1. (1904) 31 Cal 207.
2. (1886) 10 Bom 433.
3. (1907) 29 All 596.
4. (1915) 27 I C 492.
5. (1917) 42 I C 613.

A. I. R. 1918 Patna 613

MULLICK AND THORNHILL, JJ.

Bankey Behary Singh and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 167 of 1918, Decided on 5th June 1918, from order of Sess. Judge, Monghyr, D/- 12 April 1918.

(a) Criminal P. C. (1898), S. 537—Warrant initialled but not fully signed by Magistrate is not illegal—Irregularity is curable.

A Magistrate is guilty of gross carelessness in not signing his name in full on a warrant, but that in itself is not an illegality which would vitiate the arrest. It is a mere irregularity covered by S. 537. [P 614 C 1, 2]

(b) Criminal P. C. (1898), S. 77—Police Officer directed to make arrest need not be described by name in warrant.

Section 77 merely directs that a warrant shall be ordinarily directed to one or more police officers. It does not require that the name of the Police Officer to whom a warrant is in the first instance directed should be inserted in the warrant as well as his designation. [P 614 C 1, 2]

(c) Criminal P. C. (1898), S. 80—Omission to explain contents of warrant to accused does not invalidate arrest.

All that S. 80 requires is that the accused shall have reasonable opportunity of knowing on what charge he is being arrested and before what Court he is to appear, so that he may take steps for arranging for his defence. The omission on the part of the constable to explain to the accused the particulars of the warrant after showing him the warrant would not invalidate the arrest. [P 615 C 1, 2]

Syed Hasan Imam and *Gour Chandra Pal*—for Petitioners.

Manohar Lal—for the Crown.

Mullick, J.— The petitioner Banke Behari Singh has been sentenced under S. 353, I. P. C., to rigorous imprisonment for three months and a fine of Rs. 30 and under S. 224, I. P. C., to a concurrent term of rigorous imprisonment for three months. The petitioners Jagdip Singh, Umedi Singh and Sawkhi Singh have been sentenced under Ss. 225 and 353, I. P. C., to concurrent terms of rigorous imprisonment for three months each.

The case for the prosecution is that a warrant was directed by the Deputy Magistrate of Monghyr to the Sub-Inspector of Lakhi Serai for the arrest of Banke Behari Singh on a charge under S. 420, I. P. C. There was in the warrant a

direction that if the accused gave bail himself for the sum of Rs. 100, then he was to be directed to appear before the Deputy Magistrate on 7th November 1917. That warrant was directed by the Sub-Inspector of Lakhi Serai to a constable named Ram Saran, who alleges that he arrested Banke Behari Singh opposite the door of one Jehal Singh on 23rd November 1917. Banke Bihari Singh maintained that no warrant had been issued against him and after some conversation the constable proceeded to take him to the house of one Jhagru Singh, so that the accused might execute a bail bond. On the way to Jhagru Singh's house it is alleged that the remaining petitioners assaulted the constable and knocked him down and that Banke Behari Singh in the course of the struggle picked up the constable's pugri and tore it to pieces and there after escaped. It is necessary to state that Banke Behari Singh was subsequently tried for the substantive offence for which the warrant was issued and was acquitted.

Now there was an appeal against the convictions and sentences before the Sessions Judge of Monghyr, who declined to interfere, and hence the present application for revision to this Court. The main point urged before us to day is that the warrant was illegal and therefore no offence under Ss. 353, 224 and 225 could have been committed. The first ground upon which the warrant is attacked is that in the first part of it the Deputy Magistrate has only affixed his initials although in the concluding part, which relates to the taking of bail, he has signed him name in full. Reliance is placed upon S. 75, Criminal P. C. and on the case of *Abdul Gafur* v. *Queen Empress* (1). So far as that case is concerned, it does not support the contention of the learned vakil, for in that case the principal reason for holding the arrest to be illegal was that the contents of the warrant had not been explained to the accused before his arrest and that the accused had not had a chance of seeing the warrant and reading it. In my opinion the Deputy Magistrate was guilty of gross carelessness in not signing his name in both places in the warrant, but that in itself is not an illegality which, in my opinion, vitiates the arrest. S. 537. Criminal P. C., expressly states that where a document is required to be signed in full and there is some defect as to the signature then that defect constitutes an irregularity within the meaning of this section. Here the defect in regard to the signature, is, in my opinion, only an irregularity which does not affect the validity of the arrest.

It is urged that that illustration in S. 537, Criminal P. C. only relates to a case in which the defence to the substantive charge is that the accused has not been properly brought before the Court and that it would not cover a case in which the illegality of the warrant itself is a fact in issue. In my opinion the illustration in the form in which it appears in S. 537 does not necessarily support such an inference. The defect in this case was a defect of minor importance, which really does not go to the rcot of the case. The first point therefore fails. The next point is that the warrant was not properly directed to the Sub-Inspector of Lakhi Serai inasmuch as the name of that Police Officer has not been specified, and reliance is placed on Ss 75, 77 and 79, Criminal P.C., as well as upon Form 2, Sch. 5, which gives an illustration of the form in which a warrant is to be drawn up.

Now S. 77 merely directs that a warrant shall be ordinarily directed to one or more Police Officers. It does not say that the name of that Police Officer is to be inserted in the warrant as well as his designation. On the other hand the schedule no doubt suggests that both name and designation are to appear in the warrant. S 554, Criminal P. C, on the authority of which the schedule is framed, expressly states that the forms given in the schedule are liable to be varied according to the requirements of each particular case. It would certainly be extremely difficult to carry on the police administration of the country if every warrant had to be directed by name to a Police Officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place.

The learned vakil has brought to our notice the case of *Durga Tewari* v. *Rahaman Buksh* (2), but that case is no authority for the proposition that the Police Officer to whom a warrant is in the first instance directed must be directed by name and that it will not be sufficient to

1. (1896) 23 Cal 896.

2. (1900) 4 C W N 85.

merely describe him by his official designation. In that case the warrant was in the first instance directed to the Court Sub Inspector and the learned Judges of the Calcutta High Court did not take any objection to the warrant on the ground that the Court Sub-Inspector's name was not entered in the warrant. The ground upon which objection was taken was that the Court Sub-Inspector had endorsed the warrant to another officer and in doing so omitted to describe that officer by name. The learned Judges rested their decision on S. 79, Criminal P. C., which clearly requires that where a warrant is directed by the officer originally entrusted with its execution to another officer, the name of the latter officer must appear upon the endorsement. Here thar section does not apply. Therefore the second ground taken must also fail. The third ground is that the terms of S. 80, Criminal P C, were not complied with. Now the constable who made the arrest states that when he found the accused Banke Behari Singh, he showed him the warrant saying that he would take bail if it was offered. Banke Behari asserted that no warrant had been issued against him. The constable thereupon caught hold of Banke Behari's right hand.

Now S. 80 requires that the substance of the warrant shall be notified to the accused and that if the accused demands it, he shall have an opportunity of reading it himself. I agree with the Courts below that the terms of this section were substantially complied with. The construction suggested on behalf of the appellant would on the other hand make an arrest practically impossible in the case of captures after pursuit or where the accused does not understand the arresting officer's language. It seems to me therefore that all that the section requires is that the accused shall have reasonable opportunity of knowing on what charge he is being arrested and before what Court he is to appear, so that he may take steps for arranging for his defence. Here the accused had sufficient opportunity of reading the warrant itself. The warrant was partly in English and partly in Hindi and it does not appear that any obstruction was offered to his getting it interpreted. The omission on the part of the constable to explain to the accused the particulars of the warrant after showiug him the warrant cannot, in my opinion, invalidate the arrest. Reliance is placed upon *Abdul Gafur* v. *Queen Empress* (1) and *Satish Chandra Rai* v. *Jodu Nandan Singh* (3), but these cases throw no new light upon the point and were decided upon facts which established that the accused had not had a reasonable opportunity of ascertaining the contents of the warrant. Therefore the third ground also fails.

Finally it has been urged that so far as Banke Behari is concerned, he did nothing which would render him liable to conviction for the offence of assaulting the constable in the execution of his duty. Now the evidence is that Banke Behari struggled to wrench himself free while the constable was being assaulted by the other petitioners and that when the constable was lying on the ground, Banke Behari picked up his pugri and tore it up. Upon these facts the learned Courts below have held that there was an assault within the meaning of S. 353, I. P. C., that is to say, that accused by his acts and gestures created an apprehension in the mind of the constable that he would be assaulted. In this view of the case the technical offence of assault has been proved and therefore the conviction under S. 353, I. P. C., is correct. So far as the other petitioners are concerned, the assault upon the constable has been conclusively proved. The act of the petitioners was unjustifiable and lawless and in my opinion the convictions and sentences must be affirmed. The application is dismissed.

Thornhill, J.—I agree.

V.S./R.K. *Application dismissed.*

3. (1899) 26 Cal 748.

A. I. R. 1918 Patna 615

ROE AND IMAM, JJ.

Nawab Choudhry and *others*—Plaintiffs—Appellants.

v.

Lok Nath Singh and *others*—Defendants—Respondents.

Appeal No. 95 of 1916, Decided on 5th November 1917, from original decree of Sub-Judge, First Court, Shahabad, D/- 21st March 1916.

Limitation Act (1908), Art. 89—Refusal implies refusal on specific demand—Allegation that defendant "put off" giving accounts is not such refusal.

The refusal contemplated in Art. 89 is a definite refusal. Before a failure to render accounts can be accepted as a refusal to render accounts,

there must be definite evidence that a definite demand was made upon a definite date. It is insufficient to say that 'demands were made from time to time and the plaintiffs were "put off" by the defendants. "Put off" means postponed and postponement is by no means tantamount to refusal. [P 618 C 1]

V. L. N. Singh and *Ambika Prasad Upadhya*—for Appellants.

Kulwant Sahay, Siveshwar Dayal and *Parmeshwar Dayal*—for Respondents.

Roe, J.—The plaintiffs in this appeal are aggrieved by a decree of the Subordinate Judge of Shahabad limiting their right to take accounts from defendant 1 to a period of three years from the date of suit. The respondents are aggrieved that any decree for accounts should have been made against them and have filed a cross-appeal. The facts of the case are that in November 1902, corresponding to the early days of 1300 F. S., the father of the principal plaintiff by name Sorab Chowdhry in partnership with the principal defendant Lok Nath Singh made a purchase of an eight annas share in Mauza Itaur, which was 16 miles from the home of Sorab Chowdhury but was the residence of Lok Nath Singh, Lok Nath Singh having also previously acquired a two-anna share in the village.

Sorab Chowdhry died in 1312. He was succeeded as karta of the Chowdhry's family by Pargan Chowdhry, who died in 1320. There was a Cadastral Survey in the village from 1318 to 1320. It is the case of the plaintiffs that there were differences of opinion between themselves the Chowdhries, and Lok Nath's family which resulted in a determination to open separate accounts with the raiyats from the year 1320. Separate accounts were accordingly opened and it is asserted by the plaintiffs that they had in vain attempted to obtain from Lok Nath Singh an account of the collections from 1310 to 1319. Their story is that owing to Lok Nath's residence in the village and his possession of the two anna share it was thought convenient by Sorab and Pargan respectively to entrust the whole of the collections of the village to Lok Nath, with instructions to him to divide the profits equally year after year with the Chowdhries. Having been refused an account, the plaintiffs instituted this suit within three years of what they alleged to be the termination of Lok Nath's agency and claimed an account for the whole period of the agency, that is to say, 1310 to 1319. Joined with Lok Nath and members of his family in the suit was the Patwari Bishun Lal and the two other amlas of the Katchery.

The defence to the suit was that far from Lok Nath being entrusted with any collections in the village it was Sorab himself who was entrusted by Lok Nath with this collection. It was common ground of plaintiff and defendants that Bishun Lal Patwari had no other duties but the preparation of the accounts, the actual collection being undertaken in the absence of a Tahsildar by the proprietors themselves. The learned Subordinate Judge found as a fact that the agency of Lok Nath had been proved, but is of opinion that inasmuch as the constant demands for accounts made by the plaintiffs from Lok Nath had not met with any response, failure to render accounts must be construed as refusal, and therefore the period of limitation will run from the date of the suit. He therefore gave a decree for an account for the year 1319. Against the decree made there is an appeal and a cross-appeal.

It is convenient to deal first with the cross appeal, for if the cross-appeal succeeds the main appeal itself must fall to the ground. The point in issue before us is: Has it been proved that Lok Nath Singh was the agent of the Chowdhry family? The learned Subordinate Judge in dealing with this question seems to us to have dealt so loosely with the question before him as to render his judgment of very little assistance to us. We fully accept the view that where the lower Court has before it witnesses, it has a clearer opportunity of judging the rights and wrongs of the case than an appellate Court and where it is shown to us that the lower Court has taken into consideration all the points that could possibly have been placed before it, we should be slow to disturb the finding of fact arrived at by the lower Court. The learned Subordinate Judge begins his judgment upon the issue by saying, "Plaintff 1 has one into the witness box and examined several witnesses." He goes on to say later:

> "The plaintiffs have examined tenants, who depose that the collection of the 16-anna share used to be made by the defendant."

The plaintiff has in fact examined only three tenants. It is known that the collections of the village amount to twelve

hundred rupees a year. The claim for accounts covers a period of 10 years. The only rent receipts produced by the plaintiffs are three in number, one being serial No. 5 of 1311, one serial No. 7 of 1311 and the 3rd serial No. 1 of 1312. The total amount for which Lok Nath has signed as acknowledgments on these receipts is Rs. 12, plus Rs. 9 plus Rs. 3. Twenty-four rupees out of a total due of Rs. 1,200. Moreover, in examining the evidence of these three tenants we find that the first admittedly has litigation with Lok Nath Singh, and that the third accuses him of having taken possession of his orchard and converted it into bakasht land at the last survey. Nothing in particular can be urged against the second tenant-witness, but he has produced no rent receipts to show that his statement as to collection by Lok Nath is true. The evidence that Lok Nath actually collected the rent is extremely vague and unsatisfactory. The evidence that any agreement was made between Sorab and Lok Nath that Lok Nath should collect the rent, is even more unsatisfactory. The only persons that speak of it are Nawab Chowdhry, the principal plaintiff, and Tribeni Sahai, who from 13 20 has been appointed to be patwari for the plaintiff.

On the plaintiffs' evidence it is apparent that the defendants had practically no case to answer. All that could be said againt them was that as Lok Nath had a two-annas share in the village, and as Sorab Chowdhry lived sixteen miles away from the village, it was by no means improbable that some arrangement should have been made with Lok Nath for the collection of rent, but there is no proof of this fact. On the plaintiffs' case we are bound to say that such flimsy evidence should not have been accepted as proof of the issue before the Court.

The case of the plaintiffs seems, according to the learned Subordinate Judge, to have been greatly improved by the discrepancies in the defendants' evidence. In the first place, it is always unsatisfactory in this country to prove a man's guilt by criticising his defence. In the second place, the learned Subordinate Judge seems to have misunderstood a great part of the evidence which he has quoted from the mouth of the defence witnesses. For instance, he speaks of the discrepancies in the evidence as to whether Lok Nath himself collected the rent of his two-annas patti as a strong indication of the truth of the plaintiffs' case. The words used by the Subordinate Judge are:

> "There is evidence that the defendant 1 himself collects rent in respcet of that share, although defendant 1 denies his personal collection some witnesses of his speak to it."

We have searched the defence evidence in vain for any denial by Lok Nath of his collection of the two annas rent. All that the defendant said was that he did not collect any rent on behalf of the plaintiffs. It may be and probablv is true that the learned Subordinate Judge's criticisms of the evidence of the agreement that Sorab should collect the rent is justified by the circumstances of the case. It is not probable that Sorab, who lived sixteen miles away, would have consented to undertake the whole collections of the village, nor is it likely that he would have been selected to do so in preference to a resident proprietor, but that the defendant and his witness, the Patwari, have overstepped the mark in stating their defence is not sufficient to prove that the case against them was a true case. It is common ground that Bishun Lal kept the accounts. Bishun Lal has been brought on the record as a defendant in the case. He has filed the accounts from 1310 to 1319, and the accounts for the years 1310 and 1311 were certainly in existence in the years 1908 and 1909, in which years they were filed before the civil Courts and stamped with Court seals. Bishun Lal, we have little difficulty in believing, drew up every year a statement of the amounts due to himself and to the proprietors, and we note that in drawing up these accounts he took good care to see that his own interests were not neglected.

The whole series of accounts filed appear to be genuine and we are satisfied that these accounts were made from year to year. As to who was responsible for the money, the whole record leaves us in a state of doubt. It is extremely improbable that people in the position of the Chowdhries would have allowed themselves to be defrauded year after year of the sum due to them, as shown in these accounts. The story that the accounts year after year were refused is on the face of it an idle one. All that the Chowdhries had to do, was to go to Bishun Lal and ask him to show them the

accounts. No papers were required from Lok Nath Singh for this purpose. To what extent the plaintiffs have been deprived by Lok Nath of the sums due to them or whether Lok Nath was ever entrusted with collecting money on their behalf is a point on which we are left owing to the vagueness of the evidence, in the dark. One thing we do know, and that is that Pargan was not a child. He was entrusted with the collection of all sums due under rent decrees from tenants and he collected these rent decrees in a most efficient manner. Upon the rent decrees being obtained the tenants-judgment-debtors were forthwith persuaded to pay the amount into Court. In these proceedings Lok Nath Singh took no part whatever. When it was neces sary that his name should be signed it was signed by Jai Ram or by Nawab Chowdhry. If Pargan was capable all these years of looking after himself in the civil Courts as aginst the raiyats of the estate, we can conceive no possible reason why he should not be equally capable of looking after himself as against Lok Nath Singh. We have the strongest feeling that the case brought by the plaintiffs is not a true case. We therefore, dismiss the whole suit with costs.

The cross-appeal must, therefore, be decreed. With regard to the appeal itself we may say but for the cross appeal it would have succeeded. The refusal contemplated in Art. 89, Limitation Act, is a definite refusal. We are entirely in agreement with the rulings quoted before us from *Chandra Madhab Barua* v. *Nabin Chandra Barua* (1), *Easin Sarkar* v. *Baroda Kishore Acharyya Chaudhury* (2), *Madhusudan Sen* v. *Rakhal Chandra* (3). Before we could accept a failure to render accounts as a refusal to render accounts, there must be definite evidence that a definite demand was made upon a definite date. It is insufficient to say that demands were made from time to time and the plaintiffs were put off by their agents. "Put off", as we understand it means postponed. Postponement is by no means tantamount to refusal.

The cross-appeal having succeeded, the appeal fails, and the appellants must pay all the costs in this Court and in the Court below.

Imam, J.—I concur.

V.S./R.K. *Appeal dismissed.*

1. (1913) 40 Cal 108=18 I C 735.
2. (1910) 5 I C 186.
3. (1915) 43 Cal 248=30 I C 697.

A. I. R. 1918 Patna 618

ROE AND JWALA PRASAD, JJ.

Dhakeshwar Prasad Narain Singh and *another*—Plaintiffs—Appellants.

v.

Pookhar Panday and *others*—Defendants—Respondents.

Appeals Nos. 1465 to 1471 of 1916, Decided on 12th February 1918, from appellate decrees of Dist. Judge, Gaya.

Civil P. C. (1908), S. 11—Issue must be heard and finally decided.

There can be no res judicata under S. 11 unless the issue was heard and finally decided by the Court. The refusal of the Court to determine an issue raised in a case does not operate as res judicata in a subsequent suit. [P 619 C 2; P 620 C 2]

Gangadhar Das and *G. D. Singh*—for Appellants.

Kailash Pati—for Respondents.

Jwala Prasad, J.— These appeals arise out of suit for rent brought by the appellants against the respondents for the years 1317 to 1320 Fasli. The claim for 1317 and 1318 was bhaoli and naqdi. The Subordinate Judge decreed the claims in all the suits in part. The learned District Judge in appeal further reduced the claim for the years 1319 and 1320 to the amount admitted by the defendants-respondents. As regards the claim for bhaoli rent for 1317 and 1318, the learned District Judge set aside the decree of the Subordinate Judge and dismissed the suit on the ground that the claim was barred by the principle of res judicata. The plaintiffs have therefore come to this Court in second appeal. The following contentions have been raised on their behalf: (1) that the learned District Judge wrongly applied the principle of res judicata to the claim for 1317 and 1318; (2) that the learned District Judge should not have allowed bhaoli rent for 1319 and 1320 according to the admission of the defendants, but should have allowed the amount determined by the Subordinate Judge. The amount of naqdi rent allowed by the District Judge in respect of the years 1319 and 1320 has not been disputed in this appeal. As to the second contention, the District Judge has recorded a clear finding of fact that the plaintiffs had given no definite idea of the amount of outturn. This finding has been arrived

at upon the consideration of the plaint and the evidence given in the case, notably of the Patwari who admitted in his evidence that no appraisement or even detailed estimate of the crop was made in respect of the lands of the tenants sued. There is absolutely no reason why this finding should be disturbed in second appeal. This disposes of the contention of the appellants so far as the claim for the years 1319 and 1320 is concerned. The first contention of the appellants deserves a more careful consideration. The principle of res judicata has been applied upon an earlier decision in Title Suit No. 87 of 1912 by the then Subordinate Judge of Gaya, Babu Prayag Nath, of the claim of the plaintiff in respect of the years 1317 and 1318. In that suit the finding of the Subordinate Judge was as follows:

"It is therefore impossible to ascertain in these suits the quantity and kind of crops in defendant's bhaoli lands. The determination of the question involved in this issue 4 must be left for separate rent suits to be hereafter brought by the plaintiff."

The judgment was concluded in the following words:

"That the plaintiff's claim for rent of bhaoli land be dismissed leaving the plaintiffs at liberty to sue for the rent of such land."

The decree prepared in the suit also contains the same words The defendants in that case went in appeal to the High Court and objected to the aforesaid order of the Subordinate Judge giving liberty to the plaintiffs to bring another suit for the rent for the years in claim. The ground taken in the memorandum of appeal is as follows:

"That the plaintiffs not being able to prove their claim the lower Court should have dismissed it and was not justified in ordering that the plaintiffs were at liberty to bring another suit for its recovery, specially when no such prayer was made by the plaintiffs."

Upon the above point taken in appeal, his Lordship of the Calcutta High Court (Fletcher, J.) observed as follows:

"The lower Court has left the question as to the amount of rent open to be settled in any future suit that may be brought by the parties. We do not express any opinion as to whether the Judge had or had not the power of giving the plaintiffs the liberty to withdraw from the suit so far as that claim is concerned. That must be decided in proper proceeding that the plaintiffs may choose to institute."

The result was that the order of the Subordinate Judge leaving the question to be decided in another suit by the plaintiffs remained undisturbed by the High Court. I do not think the plaintiffs are precluded from laying their present claim for the bhaoli rent for the years 1317 and 1318 by reason of the above order of the Subordinate Judge in their former suit. Although an issue was raised in that suit yet the Subordinate Judge rightly or wrongly did not decide the issue and there can be no res judicata under S. 11 unless the issue was "heard and finally decided" by the Court. This is an essential condition for the application of the principle of res judicata. The learned District Judge has relied on *Sukh Lal* v. *Bhikhi* (1). But in that case it was held upon evidence that the plaintiff was entitled to one-third share of the land in suit. The issue about the title of the plaintiff was decided and determined; yet the Munsif wrongly dismissed the suit, adding that his order will not prevent the plaintiff from instituting another suit for the one-third share decided in his favour. The second suit by the plaintiff brought for possession of the one-third share was held barred by res judicata on the ground that his title was declared and decided in the first suit and that the Munsif wrongly dismissed the whole claim instead of granting him relief in respect of one-third interest to which he was entitled and the plaintiff could rectify the decree by a review or an appeal. It was pointed out by Mahmud, J., that "where an issue has been raised and evidence received and adjudication arrived at, the suit does become res judicata."

This ruling therefore does not apply to the present case, inasmuch as although an issue was raised there was no adjudication arrived at by the Subordinate Judge in the first suit. The present case is rather similar to the case of *Ram Charan Bahadur* v. *Reaj-ud-din* (2), where the Courts declined to decide the issue and dismissed the plaintiff's suit without prejudice to his right to bring a fresh suit for possession of the same lands. It was held that what

"was left undecided in the former suit cannot be said to have been heard and finally decided within the meaning of S. 13 of the Code."

The following observation in that case applies to this case as well:

"It may be that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised, and to have tried those issues upon the best evidence that the parties could adduce. But we are not prepared to say that the course taken by those Courts was ultra vires. They considered rightly or wrongly, that they were not in a position to try the main question in the cause"

1. (1889) 11 All 187.
2. (1884) 10 Cal 856.

In *Langmead* v. *Maple* (3) the plaintiff's suit was dismissed without prejudice to his right to bring another suit. It was held that the subsequent action by the plaintiff was not barred by the principle of res judicata. Willes, J., laid down that

"the conditions for the exclusion of jurisdiction on the ground of res judicata are that the same identical matters shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted and that it shall have been finally decided."

The above principle is affirmed by Lord Macnaghten in *Sheosagar Singh* v. *Sitaram Singh* (4), where his Lordship says as follows:

"To support a plea of res judicata it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided.'"

That case is much stronger than the present one, as in that case the plaintiff's suit was dismissed on merits by the Subordinate Judge and in appeal the High Court, while dismissing the case, withheld any decision on the issue concerning the merits of the case. There can be no res judicata when the question is left open: vide *Gungabishen Bhugut* v. *Raghoonath Ojha* (5), *Chunder Coomar Mitter* v. *Sib Sundari Dassee* (6) and *Ghurphekni* v. *Purmeshar Dayal Dubey* (7). In the Privy Council case of *Parsotam Gir* v. *Narbada Gir* (8), where the plaintiff's suit was dismissed by the High Court of Allahabad leaving it open to the plaintiffs to institute a fresh suit, it was held by their Lordships of the Privy Council that the former judgment did not operate as res judicata, on the ground that the Judges in the former suit did not intend to decide anything as between the parties and left it open to the plaintiffs to institute a suit against the defendant. As to the contention about the order of the Court giving the plaintiff liberty to bring another suit it was answered by their Lordships of the Privy Council in the following words:

"The question is not whether the judgment of the High Court in 1836 was right, but whether it did or did not finally decide the . . .question as between Nepal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court had finally decided the matters which it expressly left 'untouched and undecided'."

3. (1865) 18 C B (n s) 256.
4. (1897) 24 Cal 616=24 I A 50 (P C).
5. (1881) 7 Cal 381.
6 (1882) 8 Cal 631.
7. (1907) 5 C L J 653.
8. (1899) 21 All 505=26 I A 175 (P C).

The learned District Judge has tried to distinguish the aforesaid Privy Council ruling on the ground that:

"The Privy Council had before it two unintelligible judgment and therefore it was not possible to say with certainty that the question at issue in the second suit had been first issue in the first suit."

This is not the ground upon which their Lordships of the Privy Council held that the principle of res judicata did not apply:

The ground was that the question was left undecided as is clear from the following words:

"One thing however is plain; the learned Judge in 1886 did not intend to decide anything as between Nepal Gir and Narbada Gir."

Their Lordships of the Privy Council in a recent case, *Abdullah Ashgar Ali Khan* v. *Ganesh Das* (9), have held that the principle of res judicata did not apply where the Court of appeal refused to determine the issue. It is thus clear from the summary of the decision referred to above that the refusal of the Court to determine an issue does not operate as res judicata. It does not matter whether the Court was right or wrong in refusing to try the issue, or in giving liberty to bring another suit. The Code of Civil Procedure in S. 11 has clearly laid down that the matter must have been "heard and finally decided" in order to apply the bar of res judicata to a subsequent suit. I therefore hold that the claim of the plaintiffs for the bhaoli rent of 1317 and 1318 was not barred by reason of the decision in the former Suit No 87 of 1912, and that the plaintiffs are entitled to a decree for the amount of rent proved by them for the years 1317 and 1318. The case must therefore be remanded to the lower appellate Court to determine the amount of rent that the plaintiffs are entitled to for the years 1317 and 1318 and to return its finding to this Court by the 1st April.

Roe, J.—I agree that it is not res judicata that the appellants are not entitled to any rent at all for the years 1317 and 1318, and therefore concur in the proposed order remanding the case for a trial of the issue; what amount is due for the years 1317 and 1318. I do not consider it necessary to decide at present whether anything at all was decided by the previous litigation.

V.S./R.K *Case remanded.*

9. A I R 1917 P C 201=45 Cal 442=44 I A 213=42 I C 959 (P C).

A. I. R. 1918 Patna 621

JWALA PRASAD, J.

Kishan Dayal Singh—Petitioner.

v.

Jaglal Mandal—Opposite Party.

Criminal Revn. No. 1 of 1918, Decided on 5th March 1918, from order of Dist. Judge, Purnea, D/- 16th June 1917.

(a) Criminal P. C. (1898), S. 195—Sanction to prosecute for forgery—Court must examine alleged forged document before granting sanction.

Before granting sanction to prosecute an accused person for forgery it is desirable that the Court should examine the alleged forged document. [P 622 C 1]

(b) Criminal P. C. (1898), S. 195 — Refusal of sanction—Delay in applying for sanction is sufficient cause.

Inordinate and unexplained delay inmaking an application for sanction to prosecute is a sufficient ground for refusing the sanction. [P 622 C 2]

(c) Civil P. C. (1908), S. 115 — Order of civil Court refusing or granting sanction to prosecution—High Court can also interfere under Criminal P. C. S. 195 Cl. (6).

The High Court has power to interfere with an order of a civil Court refusing or granting sanction for prosecution under S. 195, Cl. (6), Criminal P. C. and not only under S. 115, Civil P. C. [P 623 C 1, 2]

Hasan Imam and *Lal Mohan Ganguly* —for Petitioner.

Krishna Sahay and *Shiveswar Dayal* —for Opposite Party.

Judgment.— This is an application against an order of the District Judge of Purnea, dated 16th June 1917, confirming sanction to prosecute the petitioner under Ss. 465, 471 and 196, I. P. C., passed on the petitioner. The sanction relates to an entry in a bahi filed in the Civil Suit No. 506 of 1913 in the Court of the Subordinate Judge of Purnea. The entry in the bahi was held by the Subordinate Judge, who tried the case to be a "childish forgery" by his judgment dated 8th September 1914. On appeal by the petitioner the District Judge agreed with the view taken by the Subordinate Judge as to the forgery of the entry in question in the bahi. The judgment of the appellate Court was passed on 22nd December 1915. There was a second appeal by the plaintiff to the High Court but the said appeal was summarily dismissed. The exact date of the dismissal of the appeal is not known but the appeal must have been filed within three months from the date of the decree of the first appellate Court, that is, before 22nd March 1915.

The present application for sanction to prosecute the petitioner was filed by the opposite party, who was a defendant in the original suit on 22nd June 1916. The application was disposed of by the Subordinate Judge on 16th June 1917. The Subordinate Judge granted the sanction whereupon the petitioner moved the District Judge under Cl. 6, S. 195, Criminal P. C. The appeal before the District Judge was disposed of on 7th November 1917. It may be mentioned here that after the dismissal of the appeal in the civil suit by the District Judge and apparently after the application for sanction was made before the Subordinate Judge an application on behalf of one Rash Behari Lal was made to the District Judge for the return of the document. This application is not dated but the seal of the Court bears the date 1st July. The document was taken back from the Judge's record room but when and by what order of the Court is not at all clear from the papers on the record. In the list of exhibits there is a note against the bahi in question as having been received under a signature which purports to be that of Rash Behari Lal. It is not at all shown who this Rash Behari Lal is, on whose behalf the application for return of the Bahi was made and who eventually succeeded in taking back the document during the pendency of the application for sanction. Rash Bihari does not appear to be one of the parties concerned in the case. The receipt given on the document is also not dated.

The order of the Court of 16th June 1917 calling upon the opposite party to produce the document does not appear to have been complied with nor was there any insistence by the opposite party to have the document produced in Court. Nor did the Court itself consider it desirable or necessary to have the document produced before it. The result was that the document was not produced and sanction was granted merely upon the finding of the predecessor of the Subordinate Judge recorded in the judgment of the original suit. Likewise the District Judge also did not take any steps to have the document produced and based his conclusions on the finding of his predecessor-in-office, who had heard the appeal in the original case. In a case of entries in the bahi held by one Court to be a "childish forgery" and by

the other Court to be "clumsy" I think it was important for the Court below as it would be for the trying Court if the sanction is not revoked, to inspect the document and to determine by inspection of the entries as to whether they were tampered with or forged. It is conceded that the sanction granted will become infructuous and the ,prosecution cannot at all proceed without the production of the document in the trying Court. There is to my mind absolutely no chance of getting the document at all. The document has been taken away by some one whose identity before me has not been disclosed. If that person is under the influence of the petitioner, it is certain that the document will not be produced at all whatever may be the result of the disobedience of the order of the Court. The petitioner himself has refused to produce it when called upon to do so by the Subordinate Judge and is not likely to obey the order of the trying Court when called upon to do so.

The petitioner showed cause by a petition which also is not dated, but from the seal of the Court it appears to be 21st December 1916. I cannot refrain from remarking that it appears to be the practice of the Purnea Court not to insist upon accepting petitions and documents and papers etc., in Courts duly signed and dated by the parties filing them. Of course this does not affect the merits of the case, but has an important bearing as regards the conduct of the cases in the District of Purnea. The petition does not disclose where the document is and who took it away from the Court.

There is therefore as I have said before, not the faintest chance of having the document before the Court. The prosecution therefore cannot at all proceed. It is strange that such an important document, in respect of which the Subordinate Judge and the District Judge had given their decisive opinion that it was a forgery, should have been allowed to be taken back from the record room. This again discloses the state of affairs that prevails in the Purnea Court. The sanction should therefore be withheld on that ground alone. Apart from this there is another important ground which by itself was sufficient to refuse the sanction. The application in this case was made about 21 months after the order of the Subordinate Judge and six months after the order of the District Judge in appeal. It is contended that the opposite party awaited the result of the appeal in the High Court, if any. References have been made to certain cases to show that it is desirable to await the result of the appeal and that an application made after the disposal of the appeal should not be considered to have been unduly delayed. But in all those cases, if I remember rightly, the application was made soon after the disposal of the case, but the order of the Court, was suspended till after disposal of the appeal.

There may be some cases where the application might also be allowed to be made after the disposal of the appeal, but it has to be judged from the circumstances of each case whether the delay was undue or was unreasonable. In the present case the delay after the disposal of the appeal by the District Judge is unexplained. The decree was passed on 23rd December 1915 and there was no reason why the opposite party should have waited three months from the date of the decree of the District Judge. The delay is therefore in this particular case unexplained and is inordinate, considering that the delay has enabled the document to be taken away from Court. I do not see any reason also why there was delay in the disposal of the application by the Subordinate Judge. It took one year to dispose of a miscellaneous appeal in which no evidence was taken and in which the judgment itself was a short one. The appeal was disposed of on 16th June 1917. The opposite party may not be responsible for this delay, but still whoever may be responsible, there has been a delay in the disposal of a charge pending against the petitioner and hanging over his head It is now about 4 years from the time that this document was filed in Court and the case disposed of by the Subordinate Judge. It is not therefore desirable on this ground also to allow the sanction to be used by the opposite party in order to harrass the petitioner.

The third ground is equally important and is in favour of the petitioner. The Court that decided that the entry in the bahi was a forgery did not at all consider the evidence to be of such a character as to justify his prosecution under S. 467, Criminal P. C. There were two docu-

ments filed in support of the claim of the plaintiff, the mortgage bond which was the basis of the suit, and the bahi, to prove that consideration money was paid to the executant of the bond. The first Court held that the bond was genuine and was admitted by the Musammat before the Registrar, but that the bahi was concocted and forged for the purpose of affording evidence to prove the passing of the consideration. I mean the District Judge in appeal suspected that the bond also was not executed by the Musammat, but did not clearly find that it was a forgery. The Court which tried the case or the appeal, would have been in a better position to judge whether the ends of justice required that the petitioner should be prosecuted for using the forged document. We do not know what would have been the opinion of those Courts if the application for sanction was heard by them. The delay has therefore deprived the petitioner of the opinion of the Courts which tried the case on the merits. It is clear that the opposite party, in order to serve its own ends and out of grudge and malice, wants to take this vindictive action against the petitioner. Under all these circumstances no sanction should be allowed to serve such a purpose and the order is liable to be set aside on this ground also.

The learned vakil for the opposite party contested the jurisdiction of this Court to interfere with the order made by the District Judge or the Subordinate Judge. True, the order in question was made in connexion with the civil suit decided by the Subordinate Judge and as such the application in respect of the sanction would be heard by the civil side of this Court and not by the criminal side. But this Court is hearing this application on its civil side. The learned vakil further urged that this Court can only deal with the order of the District Judge under S. 115, Civil P. C., and that the order should only be set aside if it was without any jurisdiction or was exercised with illegality or material irregularity in terms of that section. I do not at all feel inclined to agree with this view. The power is exercised by this Court under Cl. (6), S. 195, Criminal P. C., to grant or revoke sanction refused or granted by inferior Courts. The High Court is the appellate Court from their decision in civil suits and as such is the superior Court under Cl. 7, S. 195, and is therefore competent to deal with their order granting or revoking sanction under Cl. 6 of the section.

The Madras and the Calcutta High Courts have taken the above views : vide *Muthuswami Mudali* v *Veeni Chetti* (1), *Girija Sankar Roy* v. *Binode Sheikh* (2), and *Habibur Rahman* v. *Munshi Khodabux* (3). The view taken in *Hamijuddi Mondal* v. *Damodar Ghose* (4) quoted by the learned vakil for the opposite party was not followed in the later rulings referred to above of the same Court. Personally I have no doubt in my mind that this Court has jurisdiction to deal with the order of the inferior Courts on merits under Cl. 6, S. 195 and not only under S. 115, Civil P. C., and that the view taken in the case by the learned Judge who decided the case of *Hamijuddi Mondol* v. *Damodar Ghose* (4) was not the correct view, and in fact did not recommend itself to the very learned Judge who subsequently in *Girija Sankar Roy* v. *Binode Sheikh* (2) distinguished that rnling. The order of the District Judge in this case confirmed the sanction given by the Subordinate Judge and comes well within the aforesaid order. The result is that the sanction granted by the Subordinate Judge and confirmed by the District Judge is set aside. The proceedings that may have been instituted on the basis of this sanction are hereby revoked and quashed.

V S./R.K. *Sanction set aside.*

1. (1907) 30 Mad 382 (FB).
2. (1907) 5 C L J 222.
3. (1907) 11 C W N 195.
4. (1906) 10 C W N 1026=4 Cr L J 168.

A. I. R. 1918 Patna 623

CHAMIER, C. J. AND JWALA PRASAD, J.

Narain Prasad and *others*—Appellants.

v.

Kameshwar Persad Singh and *others*—Respondents.

In the matter of First Appeal, Decided on 17th May 1917.

Court-fee—High Court should see that proper fees are paid in all Courts.

It is the duty of the High Court to see that the court-fees are paid in the High Court and in the Courts below from which the case has come. [P 624 C 2]

(b) Court-fee—Whether valuation in lower Court can be allowed to be reduced (*Quaere*).

Quaere.—Whether the High Court has power to allow a valuation of a claim in the Court below to be reduced in order to relieve a party from liability to pay court-fee. [P 624 C 2]

Naresh Chandra Sinha—for Appellants.

Judgment.—In this case the appellant sued for possession of property which he valued at Rs. 2,500 and for mesne profits which he estimated at Rs. 19,330. By a mistake of the Court he was allowed to pay court-fees only on the value of the immovable property claimed and was not required to pay court-fees on the mesne profits claimed. He obtained a decree for possession and mesne profits and then applied to the Court to ascertain the mesne profits. The Court dismissed his application. He then appealed to this Court and paid on his Memorandum of Appeal a court-fee of Rs. 2. The Stamp Reporter then reported that court-fees were payable ad valorem on the amount claimed, namely, Rs. 19,330. The correctness of this report is not and cannot be disputed. The appeallnt being faced with the liability to pay court-fees on Rs. 19,330 promptly applied for leave to reduce the valuation of the appeal to Rs. 1,500. He had hardly obtained leave to reduce the valuation to that sum when he discovered that the probable effect of doing so would be to make it impossible for this Court to hear the appeal inasmuch as the total value of the suit might be regarded as being less then Rs. 5,000. He then came to the Court again and proposed to fix the valuation of his appeal at Rs. 2,501 so as, according to his view of the case, to make the total value of the case Rs. 5,000 and make it possible to maintain the appeal in this Court. These alterations in value of the sum claimed appear to have been made without any regard to the facts and to suit the exigencies of the moment, and they have led the appellant into a further and more serious difficulty. He has now been called upon to make good a deficiency in the court-fee payable on his application for mesne profits in the Court below.

He paid 8 annas and he has been called upon to pay the difference between 8 annas and an ad valorem fee on Rupees 19,330 It is the duty of this Court to see that court-fees are paid both in this Court and in the Courts below from which cases have come. It appears to me to be our plain duty to require the appellant to pay the deficiency in the court-fee in the Court below. The appellant now suggests that we should allow him to reduce the valuation of his claim in the Court below to a figure which will bring the payment of court-fees more within his means. I understand that an application of this kind was allowed by this Court in one case. But the point is by no means clear that the Court has power to allow a valuation of a claim in the Court below to be reduced in order to relieve a party from liability to pay court-fees. I do not think that we should allow this to be done in the present case. The appellant has had no regard whatever for the facts or the truth. He is prepared to say anything at any time that suits his purpose. In my opinion he should be required to make good the deficiency in the court-fee on his claim in the Court below and I would allow him one month within which to do so.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 624

ROE AND KINGSFORD, JJ.

Manger Singh—Plaintiff—Appellant.

v.

Khobhari Rai—Defendant — Respondent.

Civil Misc. Appeal No. 120 of 1916, and Civil Revn. No. 112 of 1916, Decided on 20th July 1916, from decision of Dist. Judge, Chapra, D/- 4th April 1916.

Civil P. C. (1908), S. 102 — Small Cause Court decree—Munsif as Court of original jurisdiction passing order—No second appeal lies against order of District Judge.

No second appeal lies from an order made by a District Judge on appeal from an order made by a Munsif acting in his capacity as a Court of original jurisdiction in execution of a Small Cause Court decree. [P 624 C 2]

Baikuntha Nath Mitter — for Appellant.

Gour Chandra Pal for *Naresh Chandra Sinha*—for Respondent.

Roe, J.—In this case we are asked to interfere with an order made by a District Judge on appeal from an order made by a Munsif acting in his capacity as a Court of original jurisdiction in execution of a Small Cause Court decree. We have no power to hear a second appeal in a case of a nature cognizable by a Small Cause Court. Therefore the second appeal must fail. We are asked in aevision to say that the District Judge had no jurisdiction. This point is concluded by the case of *Peary Lal Singh* v. *Radha Nath Singh* (1). The application for revision therefore fails. The appeal is

1. (1907) 11 C W N 861.

dismissed with costs. The application for revision is rejected. Hearing fee in each case one gold mohur.

Kingsford, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 625 (1)

IMAM, J.

Sahdeb Singh and *others*—Petitioners.

v.

Jumon Jolaha—Opposite Party.

Criminal Revn. No. 30 of 1918, Decided on 7th February 1918, from order of Deputy Magistrate, Purulia.

Criminal P. C. (1898), Ss. 107 aud 145—Proceeding started under S. 107 converted into one under S. 145—Omission to record evidence under S. 145—Order under S. 145 is illegal.

Where a proceoding is started under S. 107 and evidence is taken under that section, but the Magistrate subsequently converts the proceeding into one under S. 145 he must call for the written statements of the parties and record evidence under the latter section. If he omits to do so, any order passed by him under S. 145 would be illegal. [P 625 C 2]

Abani Bhushan Mukerji—for Petitioners.

Judgment.—The petitioners in this case were originally proceeded with under S. 107, Criminal P. C., and the case continued to be treated as a case under that section till 6th November 1917, when on the conclusion of the evidence of the second party the learned Deputy Magistrate fixed 10th November 1917 for order. He however supplemented that by adding the words "proceeding changed to S. 145, Criminal P. C." On 10th November 1917, the learned Deputy Magistrate took up this case and simply passed an order declaring the first party to be in possession of the land in dispute. The learned Vakil appearing on behalf of the petitioners contends that the order of 10th November 1917 passed by the learned Deputy Magistrate is without jurisdiction. He urges in support of the contention the failure on the part of the learned Deputy Magistrate to draw up proceedings under sub-Cl. 1, S. 145. He also contends that even if he had done so the order passed by him would still be without jurisdiction inasmuch as the Magistrate was bound not only to take the written statements of his clients, but also such evidence as they might be disposed to offer after action under sub-Cl. 1, S. 145, Criminal P. C. was taken. The proceedings taken under S. 107 of the Code and the evidence recorded thereunder could not be accepted as sufficient ground to dispense with the necessity of taking fresh action under sub-Cl, 1, S. 145. Ss. 107 and 145 are intended by the legislature to serve two distinct purposes and the learned Vakil appearing on behalf of the petitioners has rightly contended that unless and until the proceedings were duly initiated and his clients were given an opportunity of filing written statements and offering evidence, the order passed by the Magistrate would be ultra vires. I agree. The order in question is set aside and the case is sent back to the learned Deputy Magistrate to deal with it in accordance with law.

V.S./R.K. *Rule made absolute.*

A. I. R. 1918 Patna 625 (2)

SHARFUDDIN AND ROE, JJ.

Elias M. Cohen and *another* — Appellants.

v.

Secy. of State—Respondent.

Appeal Nos. 221 and 222 of 1915, Decided on 1st June 1917, from original decrees of Dist. Judge, Bhagalpur, D/- 18th February 1915.

Land Acquisition Act (1894), S. 23 — Orchard Land—Assessment of compensation—Trees and earth must be valued together.

The value of an orchard depends largely upon the suitability of the land for orchard purposes upon the care taken of it and upon its situation with regard to the market ; and regard should be had to all these things in assessing compensation to be paid for orchard land under the provisions of the Land Acquisition Act. In the case of such land the assessment of compensation is not a question merely of the value of the trees and the earth in which the trees grow. The two cannot be valued separately ; they must be valued together. [P 626 C 1]

Guru Dayal Sinha and *Lalit Mohan Ghosh*—for Appellants.

Sultan Ahmad—for Respondent.

Judgment.—These two appeals arise from a reference to the District Court of Bhagalpur by the Collector in respect of the acquisition of two plots of orchard land near Bhagalpur town. The method whereby the Collector arrived at the amount of compensation to be paid was to calculate the value of ordinary occupancy rights in neighbouring plots and add thereto the value of the trees of which these orchards were composed. This seems us to be hardly a satisfactory method. It should only have been adopted failing the possibility of arriving at the value of the lands as orchard lands.

The value of an orchard depends largely upon the suitability of the land for orchard purposes, upon the care taken of it and upon its situation with regard to the market. It is not a question merely of the value of the trees and the earth in which the trees grow. The two cannot be valued separately ; they must be valued together.

The learned vakil for the appellants has shown us a statement whereby the 32 bighas of orchard land from which these lands have been acquired are shown to give to the appellants an income of Rs. 2,074 per annum, less some Rs. 60 or Rs. 70 a month for expenses of establishment. Deducting Rs. 700 or Rs. 800 from the total annual income the profit per. bigha is approximately Rs. 40 per annum The annual value of the portion acquired may be taken at Rs. 280 per annum, which at 15 years' purchase a fair price for an orchard in which the trees and soil need to be constantly renewed may be capitalised at Rs. 4,200. Taking the matter from another point of view we find that orchard land adjacent to the present orchard land was prior to the acquisition, valued by vendor and purchaser at Rs. 30 a kattah or Rs. 600 a bigha. Similar orchard land in a neighbouring tala appears to have fetched much the same price. Rs. 600 per bigha would also come to Rs. 4,200 for this orchard inclusive of all trees etc., and compensation for removal. We are of opinion that the fair price for the orchard which is the subject of Appeal No. 222 is Rs. 4,200 inclusive of all claims but exclusive of 15 per cent additional compensation. In Appeal No. 221 the land may be valued at the same rate, i. e. Rs. 600 per bigha, exclusive of the additional compensation. Each side will bear his own costs throughout the litigation.

V.S./R.K. *Order accordingly.*

A. I. R. 1918 Patna 626

JWALA PRASAD AND COUTTS, JJ.

Pramila Balidas and *others*—Appellants.

v.

Jogesher Mandal—Respondent.

Appeal No. 528 of 1917, Decided on 21st June 1918, from Appellate Decree, of Sub-Judge., Singhbum, D/- 17th April 1917.

Minor—Lease in minor's favour imposing liability is void—Transfer of Property Act, S. 8.

A lease in favour of a minor which imposes a liability upon the minor is null and void and cannot confer any right or title upon him, 30 *Cal.* 539 (*P. C.*), *Foll.* [P 627 C 2]

Siva Narain Bose—for Appellants.

Atul Krishna Roy and *Susil Madhub Mullick*—for Respondent.

Jwala Prasad, J.—This appeal arises out of a suit for ejectment. The land in question appertains to the Mukarrari of one Slochana Debi. On 1st June 1910, Slochana mortgaged her mukarrari interest to the Midnapur Zemindari Co. Ltd,, stipulating that she would have no power to grant any permanent lease during the continuance of the mortgage. The mortgage is Ex. 2. Kanchan Lal Mahapatra, an occupancy-raiyat of the land in suit, surrendered it on 27th April 1911. Slochana permanently settled the land with defendant 1 by executing a lease, Ex. 5, in her favour. Defendant 1, the lessee, is a minor and is the wife of defendant 2. On 26th May 1913 the plaintiffs took a Darmukarrari of the village from Slochana and redeemed the mortgage of the Midnapur Zemindari Co. Ltd., and in 1914 brought the present suit for a declaration that the settlement of the land in suit with defendant 1 by Slochana, the Darmukarrari, is null and void and for khas possession.

The lease is in respect of 27 bighas 2 cottas and 11 dhurs of land at an annual rental of Rs. 7-5-9. Under the terms of the lease the lessee has to pay the aforesaid rent by instalments and on default he is liable for interest, etc. The Courts below have decreed the suit, holding that the lease in favour of defendant 1 is void on the ground of its being in favour of a minor. The reason given by the lower Appellate Court for the above view is in the following words:

"In the case of a lease each party is obliged to do something, that is, the lessor is to maintain the lessee in possession and the latter is to pay the rents and to perform the other terms of the lease. In this case in a suit by the lessor to recover rents or to enforce the other terms of the lease the lessee would be entitled to plead her minority by way of answer and so there is want of mutuality in this case."

The Court below has relied upon the Privy Council case of *Mir Sarwarjan* v. *Fakhruddin Mahomed* (1). That was a case brought by a minor for the specific performance of an agreement for sale to

1. (1912) 39 Cal 232=39 I A 1=13 I C 331 (PC).

him of certain immovable property entered into by his guardian and manager of his estate. The suit was brought by the minor after he attained majority. Their Lordships of the Privy Council dismissed the suit on the ground, to quote their Lordships words that:

"the minor was not bound by the contract. There was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract."

It was assumed in that case that the purchase was advantageous for the minor. In an earlier case of *Mohori Bibee* v. *Dharmodas Ghose* (2) their Lordships of the Privy Council held that a mortgage made by a minor is void. The mortgage was under the Transfer of Property Act. Their Lordships considered the various sections of the Contract Act and those of the Transfer of Property Act, and came to the conclusion that it is essential that all contracting parties should be competent to contract and that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Contract Act and hence the mortgage made by the minor was not only voidable but void, and upon that ground refused to direct the minor to restore the benefit received by him under the mortgage. This was followed by the Allahabad High Court in *Shiam Lal* v. *Ram Piari* (3) and by the Madras High Court in *Navakoti Narayana Chetty* v. *Loyalinga Chetty* (4), where the sale executed by a minor was held not to convey any interest to the vendee. The appellant contends that the aforesaid decisions of the Privy Council do not apply to this case. It is said that the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed* (1) was in respect of specific performance of a contract and cannot apply to a lease which is governed by the Transfer of Property Act, and that *Mohori Bibee* v. *Dharmodas Ghose* (2) was in respect of a mortgage executed by the minor and not of one executed in his favour. In support of his contention the appellant has relied upon the lollowing cases:

(1) *Bhaggyadhar Mandal* v. *Mohini Mohan Banerji* (5), where Chaudhuri and Teunon, JJ., held that a mortgage executed in favour of a minor is not void and that it can be enforced at the instance of the minor. The reasons upon which the decision is founded have not been given in the report. (2) *Munni Koer* v. *Madan Gopal* (6), where it was held that there is nothing in the law to prevent a minor from becoming a trustee of immovable property and from suing for possession of the property conveyed to him by a valid deed of sale. In that case it was observed that:

"very different considerations would arise if after having agreed to sell the property, the defendant before receiving the price had refused to execute a conveyance and the plaintiff was driven to a suit for specific performance. In such a case the plaintiff would have to set up a contract."

(3) The case of *Raghava Chariar* v. *Srinivasa Raghava Chariar* (7), where a Full Bench of the Madras High Court overruling the earlier decision in *Navakoti Narayana Chetty* v. *Loyalinga Chetty* (4) held that a mortgage executed in favour of a minor is enforcible by him or by another person on his behalf. A distinction has been drawn in this case between an executory contract and a contract wholly performed by one or by both the parties resulting in a transfer by the one party to the other, or in mutual transfers. The former has been held to be void within the principle laid down by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (2), while the latter (completed transfers) have been held not to be affected by the Privy Council decision. The present lease can hardly be said to be covered by any of the aforesaid authorities relied on by the appellant. At p. 335 (of 40 *Mad.*) of the aforesaid Madras case, *Raghava Chariar* v. *Srinivasa Raghava Chariar* (7), Srinivasa Aiyangar J, pointed out that:

"a transfer to a minor by way of a lease, he agreeing to pay rent or to perform any particular covenants which form an essential part of the transaction, may prevent the transfer from taking effect."

The lease in question comes well within this observation, because it imposes a liability upon the lessee-appellant, defendant 1, to perform the terms of the lease and to pay rent annually to the lessor, and in default to pay interest, etc. To my mind under the principles laid down by their Lordships of the Judicial Committee in the cases of *Mohori Bibee* v. *Dharmodas Ghose* (2) and *Mir Sarwarjan* v. *Fakhruddin Mahomed* (1), the lease is null and void and cannot confer

2. (1903) 30 Cal 539=30 I A 114. (P.C).
3. (1909) 32 All 25=4 I C 706.
4. (1909) 33 Mad 312=4 I C 383.
5. (1916) 20 C W N 120.
6. (1915) 38 All 62=31 I C 792.
7. (1916) 40 Mad 308=36 I C 921 (F B).

any right or title upon the appellant. Mr. Mullick then contends that even if the lease be held to be void, the appellant is in possession of the land in suit as a raiyat and has acquired rights of a non-occupancy tenant under the Chota Nagpur Tenancy Act (6 of 1908 B. C.) and cannot be ejected under S. 41 of the Act. I fail to appreciate this contention. The appellant claims to hold the land and to have entered into possession thereof under the lease. The lease being void he is a mere trespasser and is liable to be ejected by the landlord. The result is that the appeal is dismissed with costs.

Coutts J.—I agree.

V.S./R.K. *Appeal dismissed.*

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* A. I. R. 1918 Patna 628

JWALA PRASAD, J.

Bhowanath Singh and *others* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 373 of 1917, Decided on 3rd December 1917, from order of J. C. Chota Nagpur. D/- 20th July 1917.

(a) Cattle Trespass Act (1 of 1871), S. 24—There must be proof and finding that cattle were seized while trespassing and causing damage.

For a conviction under S. 24, Cattle Trespass Act it is not enough that the accused removed the cattle from the pound; the prosecution must further prove and there must be a finding of the Court that the cattle were liable to be seized under the Act, in other words that the cattle were seized while they were trespassing upon and doing damage to the field of the owner and had then been put in the pound. [P 628 C 2]

*** (b) Criminal P. C. (5 of 1898), Ss. 236 and 237—S. 237 is enabling section—S. 236 applies only where though facts are clear it is not clear as to what section applies—Doubt referred in S. 236 refers to doubt in law and not of fact.**

Section 237 would apply in cases where S. 236 applies. S. 237 is an enabling section which empowers the Court to convict the accused of offences for which no charge has been framed but for which a charge could have been framed under S. 236. S. 236 applies only when there is no doubt as to the facts of the case but only under which section of the law upon the facts found the accused would be guilty. The doubt referred to in S. 236 is a doubt of law and not of facts. [P 629 C 2]

(c) Criminal P. C. (5 of 1898), Ss. 236 and 237—Charge under S. 379, I. P. C.—Accused defending himself of that charge—Conviction under S. 24, Cattle Trespass Act cannot be passed.

Where a charge under S. 379, I. P. C. is framed and the attention of the accused is directed only to the defence of the charge framed against him he cannot be convicted for an offence under S. 24, Cattle Trespass Act without framing a charge under that section as well and without giving him an opportunity to produce evidence in rebuttal thereof. [P 630 C 1]

Naba Kumar Chaudhuri—for Petitioners.

Judgment.—The petitioners have been convicted by the Deputy Magistrate of Daltonganj under S. 24, Cattle Trespass Act, 1 of 1871, and sentenced to a fine of Rs. 25 each. The conviction has been upheld by the Judicial Commissioner of Chota Nagpur by his order dated 20th July 1917. One Abdur Rahim a relation of a servant of the lessee of Tetrain pound lodged a complaint against the accused for having removed 32 heads of cattle from the pound by opening the tatti door. The cattle are said to have been impounded by Zafar Ali and his son Tabarak while trespassing on and damaging their sugarcane field. The complaint petition mentions in Col. 3, the charges under Ss. 454 and 380, I. P. C. The Magistrate, after recording evidence framed a charge under S. 379, I. P. C., against the petitioners for having removed the cattle from the charge of the poundkeeper. The Deputy Magistrate held:

"that at the time when the cattle were put inside the pound there was nobody in charge of the pound that the pound receipts and counterfoils were hastily prepared after the occurrence and were not real receipts and counterfoils granted or written up at the time the cattle were put into the pound, and that there was therefore no impounding of the cattle within the meaning of Ss. 8 and 9, Cattle Trespass Act, and therefore no charge of theft of cattle from the pound can arise nobody having taken charge on behalf of the pound keeper of the cattle."

Upon the above finding the Magistrate acquitted the accused of the charge under S. 379, I. P. C., but he convicted them under S. 24, Cattle Trespass Act. The findings for this conviction are as follows:

"The accused nevertheless must be held on the evidence adduced for the prosecution to have rescued the cattle not from the seizuer but from the pound within the meaning of S 24, Cattle Trespass Act, I of 1871 . . . I consider the evidence adduced for the prosecution to be reliable on the point namely that the accused came and removed the cattle therefrom and took the same away and did not return them to the pound in spite of Abdur Rahim's remonstrances."

There is no finding by the Magistrate that the cattle were seized while trespassing on or damaging the field of Zafar Ali and his son Tabarak. A finding upon this point was essential in order to bring the petitioners within the Cattle Trespass Act. S. 10 of the Act empowers certain persons named therein to "seize or cause to be seized any cattle trespassing on

such land and doing damage thereto." S. 24 makes it penal when one "forcibly opposes the seizure of cattle liable to be seized under this Act:" and also when one rescues the same after seizure either from the pound or from any person taking or about to take them to a pound. The Magistrate no doubt finds that the petitioners did remove the cattle from the pound. But this is not enough for conviction under S. 24 of the Act. The prosecution must further prove and there must be a finding of the Court that the cattle were liable to be seized under the Act, in other words that the cattle were seized while they were trespassing upon and doing damage to the field of the owner and were then put in the pound.

The Magistrate did not direct his mind to the first and essential element constituting the offence under S. 24, Cattle Trespass Act. In fact he did not realise at any stage of the trial that he was trying the accused for an offence under the Cattle Trespass Act. The present conviction therefore of the petitioners under S. 24, Cattle Trespass Act is illegal for want of a proper finding upon the point as to whether the cattle were lawfully seized while trespassing upon or doing damage to the crop of the owner of the sugarcane field. It was held in the case of *Queen Empress* v. *Lakshmanna* (1) that a conviction under S. 24, Cattle Trespass Act can only be supported if the cattle were liable to be seized under the Act. Upon this ground alone the conviction should be set aside and the case remanded for a fresh trial under the Cattle Trespass Act. The Judicial Commissioner in his order upheld the judgment of the Deputy Magistrate in these words:

"In my opinion the findings of the Magistrate bring the offence within S. 24, Act 1 of 1871. Under S. 237, Criminal P. C the Magistrate had power to convict of this offence. The application is rejected."

As shown above there was no finding of the Magistrate on facts which would bring the petitioners within S. 24 of the Act. There was therefore a misapprehension in the mind of the Judicial Commissioner as to the exact findings of fact arrived at by the Magistrate. I am also of opinion that the accused in this case could not be convicted under section 24 without a proper charge having been framed. The section relied upon by the Judicial Commissioner is S. 237, Criminal P. C., S. 237 of the Code would apply only in cases where S. 236 would apply. This S. 237 is an enabling section which empowers the Court to convict the accused of offences for which no charge had been framed but for which a charge could have been framed under S. 236. S. 236 applies only when there is no doubt as to the facts of the case; but only under which section of the law upon the facts found the accused would be guilty.

In the present case the Magistrate acquitted the accused of the offence under S. 379 but convicted them under S. 24, Cattle Trespass Act, not on account of any doubt in his mind as to the law to be applicable but on account of the doubt in his mind as to the facts alleged by the prosecution, namely the making over of the cattle to the pound-keeper and obtaining receipts for the same. I am supported in my view by the case of *Khan Muhammad* v. *Empress* (2). There the alternative charges were under Ss. 302 and 304, I. P. C. There was no doubt in that case as to the applicability of the law whether Ss. 302 and 304 would apply, but there was doubt as to the existence of the particular facts; and it was held that neither S. 236, Criminal P. C., nor S. 72, I. P. C., applied to a case in which there was a doubt as to the existence of the particular facts. Further it was held that as there was no doubt on any matter of law the alternative charges under S. 302 and S. 304 were bad. Same was the view taken in the Calcutta High Court in the case of *Wafadar Khan* v. *Queen-Empress* (3) and in *Queen-Empress* v. *Croft* (4). The result is that the doubt referred to in S. 236 is generally described as a doubt of law and not of facts. As shown above there was no doubt as to the law applicable in the present case. Therefore Ss. 236 and 237 have no application. In *Khan Muhammad* v. *Empress* (2) Plowden, J., held that Ss. 236 and 237 have no application to offences under different Acts, while Beverly, J., in the above case held to the contrary.

In the present case the complaint was on behalf of the pound-keeper for offences under Ss. 380 and 454, as expressly mentioned in the complaint petition. There was no complaint by the person who had actually seized the cattle and there was

1. (1901) 24 Mad 318.
2. (1887) 11 P R 1887 Cr.
3. (1913) 21 Cal 955.
4. (1896) 23 Cal 174.

no charge framed at the trial under the Cattle Trespass Act. The Magistrate framed the charge under S. 379, I. P. C., after the evidence was recorded. He was therefore in full possession of all the facts —still he did not frame a charge under S. 24. He acquitted them under S. 379 but convicted them under S. 24, Cattle Trespass Act, which was neither in his mind during the trial nor the accused knew anything about it and therefore they were materially prejudiced by not having a charge framed under that section. The offence no doubt under the Cattle Trespass Act is triable under the procedure prescribed for summons cases and therefore no charge may be necessary but when a charge under S. 379, as in this particular case was framed and the accused's attention was directed to the defence of the charge framed against them it was necessary to frame a charge under the Cattle Trespass Act as well. The accused were never called upon to meet any charge under the Cattle Trespass Act, and even if there be evidence of the facts constituting an offence under S. 24, the accused were given no opportunity to adduce evidence in rebuttal thereof. It is not therefore possible to maintain a conviction under the Cattle Trespass Act: see the case reported as *In the matter of Chinibas Pal* (5). In the terms of the above ruling I would make the rule absolute, set aside the conviction and sentence, and send the case back to the Magistrate to be tried under the Cattle Trespass Act giving the petitioners an opportunity to meet the charge laid against them under that section.

V.S./R K. *Rule made absolute.*

5. (1901) 5 C W N 567.

A. I. R. 1918 Patna 630

IMAM, J.

Mt. Batulan—Defendant—Appellant.

v.

Nirmal Das and *others*—Plaintiffs—Respondents.

Appeal No. 417 of 1917, Decided on 30th January 1918, from appellate decree of Dist. Judge, Patna.

Specific Relief Act (1877), S. 22—Specific performance—Mere delay is not sufficient to defeat claim—It must be such as to justify inference of abandonment—Failure to enforce registration does not amount to abandonment.

Mere delay in the institution of a suit for specific performance of a contract to sell land is not sufficient to defeat the claim. The delay must be of such a character as to give rise to an inference of the abandonment of the right or should disclose some prejudice to the defendant. [P 631 C 2]

The failure of the plaintiff to obtain compulsory registration of the deed in his favour is not of itself sufficient to prove abandonment. [P 632 C 1]

Bankim Chandra Mittra—for Appellant.

Sambhu Saran—for Respondents.

Judgment.—The plaintiff instituted this suit for the specific performance of a contract entered into by him and defendants 1 and 2 on 25th June 1912. Evidently the agreement to sell 4½ annas share of Salempur Chatura Lakhraj took place two or three days before this date.

On 27th June defendants 1 and 2 executed a deed of sale in favour of the plaintiff, but this deed was not registered. On 17th October 1912 the sum of Rs. 71 out of the consideration money settled at Rs. 75 between the parties was paid by the plaintiff to defendants 1 and 2. On 24th February 1914 defendants 1 and 2 executed a deed of sale in favour of defendant 4 and sold the property in suit with some other properties. Three months after it transpired that defendant 3 also was supposed to have some interest in the property and a supplementary deed of sale was executed by defendants 1 to 3 in favour of defendant 4 in respect of the same properties. The suit of the plaintiff was instituted on 1st October 1915. The Munsif of Barh who tried the suit dismissed it, but on appeal the learned Judge of Patna has reversed the decision of the Munsif and has decreed the suit in favour of the plaintiff.

The learned vakil appearing before me on behalf of defendant 4 urges the following points on which, he submits, I should hold the judgment of the learned District Judge to be incomplete and insufficient. Firstly, it is contended that issue 2 framed by the Munsif dealing with the question of limitation in this case has not been considered by the learned Judge. The learned Munsif found on this point against the plaintiff, on the ground that the agreement to sell having been made two or three days before 15th June 1912, and the plaint having been filed on 1st October 1915, the suit would be barred under Art. 113, Limitation Act, inasmuch as the suit was instituted three years after the agreement to sell

took place. The learned Munsif disbelieved the plaintiff's case with reference to the allegation that there was a subsequent agreement to execute the deed or to register it in October 1912, and hence he found that the suit was instituted after three years of the agreement. If it be held that more than three years had passed since the date fixed for the performance of the contract and no suit had been instituted, Art. 113 would no doubt govern the case. But the finding of fact arrived at by the learned District Judge with reference to the subsequent agreement to execute the deed and to register it would clearly take this case out of the mischief of Art. 113, Limitation Act. The learned Judge in his judgment holds that the payment of Rs. 71 and the execution of the receipt Ex. 2 have been proved. The leraned Judge also accepts the evidence of the plaintiff on the point of the passing of a portion of the consideration money, namely, Rs. 71 to defendants 1 and 2. Ex. 2, which is the receipt for this money, has been duly proved and accepted as genuine by the learned Judge. This receipt and the findings of the learned Judge on this point put the matter beyond a shadow of doubt as regards the payment made on 17th October 1912.

On this finding it would be impossible to hold that limitation applies to the case of the plaintiff. On 17th October 1912 there was the acceptance of a part of the consideration money by defendants 1 and 2. This by itself is sufficient to show that the time for the performance of the contract was some day subsequent to 17th October 1912, when that payment was made. If so the suit would be within time. As a matter of fact the refusal to register the deed according to the plaint did not take place till 27th October 1912. If that be so, then if Art. 113, Limitation Act, is to apply to this case, it would apply from the date of this refusal, namely, 27th October 1912, and not before. In this connexion para. 22 of the plaint is significant inasmuch as one of the various dates when the cause of action in this case is stated to have actually arisen is 27th October 1912.

The learned vakil appearing on behalf of defendant 4 contends that the learned Judge has not taken up the question of limitation as an issue in the case and dealt with it properly. It is true that the judgment of the learned Judge has not dealt with this question of limitation exhaustively, but I find that the principal elements constituting the issue of limitation in this case have, as a matter of fact, received the learned Judge's consideration and the findings to which I have made reference are sufficient in themselves to show that Art. 113, Lim. Act has no application to the present case.

The next point to which my attention has been drawn by the learned vakil appearing on behalf of the defendant-appellant is the question of laches on the part of the plaintiff in instituting this suit. It is pointed out that although the refusal to register the deed took place on 27th October 1912, the plaintiff showed no sign of instituting his suit till almost the close of the year 1915 and that this delay on his part might be considered as an indication that he had abandoned all idea of pressing his claim for specific performance of the contract entered into between himself and defendants 1 and 2. Delay cannot in this case be disputed, but the question is whether this delay by itself is sufficient to justify me to hold that the plaintiff has been guilty of laches. As I have held before, the suit is not barred by limitation. Therefore, the delay is not such as is not permitted by the law. On the authority of *Kissen Gopal Sadaney* v. *Kally Prosonno Sett* (1), mere delay is not sufficient. The delay must be of a character as to give rise to an inference of the abandonment of the right or should disclose any prejudice to the defendant. The learned Munsif who framed the issue on this question found it against the defendant. The learned Judge who heard the appeal has not dealt with this question. It has been contended that the learned Judge should have done so and that the case for that reason should be referred to the learned Judge for disposal after he has considered it. I am not disposed to agree to this prayer, inasmuch as nothing has been shown how the delay in instituting the suit has either prejudiced the defendants or amounts to an abandonment of the right of the plaintiff to ask for specific performance of the contract. Defendant 4 is a near relative of defendants 1 to 3. The finding of the learned Judge is that the defendant has failed to prove

1. (1906) 33 Cal 633.

that she was a bona fide purchaser for value without notice to the plaintiff's equitable title.

Considering the circumstances of the case I have no doubt that defendant 4 was well aware of the major portion of the consideration money having been paid by the plaintiff to defendants 1 to 2. There is therefore no reason to think that there was any valid reason for defendant 4 to believe that the plaintiff had abandoned his claim. My attention has been drawn to the fact that there was no attempt on the part of the plaintiff to apply for compulsory registration of the deed of sale Ex. 1 and that this ought to be sufficient in itself to leave defendant 4 under the impression that the plaintiff had no intention of proceeding with the agreement that was entered into in June 1912. I am not satisfied that, the plaintiff not having asked for compulsory registration, this in itself is sufficient to justify any inference against him with reference to his abandonment of the claim by conduct. Moreover, I find nothing in the written statement of defendant 4 to show that there was, apart from the delay, anything in the conduct of the plaintiff to suggest abandonment. The only paragraph of the written statement to which my attention has been drawn is para. 11. I am unable to find how the allegations in para. 11 can justify my holding that there have been such laches on the part of the plaintiff as to induce the exercise of the discretion vested in this Court under S. 22, Specific Relief Act in favour of the plaintiff. In the circumstances I am also unable to accept the contention that in this case on the question of laches there is any necessity for the case to be referred back to the learned Judge who heard the appeal. The learned vakil appearing on behalf of the defendant-appellant has pressed upon me the consideration that I should rule out the relief for the specific performance of the contract and grant to the plaintiff relief No. 4, which is in the alternative. The alternative relief sought by the plaintiff is evidently subject to the condition that should the Court find any difficulty in passing a decree for the specific performance of the contract, then the alternative relief might be granted. The learned District Judge found no difficulty in giving a decree for specific performance of the contract and I confess I see no difficulty in my way. No sufficient reason has been placed before me as to why in the absence of any particular difficulty the relief sought in the first instance should not be granted and that the relief in the alternative should be considered as the right and proper one in this case. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 632

MULLICK AND ATKINSON, JJ.

Janki Bai Kutiani and *others*—Plaintiffs—Appellants.

v.

Najaf Ali Khan and *others*—Defendants—Respondents.

Appeal No. 185 of 1917, Decided on, 19th November 1917 from appellate decree of Addl. District Judge, Gaya, D/- 17th November 1916.

(a) Civil P. C. (1908), S. 100—Question of benami or fraud is mixed question of law and fact.

A question of benami or fraud is not one of pure fact; it is a mixed question of fact and law, and if a Court proceeds on mere suspicion and draws inferences from facts proved such as no reasonable man would draw, then it commits an error of law. [P 633 C 1, 2]

(b) Civil P. C. (1908), S. 100—Inferences drawn from facts can be corrected.

While a Court of second appeal cannot interfere with findings of fact based on legal evidence, it is fully competent to correct the inferences drawn from those facts. [P 633 C 2]

Hasan Imam, Kulwant Sahay and *Bimala Charan Sinha*—for Appellants.

Kailashpati—for Respondents.

Mullick, J.—We are satisfied after perusing the record and the judgment that the judgment of the Additional District Judge cannot be maintained and that the case must go back on remand. The question is whether the registered mortgage-deed propounded by the plaintiff is genuine and valid. The burden of proof was heavily on the defendants and the learned Aditional District Judge, agreeing with the trial Court, has come to the conclusion that the deed was a benami document executed by defendant 1 and his deceased brother, the father of defendant 2, for the purpose of protection against the evil designs of one Ramgir. It was open to the learned Additional District Judge to believe the defendant 1, who gave his testimony in Court denying that there was consideration for the bond. It was also open to the learned Court to decline to believe that direct evidence and to rely upon the circumstantial evidence, that is

to say, upon the relationship and the conduct of the parties, and to draw legitimate inferences from the facts established by such circumstantial evidence. Or again it was open to him to rely both upon the evidence of defendant 1 and the circumstantial evidence, in order to come to a finding as to the genuineness of the mortgage bond. My difficulty, however is that it is not clear which of these courses the learned Additional District Judge has adopted. Has he believed defendant 1? If he has, then his finding that there was no consideration and that the transaction was benami must be final in second appeal. But from the tenor in which he has expressed himself it is extremely difficult to say that the learned Additional District Judge has definitely believed the defendant. Nor am I certain that the learned Judge has relied upon the circumstantial evidence. That there was some confusion in his mind is quite clear from that passage in his judgment in which he explains how the bond came into the possession of the plaintiff. The plaintiff relied upon her possession of the bond as showing that there was consideration. Defendant 1 explained the plaintiff's possession by saying that the bond was in the possession of his brother and then passed into the possession of defendant 2, the daughter of his brother, and through her into the possession of the husband of defendant 2, who having quarrelled with defendant 1, delivered the bond to the plaintiff. The learned Judge emphatically characterizes the defendant's evidence upon this point as neither convincing nor satisfactory, but immediately afterwards proceeds to accept the story on the ground that the probabilities are in its favour. It is not clear whether to some extent the learned Judge has not been influenced by mere suspicion and therefore the course that we will take is to set aside his judgment and decree and to remand the appeal in order that the findings may be distinctly stated.

The law as to how far a Court of appeal can interfere with the findings of the first Court upen a question of benami or fraud has been stated in many decisions in our Courts, of which Mr. Hasan Imam has today placed the following before us: *Ranga Ayyar* v. *Srinivasa Ayyangar* (1), *Upendra Nath Nag* v. *Bhupendra Nath Nag* (2), *Mina Kumari Bibi* v. *Bijoy Singh* (3), *Nivath Singh* v. *Bhikki Singh* (4) and *Nil Madhub Mahta* v. *Raj Kishore Das* (5). The question is not one of pure fact; it is a mixed question of fact and law, and if a Court proceeds on mere suspicion and draws inferences from facts proved such as no reasonable man would draw, then the Court commits an error of law. It follows therefore that while a Court of second appeal cannot interfere with findings of fact based on legal evidence, it is fully competent to correct the inferences drawn from those facts.

The appeal will therefore be remanded to the District Judge of Gaya in order that it may be reheard. If the officer who heard the appeal is still in the District and is competent to hear it, he will hear it on remand. If he is not, then the learned District Judge will make whatever arrangement seems suitable to him for the hearing, which should be expedited. Costs will abide the result.

Atkinson, J.—I agree.

v.B./R.K. *Case remanded.*

1. (1898) 21 Mad 56.
2. (1916) 32 I C 267.
3. A I R 1916 P C 238=40 I C 242=44 I A 72=44 Cal 662 (P C).
4. (1885) 7 All 649.
5. (1913) 21 I C 413.

A. I. R. 1918 Patna 633

DAWSON-MILLER, C. J. AND MULLICK, J.

Narain Singh — Defendant — Appellant.

v.

Baba and *another*—Plaintiffs—Defendents—Respondents.

Appeal No. 514 of 1917, Decided on 5th February 1918, from appellate decree of Sub-Judge, Ranchi, D/- 1st March 1916.

(a) Chota Nagpur Tenancy Act (1908), S. 139 (5)—Wrongful dispossession of tenant—Suit to recover possession in Civil Court is maintainable.

Where a tenant has been wrongfully dispossessed of his holding, he may bring a suit for possession of the land in the Civil Courts. S. 139 (5) is no bar to such a suit. The word "application" in the section does not include suits.

[P 635 C 2]

(b) Practice—Evidence—Inadmissible evidence admitted at request of parties cannot be objected in appeal.

Where the parties themselves request either that certain evidence which is not in itself admissible as evidence, if objections are taken, should be considered by the Court or where they request that the Judge should himself put questions to witnesses, it does not lie in the mouth of either party, who asks that that course should be taken, afterwards to question it in appeal.

[P 634 C 2]

(c) Interpretation of Statutes—Words of previous statute re-enacted — Legislature should be deemed to have intended to continue previous law.

In construing a statute the Court is entitled to look at the course of legislation up the date of the statute, and if the words of a previous state are re-enacted it may be assumed that it was intended that the law should be continued as it previously existed. [P 635 C 1]

Atul Krishna Ray—for Appellant.

S. N. Palit and *U. C. Laha*—for Respondents.

Dawson-Miller, C. J.—In this case defendant 1 appeals from a decision of the Subordinate Judge of Ranchi and he contends that the decision ought to be set aside on two grounds. The first is that the Court had no jurisdiction to try the case, although neither before the Munsif nor before the lower Court of appeal was any such objection taken. The second ground upon which he asks us to allow this appeal is that the learned Munsif who tried the case originally went himself and inspected the locality concerning which the dispute took place, and although it is not contended that he had no power to go and make an inspection of the locality it is contended that in the course of that inspection the Munsif took evidence by asking questions from an old man called Chilgu and based his decision entirely, or at all events largely, upon the evidence so obtained. The facts of the case quite shortly appear to be these:

The plaintiff many years ago, about the year 1901, I think it is, settled upon certain waste lands described in the survey as plot No. 613 in Mauza Saheda with the intention of converting them into his korkar. No objection was apparently taken by the malik at that time nor indeed for many years afterwards and therefore he contends that no objection having been taken for two years he is entitled to occupancy rights in respect of that land, he having a few years ago converted it into cultivable land. The original malik appears to have died and was succeeded by defendant 2. In the year 1908 a survey and settlement took place in which the lands in question were entered in the Record of Rights as the ghair mazrooah khas of the malik and no objection was apparently taken to that by the plaintiff. The reason given in the judgment of the Court below for the plaintiff taking no objection is that at that time the land had not been entirely brought under cultivation and the plaintiff did not think that it was necessary that he should assert his rights at that time or that he was entitled to get his name entered in the survey record as having any right or title to the land.

Then according to the plaintiff he grew crops on the land and shortly before this suit was instituted in 1915, defendant 1, who claimed to have taken settlement from the present malik defendant 2, appears to have destroyed the crops and disputed the plaintiff's right or title to any occupancy at all. The Munsif at the trial having heard evidence upon the application of the plaintiff made a personal inspection of the land in question with a view to ascertaining how far the plaintiff's evidence was accurate, to the effect that he had erected bunds on the land and had carried out other works with a view to reducing the land to a state fit for cultivation. During the course of that inspection, according to the Munsif's report of what took place, it appears that both parties asked the Munsif to question this old man Chilgu, who was either the headman of the village or one of the oldest inhabitants; and from the evidence given by Chilgu the learned Munsif was confirmed in the impression, which he seems from his judgment to have arrived at apart from this evidence, that the plaintiff had erected a bund or embankment whereby the land in this plot No. 613 was materially assisted in being redeemed to a state of cultivation. Now where the parties themselvss request either that certain evidence, which is not in itself admissible as evidence if objections are taken, should be considered by the Court or where they request that the Judge should himself put questions to witnesses, I cannot see that it lies in the mouth of either of the parties, who ask that that course should be taken, afterwards to question it on appeal if it should turn out that the result of the evidence is against them, and therefore in my opinion this part of the appeal must fail.

The next objection which is taken is that this being a suit to recover possession the Court, that is to say, the Court of the Munsif in which the suit was originally brought, had no jurisdiction to try it because under the Chota Nagpur Tenancy Act of 1908 which applies to

suits with respect to the land in question it is provided in S. 71 that if any tenant is ejected from his tenancy or from any portion thereof in contravention of S. 68, he may within a period of one year from the date of such ejectment present to the Deputy Commissioner an application praying to be replaced in possession of such tenancy or portion; and the Deputy Commissioner may, if he thinks fit, after making a summary enquiry replace him in possession in the manner described in S. 68. That section says that no tenant shall be ejected from his tenancy or any portion thereof except in execution of a decree, or in execution of an order of the Deputy Commissioner passed under this Act. Then S. 139 of the same Act provides as follows:

"The following suits and applications shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other Court, except as otherwise provided in this Act, namely,"

and then follow eight different classes of suits or applications which it is said shall be tried only by the Deputy Commissioner. No. 5 is:

"All applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord."

It is said that sub-S. 5 applies to the present case and therefore the suit is barred, because it could only be tried under that sub-section by the Deputy Commissioner. Reliance was placed upon the earlier legislation, both the Act of 1859, S. 23 (6) and the Chota Nagpur Proedure Act of 1879, S. 37, Cl. 6, in which suits of this nature were only cognizable by the Deputy Commissioner and it is said that there is no difference between the word suits and the word applications used in S. 139 of the present Act and that it was intended merely to re-enact the law as it previously existed. In construing a statute I think one is certainly entitled to look and see the course of legislation up to that time, and if the words of the previous statute are re-enacted, it may be assumed that it was intended that the law should be continued as it previously existed. But in the present case S. 139 of the Act of 1908 seems to my mind clearly to draw a distinction between suits and applications and the reasons seem to me to be clear. The word application in the section merely refers to certain summary procedure, at all events in sub-S. 5 which provides that in case where tenants are ejected they may at once and without the delay and expense of bringing a suit be—if they make out their case—put in possession of the disputed property. But having regard to the fact that the word suits is also used in many of the sub-sections in the same section I cannot belive that it was intended in the presant Act that not only applications such as those I have described should be confined to the Deputy Commissioner's Court alone, but also suits which claimed not only to be put in possession but also included claims for declarations and matters of that sort.

In the present case it is noticeable that not only did the plaintiff seek the relief of being put in possession of the disputed land, but he sought a decree adjudicating upon his korkar rights and claimed also any other reliefs to which he was entitled in the opinion of the Court. In any case I do not think that S. 139, sub-S. 5, of the Act in question was intended to bar a suit being brought in some other Court besides that of the Deputy Commissioner. The matter has already been the subject of judicial decision in a case which came before the High Court of Calcutta in 1910 and the judgment of Woodroffe and Carnduff, JJ., appears in *Khetra Nath* v. *Paru Beuri* (1). Both these learned Judges were agreed that the word application in the section under consideration did not include and was not meant to include suits such as that which has been brought in the present case. I think on both grounds this appeal must fail and must be dismissed with costs. The costs, which the respondents have to pay in respect of their unsuccessful application for security, will be set off against the costs they recover in the appeal. We assess the appellant's costs of that application at one gold mohur.

Mullick, J.—I agree.

V.S./R.K. *Appeal dismissed.*

1 (1911) 9 I C 478.

A. I. R. 1918 Patna 635

SHARFUDDIN AND ROE, JJ.

Gauri Dutt—Appellant.

v.

Dohan Thakur—Respondent.

Misc. Appeal No. 311 of 1916, Decided on 4th July 1917, from order of Sub-Judge, Muzaffarpur, D/- 10th June 1916.

Civil P. C. (1908), O. 23, R. 3—Compromise —Decree outside scope of suit—Compromise including matter outside scope of suit should not be given effect to.

Plaintiff sued defendant for recovery of a certain sum claiming interest at 24 per cent. per annum. Before the disposal of the suit a compromise was effected between the parties, whereby it was agreed that the defendant should pay to the plaintiff a certain sum on a certain date and that if the money was paid on that date, interest should run at the rate of nine per cent. per annum. It was further agreed that if the money was not paid on the date fixed interest should run at the rate of 24 per cent. per annum from the date of the compromise to the date of realisation.

Held: that the decree-holder was entitled to recover interest only at the rate of nine per cent. per annum.

Per *Roe, J.*—The agreement to pay after the specified date a rate of interest not claimed in the plaint was outside the scope of the suit, and any portion of the compromise which fell outside the scope of the suit was invalid and ought not to have been included in the decree and could not be executed as part of the decree.

[P 636 C 2]

Chandra Sekhar Banerji—for Appellant.

Saroshi Charan Mitter—for Respondent.

Sharfuddin, J.—The appellant who was a decree-holder instituted a suit for recovery of Rs. 7,018-6-6 against the defefendant on a bahi khata. Before the disposal of the suit a compromise was effected between the parties and a petition was put in embodying the terms of the compromise. It was agreed that the defendant should pay to the plaintiff the sum of Rs. 2,500 on or before 30th June 1915; and that if the money was paid by that date, interest should run at the rate of 12 annas per cent. per mensem. It was further agreed that if the money was not paid on or before 30th June 1915, interest should run at the rate of 24 per cent. per annum from the date of the compromise to the date of realization. Under the terms of the compromise a decree was prepared; and the plaintiff put that decree into execution, and in doing so calculated the interest at the rate of 24 per cent. per annum, upon which the defendant put in an objection under S. 47, Civil P. C. In his objection the defendant raised several grounds, but the one with which we are concerned is that the decree-holder should not have calculated the interest at 24 per cent. The executing Court allowed the objection, holding that the higher rate of interest was a penalty. Against this order the present appeal is preferred by the decree-holder. The contention on behalf of the appellant is that the rate of interest under the deed of compromise was really 24 per cent. per annum, and that it was agreed by way of concession to the defendant that if he paid the sum agreed upon on or before 30th June the rate of interest would be reduced to 9 per cent. per annum.

In this matter the question whether 24 per cent. is in the nature of a penalty or not does not arise. The interest on the money advanced to the defendant was at the rate of 13 annas per cent. per annum, i. e., Rs. 9-12-0 per annum, and this was the rate claimed in the plaint. From the terms of the compromise itself it is very clear that the rate of interest agreed upon was really 9 per cent. per annum, and the decree-holder therefore is entitled to obtain from the defendant Rs. 2,500 with interest at the rate of nine per cent. per annum. As to the stipulation that the rate of interest will be 24 per cent. per annum upon failure to pay the money agreed upon on the date agreed upon it is a matter which we consider to be altogether superfluous. The appeal for the above reasons will be dismissed with costs.

Roe, J.—I agree that the agreement to pay, after the specified date, a rate of interest not claimed in the plaint, was outside the scope of the suit, and that any portion of the compromise which fell outside the scope of the suit was invalid and ought not to have been included in the decree and cannot be executed as part of the decree. With regard to the second plea taken, that on a previous application one of the plaintiffs took the same objections as are now before us and that that application was dismissed for default, I am of opinion that the dismissal for default is not a bar to giving the relief which is now sought.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 636

MULLICK AND THORNHILL, JJ.

Khetro Mohan Datt—Appellant.

v.

Dilwar and *others*—Respondents.

Appeal No. 167 of 1917 and Civil Revn. No. 148 of 1918, Decided on 20th June 1918 from appellate order of Dist. Judge, Purulia, D/- 23rd April 1917.

Civil P. C. (1908), O. 21, R. 91—Execution sale—Purchaser cannot impugn validity of sale except on ground that judgment-debtor had no saleable interest.

It is not open to a party who purchases at an auction sale to impugn the validity of his own purchase when he finds that he has bought a property which is not worth as much as he expected at the time of his purchase. He cannot attack the purchase except on the ground that the judgment-debtor had no saleable interest in the property. [P 637 C 2]

Gour Chandra Pal—for Appellant.

Shiv Narain Bose—for Respondents.

Muliick, J.—This is a matter which arises out of an execution sale held in enforcement of a decree for money. The right, title and interest of the judgment-debtor in certain immovable property was sold on 28th March 1916 and purchased by a person who says he is in no way connected with the judgment-debtor. On the 27th March, a mortgagee of the property came in and asked the Court to sell the property subject to his mortgage, although that mortgage did not find any mention in the sale proclamation. It seems that when the parties were called upon to settle the sale proclamation the judgment-debtor did not appear and so the Court had no opportunity of notifying the mortgage charge in the sale proclamation. After the sale was held and confirmed, the auction-purchaser appeared before the execution Court and demanded that the sale should be set aside on the ground that he had purchased in ignorance of the fact of the mortgage charge. He contended that as the mortgage charge had not been notified in the sale-proclamation he was not bound by his purchase and that the sale should be rescinded. The Munsif very properly held that the auction-purchaser was not a person who could come in and attack his own purchase. He also seems to be of opinion that the auction-purchaser had sufficient opportunity of knowing that the property was sold subject to the mortgage charge.

The auction-purchaser then appealed to the District Judge and he without deciding the question as to whether the auction purchaser had any locus standi in the matter said that it was a fit case for the exercise of his inherent powers and that as there was no provision of the Code under which he could set aside the sale, he would do so on the ground that the omission to notify the incumbrance at the time of the sale operated harshly upon the auction-purchaser. Now in my opinion it is quite clear that the learned Munsif took the correct view that it is not open to a party who purchases at an auction-sale to impugn the validity of his own purchase when he finds that he has bought a property which is not worth as much as he expected at the time of his purchase. Every man buys at an auction sale with his eyes open and the general principle that an auction-purchaser cannot attack his own purchase except on the ground that the judgment-debtor had no saleable interest must apply. Nor is this a case in which the inherent powers of the Court can be exercised, as the auction-purchaser has his proper remedy against the decree-holder. If he has bought a property the title as to which was defective, and if he has been misled on account of any fraud or omission on the part of the decree-holder, it will be open to him to seek his remedy against the decree-holder by a suit for such damages as the law allows. But there is no reason why the Court should interfere on behalf of the auction purchaser and set aside a sale simply because the auction-purchaser has bought a bad title.

The result is that the order of the learned District Judge is set aside. We make this order not in appeal, but in the exercise of our revisional powers, because it seems to us that no second appeal lies to this Court as no first appeal lay to the District Judge. We treat the memorandum of appeal as an application for revision and make the order under S. 115, Civil P. C. The petitioner before us will get his costs. Hearing fee one gold mohur.

Thornhill, J.—I agree.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 637

JWALA PRASAD, J.

Wazir Ali—Defendant—Appellant.

v.

Mt. Mahimunnissa and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 295 and 473 of 1917, Decided on 21st December 1917, from decision of Sub-Judge, Purneah.

(a) Transfer of Property Act (4 of 1882), S. 54—Transfer is not complete without registered deed — Mere admission by some

executants does not make deed registered and no title passes.

Under S. 54 a contract of immovable property of the value of Rs. 100 and upwards, unless followed by the registration of the deed, connot completely transfer property.

Where one of several executants of a deed admits execution before the Registrar but the deed is not actually registered, the document can pass no title. [P 638 C 2]

(b) Registration Act (16 of 1908), Ss. 35 and 87—Registration on admission by only some executants is improper — Whether irregularity is cured by S. 87 (*Quaere*).

Registration of a document on the admission of execution by one of several executants is irregular. [P 638 C 2]

Quaere.—Whether the irregularity is cured by S. 87. [P 638 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 153 —Question whether "naqdi" or "bhawli" rent is payable—Second appeal is not barred.

In a case where the question is whether the defendant is liable to pay naqdi or bhawli rent a second appeal is not barred by S. 153, Ben. Ten. Act: 29 *I C* 896, *Foll*. [P 639 C 1]

Purnendu Narayan Sinha—for Appellant.

Naresh Chandra Sinha—for Respondents.

Judgment.—These appeals arise out of rent suits brought by the heirs of one Riazat Ali patnidar. The defendant is the tenant. In Suit No. 2699 the claim was for arrears of rent at a naqdi jama of Rs. 9 besides cesses from 1319 to 1321. In Suit No. 2701 the claim was for bhawli, i. e., half the produce as rent for the same period. The defendant-appellant pleaded that the interests of Riazat Ali and others, patnidars, were transferred by virtue of a sale-deed of 1916 in favour of one Jama Baksh and that Jama Baksh became the owner of the patni and hence he alone was entitled to the rent and not the plaintiffs. There was a further contention in Suit No. 2701 that they were not liable to pay the bhawli or adhi rent inasmuch as the rent was converted into a naqdi of Rs. 2-12-0 by Riazat Ali and that the plaintiffs were bound by that conversion. The third plea was the usual plea taken by the defendant in a rent suit that the rents in arrears were paid up and were not due. Issues were accordingly framed by the first Court and all the contentions of the defendant were overruled, with the result that the suit was decreed with certain variations in the claim as regards the bhawli rent. The judgment of the Munsif was upheld by the Subordinate Judge in appeal.

The contentions in the second appeal are almost the same as taken in th Courts below. It has been held by the Courts below that the sale-deed in favour of Jama Bakhsh by Riazat Ali and others was not registered. This fact is not controverted by the appellant, but it is said that one of the executants of the deed, Riazat Ali, had admitted before the Registrar the execution of the document and that was sufficient to pass the interests at least of Riazat Ali. S. 54, T. P. Act, is a complete answer to this contention, which provides that a transfer of tangible immovable property of the value of Rs. 100 and upwards can only be effected by a duly registered instrument. It is needless to quote authority on the point. The contract of sale unless followed by the registration of the deed, cannot completely transfer the property, and as expressly laid down in that section, cannot by itself create any interest in or charge on the property. As to the contention about Riazat Ali's admission of the execution of the deed before the Registrar, it may be noticed that under S. 35, Regn. Act (16 of 1908), all the persons executing the document should have admitted the execution before the Registrar before he was bound to register the document. In *Srimati Sujan Bibi* v. *Srimati Asafa Khatun* (1) it was observed that if the document is registered on the admission of one of the executants it was doubtful whether the defect in registration of the document could be cured by S. 87 of the Act, disagreeing with the view in *Pakran* v. *Kunhammed* (2), but in both these authorities it was admitted that registration could only be properly done on the admission of all the executants and that non-compliance with S. 35 constitutes an irregularity or defect.

In the present case the registration has not taken place at all, so that no question of curing an irregularity arises. I therefore hold that the plaintiffs were entitled to maintain the suit. This is the main contention of the learned vakil on behalf of the appellant. The other contention is that the question as to whether the rent was commuted into naqdi in Suit No. 2701, was not properly decided by the Court below inasmuch as the Court did not discuss the evidence but simply said that it went through the

1. (1909) 4 I C 69.
2. (1900) 23 Mad 580.

evidence and agreed with the first Court. The lower appellate Court's judgment was a judgment in agreement. The evidence was fully discussed by the first Court. The contention is overruled. It has been contended before me by the respondents that S. 153, Ben. Ten. Act bars a second appeal in the present case. In case No. 2701 the issue was whether the defendant held land in that suit at a naqdi rent. Upon this issue a second appeal would certainly lie and S. 153 would not be a bar vide the case of *Kali Krishna Baiswas* v. *Ram Chandra Baidya* (3). As to Suit No. 2699, the contention of the appellant is that he set up the right of the alleged vendee, and therefore there was a conflicting claim as to the title in land and hence S. 153 did not apply. The sole question is whether there was any conflicting claim between the parties in the present suit. The vendee is not a party and hence there was no conflicting claim between the plaintiffs and the vendee. Therefore, second appeal would not lie in Suit. No. 2699 as the claim for rent was below Rs. 100. The result is that both these appeals are dismissed with costs.

V.S./R.K. *Appeals dismissed.*

3. (1915) 29 I C 896.

A. I. R. 1918 Patna 639

IMAM, J.

Jagan Dubey and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 93 of 1918, Decided on 11th April 1918.

(a) Penal Code (1860), S. 447—Finding as to who was in possession of land in dispute is necessary.

For a conviction under S. 447 the finding on the point as to who was in possession of the land in dispute is necessary. [P 640 C 1]

(b) Penal Code (1860) S. 447—Person entering upon land in bona fide assertion of right to remain there till ejected in accordance with law is not guilty.

Where a person enters upon land, not with the object of intimidating annoying or insulting the complainant, but in the bona fide assertion of his own right to remain on the land till he is ejected therefrom in accordance with law, he is not guilty of an offence under S. 447. [P 640 C 1]

M. Yunus—for Petitioners.

Government Pleader—for the Crown.

Judgment. — The three petitioners Jagan Dubey, Damri Dubey and Bigan Kahar were convicted under S. 447, I. P. C., by the Sub-divisional Officer of Sassaram. On appeal their conviction was upheld by the learned Sessions Judge of Shahabad. The present petition is on behalf of the three men. Mr. Yunus appearing on their behalf contends that the conviction under S. 447, I. P. C., cannot be sustained on the findings of the learned Judge. It appears that some canal side cutting lands kept by Government are from year to year settled with people and that amongst them the land with which this case is concerned was one. This land has been, it is admitted, settled with the father of the principal accused Jagan Dubey from year to year. The circumstances of the annual settlement leave little doubt that the accused believed that the renewal after the expiration of every annual lease would be a matter of course. What happened last year was that the lease expired on 31st March 1917. On 8th May an application was put in by the private prosecutor Bidyapat before the Settlement Officer for the lease of the land in question. On 7th May the settlement was made with this man and he was duly given the lease. On 7th August 1917 Bidyapat entered upon this land. Nothing happened on that day, but on the day following the accused Jagan and the other two petitioners came to the land and ordered Bidyapat to leave the field. He refused and thereupon Jagan called upon his men to beat him.

The latter ran away, on which the land was ploughed up by the accused and his party. Mr. Yunus contends that before a conviction under S. 447, I. P. C., can stand, the finding on the point as to who was in possession of the land in dispute was necessary. He contends that although the last lease expired on 31st March 1917, yet his client continued to remain in possession of this land and that he was in possession of this land when on 8th August he came and ordered Bidyapat to leave the place. Mr. Yunus relies for this contention on a finding of fact in the judgment of the lower appellate Court. That finding runs as follows:

"Indeed there is little doubt that he had actually sown 'Rohini Bawag' earlier in the year between the expiry of his lease on 31st March and the first entrance of Bidyapat on the land. It would seem that at that time he was unaware that his lease would not be renewed."

On this finding he invites me to hold that the land continued to be in possession of his client. The learned Government Pleader appearing in support of the conviction on the other hand contends

that even if the land continued to be in possession of the petitioner Jagan, in any event on 7th August 1917, the day previous to the occurrence, Bidyapat had entered upon this land and that therefore on 8th August, when Jagan came to interfere, the land was in possession of Bidyapat and therefore Jagan came and entered upon land in possession of the complainant Bidyapat. I am therefore asked to hold that on 8th August, when the petitioner came to this land, he came as a trespasser. I find from the judgment of the lower appellate Court that on 7th August when Bidyapat entered upon this land there was no obstruction; but there is evidence to show that before that threats had been used by Jagan against Bidyapat. In answer to this Mr. Yunus contends that the fact that after the expiration of the lease the land had been actually cultivated by his client and further the fact that his client had threatened Bidyapat against entering upon this land, show clearly that his client was not only in possession of the land but was also asserting it against Bidyapat and anybody else who might obtain or try to obtain a lease of it from the canal authorities. He also contends that if nothing happened on 7th August that might be due to the fact that the complainant came to the land without the knowledge of the accused.

On the finding of the lower appellate Court I cannot but come to the conclusion that the petitioner Jagan continued to be in possession of this land after the expiry of his lease In the circumstances I am coerced to hold that on 8th August, when he came and drove Bidyapat out of the land, he did so in the bona fide belief that he being in possession of the land was entitled to remain on it till duly ejected. On the facts of this case therefore there is substances in the contention that the entry of Jagan on the land in question was not with the object of intimidating, annoying or insulting Bidyapat, but was in the bona fide assertion of his own right to remain on the land till he was ejected therefrom in accordance with law. For these reasons I hold that the conviction under S. 447, I. P. C., of the petitioners is unsustainable. The conviction and sentences as against these petitioners are set aside.

V.S./R.K. *Comviction set aside.*

A. I. R. 1918 Patna 640

JWALA PRASAD, J.

Ram Sarup—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 23 of 1917, Decided on 10th December 1917, from order of Munsif, Sitamarhi, D/- 27th September 1917.

(a) Penal Code (1860), S. 464—Accused Gomasta of *S* verifying plaint "*S* ba kalam khas" — Accused admitting verification but pleading authority from *S*—*S* not denying fact—Accused is not guilty of forgery, plaint not having been signed fraudulently.

Accused, a gomashta of one *S*, filed a plaint on behalf of S. and verified it in the words "*S*. ba kalam khas." *S* accepted the plaint, gave evidence in support of it and obtained a decree on its basis. During the suit accused admitted that the plaint had been verified by him, but that he had authority from *S*. *S* did not deny this:

Held: that the accused was not guilty of forgery inasmuch as he did not make the signature of *S* on the plaint dishonestly or fraudlently. [P 642 C 2]

(b) Criminal P. C. (1898), S. 195 (c) — Limitation in S. 195 (c) — Whether also applies to order under S. 476. (*Quaere*)

Quaere—Whether the limitation contained in S. 195 (c) in the words "a party to any proceeding in any Court," applies also to an order under S. 476 of the Code by reason of the words in the latter section, "any offence referred to in S. 195'. [P 642 C 2]

Ambica Prasad Upadhaya—for Petitioner.

Judgment.—This is an application against an order of the Munsif of Sitamarhi, dated 27th September 1917, passed under S. 476, Criminal P. C., directing the prosecution of the petitioner for an offence under S. 465 read with 471, I. P. C. The petitioner is a gomashta of one Sagar Mall. A suit was instituted in the Court of the Munsif on 5th March 1917 for recovery of money based upon a mortgage bond executed by the defendants in the suit in favour of Sagar Mall. Sagar Mall has a cloth shop in Sursund. The plaint was filed under the signature purported to have been made by Sagar Mall himself. The verification and the signature are in the handwriting of the petitioner in these words: "Sagar Mall ba kalam khas." The bond was not disputed and the principal plea taken by the defendants in the suit was that of payment of a certain sum of money said to have been made by him but not credited in the suit. Upon an issue having been framed on that plea, evidence was taken on behalf of the parties. In the course of the trial Sagar Mall was examined on 3rd August

as a witness to prove his case. He was recalled and was cross-examined on 4th August and in answer to a question of the Court said as to Ex. 10, which runs as follows:

"I did not write the above. My gomashta Ram Sarup Ram wrote it not in my presence."

The petitioner Ram Sarup was examined as a Court witness on 6th August with regard to Ex. 10. He said:

"This is in my handwriting. The plaintiff authorised me to sign for him in the way in which I have signed. Dwarka Prasad Mohurrir asked me to sign in that way, as I had no mukhtearnamah from the plaintiff."

The mortgage suit was disposed of on 6th August with the result that a modified decree, giving credit to the defendant for Rs. 400 was passed in favour of the plaintiff. On that very day the Court ordered proceedings to be drawn up against the petitioner for having forged the signature of Sagar Mall on the plaint. The petitioner showed cause and on 27th September was examined in support of the cause shown by him. He repeated the statement made by him on 6th August referred to above in the following words:

"I am gomashta of Sagar Mall Exs. 10 and 10-1 are the signatures of Sagar Mall written by him: I signed for Sagar Mall as I was authorised by him to do so. I did not do it dishonestly or fraudulently to deceive anybody. I did not do it to do wrongful gain or loss. I have deposed before on behalf of Sagar Mall in the original case"

On that very day the Court made the order absolute and directed the prosecution of the petitioner under the sections set forth above. The reason given by the Munsif for his order under S. 476 is as follows:

"The above Exs 10 and 10-1 show clearly that the accused has committed forgery and that he used the forged document in Court. By his acts he practised fraud upon the Court and led the Court to believe that the plaint was propelry signed and verified by the party. If the accused would have signed thus 'dastakhat Sagar Mall bakalam Ram Sarup,' the case would have been different. The verification of pleadings is a most solemn act and this has been very lightly treated by the accused. It seems therefore that the accused has committed offences under S. 465 and 471, I. P. C."

Order 6, R. 14, Civil P. C., provides that every pleading shall be signed by the party and his "pleader(if any)" with and important proviso to it namely that

"where a party pleading is by reason of absence or for other good cause unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue on his behalf"

The plaintiff in his evidence has said that the plaint was not signed in his presence and that it was signed by Ram Sarup his gomashta. The plaintiff accepted the plaint filed on his behalf as his own, supported it by his own evidence in Court, and obtained a decree on the basis of that plaint. He does not deny that the petitioner Ram Sarup was not authorised by him to sign the plaint; and, from the conduct of the plaintiff, it must be presumed that there was an implied authority by him to the petitioner to sign the plaint. The petitioner asserted the authority given to him during the trial of the original suit, and also when he showed cause. He has also explained the reason why he did put in the words "bakalam khas" instead of "bakalam Ram Sarup". The learned Munsif admits that if the signature would have been "bakalam Ram Sarup" the matter would have been quite different. From this I understand the Munsif to mean that in that case the prosecution of the petitioner would not have been directed at all. The learned Munsif does not hold that the signature "bakalam khas" was made dishonestly with a view to cause wrongful gain or loss as defined in S. 24, I. P. C. He however says that the petitioner

"practised fraud upon the Court and led the Court to believe that the plaint was properly signed and verified."

Under S. 25, I. P. C.,

"an act is said to be done fraudulently when it is done with intent to defraud but not otherwise."

There must therefore be a clear "intention to deceive" and to obtain an advantage. It is needless to quote authorities to show what would constitute a fraudulent act within the meaning of S. 25, I P. C. But on a careful examination of all those authorities, it is clear that no hard and fast rule can be laid down; it has to be determined in the circumstances of each case, whether the intention of the accused was such as to constitute in point of law an "intent to defraud." In the present case, the circumstances, if carefully scrutinized, do not at all go to show that there was such an intention on the part of the petitioner as is contemplated by the section. The bond in question is a mortgage-bond dated 2nd October 1915. The due date for the repayment of the money covered by the bond mentioned therein as well as in the plaint is 30th Pous 1324 corresponding to 8th January 1917. The suit was instituted on 5th March 1917, the suit was not at all going

to be time-barred and no advantage would have been gained to the petitioner or to his master Sagar Mall in not instituting the plaint on the date on which it was filed. If the petitioner actually wrote the signature in the plaint adding the words "ba kalam Ram Sarup" (that is by the pen of Ram Sarup) showing that it was written by him and not by Saggar Mall, there was absolutely no risk to the plaintiff's claim at all. So the signature, as it stood as "ba kulam khas", did not give any advantage to the plaintiff and the absence of it would not have exposed the petitioner or his master to the risk of any loss or damage. Ram Sarup as the gomashta of Sagar Mall was in charge of the shop of Sagar Mall in respect of which the transaction question is said to have been entered into. Therefore it was the ordinary duty of the man to carry on the business of the shop and to realise moneys lent on behalf of the firm to debtors. He believed that he was authorised to sign it for Sagar Mall and he expressly said in his evidence that Dwarka Prasad Mohurrir asked him to sign in this way, as he had no mukhtearnamah from the plaintiff. Under clause 1, S. 464, I. P. C.,

"man is said to commit forgery when he dishonestly or fraudulently . . . . . signs . . . . .a document with the intention of causing it to be believed that such document . . . . . was signed . . . . . by or by the authority of the person by whom or by whose authority he knows that it was not signed."

So if the man believed that he had an authority on behalf of Sagar Mall he would have come under Cl. 1, S. 464.

In *Reg.* v. *Bhavanishankar* (1) the accused 1 was the manager of an estate framed by one Dalsukhram. Accused 2 was a peon of the same firm of Dalsukhram. Petitions bearing the signature of Dalsukhram in the handwriting of accused 1, as in this case, were presented to the mamlatdar requesting him to realise the rents due from the debtors of Dalsukhram under the provisions of Regn. 17 of 1827. The signature on each of those petitions was made exactly as it would have been made by Dalsukhram himself and the petitions were lodged on the last day they could have been lodged. The Assistant Sessions Judge was of opinion, as the learned Munsif in this case, that the intention was to deceive the Court. Their Lordships of the Bombay Court disagreed with the view of the lower Court and held that

"assuming that even if accused 1 had no authority to sign the document on behalf of Dalsukhram, his master, he could not be held to have committed a forgery within the meaning of S. 464, I. P. C. Assuming that the prisoner had no authority, he cannot be found guilty, unless he signed the petition dishonestly or fraudulently. Further that the act was done for the benefit of Dalsukhram but it was not suggested that he was not legally entitled to the rents which it was the prisoner's object to recover from the tenants."

The facts and circumstances of this case are on all fours with those in the case cited above. There does not appear to be any particular object or sinister motive in using the words "ba kalam khas" instead of "ba kalam Ram Sarup." The learned Munsif also does not say that there was such motive, but simply says that the petitioner treated the verification "very lightly." To my mind therefore the act of the petitioner was a casual and accidental one without fully realising the responsibility of the signature having been put so as to show that it was signed by Sagar Mall himself and not by the petitioner. I do not therefore think that in this case there was any intention on the part of the petitioner to practise fraud upon the Court, as is said by the Munsif in his judgment of 27th September 1917. There was no object in that at all. The petitioner therefore is not guilty and has committed no offence. The order to prosecute is bad and should be set aside. It has also been contended by the learned Vakil for the petitioner that he was only a witness in the suit and was not a party and hence no order under S. 476, Criminal P. C., for his prosecution could be passed, inasmuch as the offence of forgery referred to in S. 195 (c) of the Code must have been committed by "a party to any proceeding in any Court." No doubt sanction under S. 195 (c) can be given only against a party to the proceedings in the Court in which the document is produced or given in evidence. It is contended that the limitation of S. 195 (c) would apply also to an order under S. 476 by reason of the words in the latter section "any offence referred to in S. 195."

There has been a great diversity of opinion on this point. The authorities have recently been reviewed in *Jadunandan Singh* v. *Emperor* (2), which held that the limitation of S. 195 (b) would apply to orders under S. 476 as well. In that

1. (1874) 11 B H C R 3.

2. (1910) 37 Cal 250=4 I C 710=1 Cr L J 37.

case the offence was committed in lodging a false case before the police and was not committed before any Court, and may be distinguished from the present case where the question is not whether the Offence was committed, but the question is whether the offence of forgery committed by a witness and brought to the notice of the Court in respect of a document produced in Court is excepted from the operation of S. 476, Criminal P. C. by reason of the limitation in S. 195 (c), which applies to a party only. It was held in the case of *Abdul Khadar* v. *Meera Saheb* (3) that the Court cannot order prosecution under S. 476 in respect of a forgery case. On the other hand the cases to the contrary are *Keshav Narayan Manolkar*, In re (4) and *Akhil Chandra Sen* v. *Queen-Empress* (5) and *Devji*, In re (6). In view of the conflict in the authorities it is not desirable to decide the point, inasmuch as the order under S. 476 is being set aside on merits. The result is that the order of the Munsif dated 27th September 1917 sanctioning the prosecution of the petitioner is set aside and the prosecution stated on the foot of that order is also quashed.

V.S./R.K. *Order set aside.*

3. (1892) 15 Mad 224
4. (1912) 13 Cr L J 848=17 I C 720.
5. (1895) 22 Cal 1004.
6. (1894) 18 Bom 581.

A. I. R. 1918 Patna 643

MULLICK AND THORNHILL, JJ.

Satya Deva Swami—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 84 of 1918, Decided on 29th May 1918, from order of Sess. Judge, Champaran, D/- 4th May 1918.

(a) Penal Code (45 of 1860) S. 330—S. 330 contemplates assault with object of obtaining confession or restoration of stolen property.

Section 330 of the Penal Code contemplates that there must be immediate connexion between the assault and the restoration of the property, i. e., the intention of the person causing the assault must be proved to be to obtain from the person assaulted a confession or restoration of stolen property and there must be no reasonable ground for explaining the assault otherwise than upon that foundation.

[P 645 C 1]

(b) Penal Code (45 of 1860), Ss 323 and 330—Assault not with object of obtaining restoration of stolen property—Assault in fit of anger—Assault amounts to simple hurt under S. 323.

Where it was found that the object of the assault was not to obtain the restoration of stolen property but that the assault was committed in a fit of anger quite independent of the intention to extract a confession or cause a restoration of stolen property:

Held: that the assault did not come under S. 330 but amounted to simple hurt under S. 323, Penal Code. [P 645 C 1]

S. Sinha and *Rajendra Prasad*—for Appellant.

Sultan Ahmad—for the Crown.

Mullick, J.—The appellant has been convicted by the Sessions Judge of Champaran in a trial with the aid of two Assessors of an offence under S. 330, I, P. C. and sentenced to simple imprisonment for one month and a fine of Rs. 50. in default rigorous imprisonment for fifteen days. The story told for the prosecution is that on or about 7th December 1917 the appellant Satya Déva Swami was lodging in a garden house in the town of Motihari belonging to one Debi Prasad of that town. The appellant appears to be a gentleman who has had an education in America and who now spends his time in this country in religious pursuits and goes about from district to district preaching and lecturing. It appears that he had come to the District of Motihari for this purpose and that while he was lodging in the garden house above mentioned, some of his property was stolen, including, as he now says, a valuable manuscript in Hindi. Information was given to the police of the theft, but without any result. It is admitted that suspicion fell upon the complainant Mahabir Mali, who is in the service of Debi Prasad and looks after the garden on his behalf. It is also admitted that in consequence of the information given by the appellant the house of Mahabir was searched by the police and it is established by evidence that one Mangal, a disciple of the appellant, went to the house of Mahabir's father for the purpose of inducing him to return the appellant's property. On 30th of December the appellant returned from a lecturing tour and the case for the prosecution is that he sent one Basudeo Narayan Munshi, who also lodges in the garden, to fetch Mahabir to the house which is known as the "cottage"; that Mahabir came and that the appellant called upon him to give up the stolen articles; that Mahabir repeated that he was innocent and that thereupon the appellant struck Mahabir

on the buttock with a stick causing a swelling.

The prosecutor then goes on to say that his cries attracted constable Faiz Khan to the spot as also a crowd of some 20 or 25 people, and that under the appellant's orders his disciple Mangal, one Baidyanath the son of a local pleader, Ranjiwan the sais of Baidyanath and Basudeo Narayan proceeded to take him (complainant) to the house of Gorak Prasad for the purpose of locking him up there for the night. It is further alleged that the constable accompanied the party but that when they were passing the house of Sub-Inspector Qurban Ali, the constable raised an alarm; that thereupon all those who were holding the complainant ran away and that the complainant was then able to relate his story to the Sub-Inspector. It is said that this took place at 7 p. m. and that the Sub-Inspector after learning the complainant's story sent him in charge of three constables to the house of Mr Marsham the Superintendent of Police and himself followed shortly afterwards; and that at 9 p. m. the first information of Mahabir Prasad was recorded in the presence of Mr. Marsham. On 31st of December the police arrested Satya Deva Swami, Basudeo Narayan, Mangal, Baidyanath and Ramjiwan. Basudeo made a statement before Mr. Ritchie, Deputy Magistrate, pending the investigation, but the other accused refused to make any statements. Eventually all the five persons were placed on their trial before the Court of Session on charges under Ss. 330 and 348 I. P. C The Assessors were both of opinion that there was no evidence against any of the accused. The learned Sessions Judge however while disbelieving the greater part of the story for the prosecution and being of opinion that the case so far as it related to Baidyanath and his sais and Basudeo and Mangal was false, convicted the appellant under S 330, I. P. C., holding that he had assaulted the prosecutor with a lathi for the purpose of either extorting a confession or constraining him to restore or cause the restoration of the stolen property. It is against this conviction that the appellant comes here in appeal.

It is to be mentioned that while some of the accused in the Sessions Court were defended by competent counsel the appellant declined either to cross-examine the witnesses or to addres the Court. He did not, either in the Committing Magistrate's Court or before Mr. Ritchie, make any statement with a view to explain the circumstances against him. In the Sessions Court however he filed a written statement setting out his account of what took place on 30th of December. He states that he did call the prosecutor to the cottage and that he demanded from him his property, in particular the manuscript which he valued most. He admits that he struck the complainant one blow with a lathi but his excuse is that the prosecutor became abusive He then says that the prosecutor, seeing that a police constable was standing by, took the aggressive and attempted to strike him with a danta (or stick); that he in self-defence wrenched this danta from the hands of the prosecutor and thereafter suggested to those who had come to the spot that the prosecutor should, in order that he might do no harm to him, be taken to the house of his master, Debi Prasad and kept there for the night and that for this purpose Mangal and others started from the garden for Debi Prasad's house taking with them the prosecutor. As to what took place afterwards there is no affirmative evidence on the side of the defence because no witnesses have been called. We have in the statements of those accused who were charged with the offence under S. 348, I. P. C., an account of the part which the constable Faiz Khan played in the matter. If these statements are to be believed, the constable was a consenting party to the taking of the prosecutor to Debi Prasad's house, and it was only upon reaching the house of the Sub-Inspector Kurban Ali that the thought struck him that it was a good opportunity of securing the arrest of so many undesirable persons.

However with what took place after the prosecutor left the gates of the garden we are not much concerned, because the persons who are said to have confined him on the way for the purposes of obtaining a confession or causing restoration of stolen property have been acquitted by the Sessions Judge. The question before us now is whether or not there was an assault in the cottage under circumstances which would bring the appellant within the purview of S. 330, I. P. C. Now, the two eye-witnesses

called by the prosecution on this point, namely, a ploughman named Dhaju Dusadh who worked under the prosecutor, and Baldeo Kurmi who is a cousin of the prosecutor, have been disbelieved by the Court below. So that we have only the word of the complainant as against the word of the accused; and the question is whether upon the testimony of the prosecutor alone coupled with the admissions of the accused above referred to a case under S. 330, I. P. C., has been made out. In my opinion it has not.

The learned Sessions Judge seems to consider that every master who slaps his servant because the servant has stolen some article of trifling value, is liable to have himself committed to the Court of Session on a charge of assault under S. 330, I. P. C. In my opinion he is wrong. S. 330 contemplates that there must be immediate connection between the assault and the restoration of the property that is to say, the intention of the person causing the assault must be proved to be to obtain from the person assaulted a confession or the restoration of stolen property; and there must be no reasonable ground for explaining the assault otherwise than upon that foundation. If in the present case the appellant is able to show, or if it can be fairly inferred from the facts, that the object of the assault was not to obtain restoration of stolen property, but that the assault was committed in a temporary fit of anger quite independent of any intention to extract a confession or cause restoration of stolen property, obviously the assault would not come under S. 330, I. P. C., but would come under the definition of simple hurt under S. 323, I. P. C.

Now what are the facts in this case? As I have said, the complainant has been disbelieved with regard to what took place outside the garden. Have we any guarantee therefore of his truthfulness as to the occurrence inside the garden? Or is there any reason why the version of the accused should not be preferred to that of the complainant? I for my part fail to see why, when there are no reliable witnesses, we should be compelled to accept the story of the complainant who has been disbelieved with regard to the greater part of his story. Then as to the constable. He states that he did not see any stick but that what he did see on his arrival at the garden was that the prosecutor was lying on the floor and making a noise, while the appellant was striking him with his fist and was kicking him. He admits that he knew that Baidanath was a person whom he was required to watch, inasmuch as the father of Baidyanath was an adherent of Mr. Gandhi in connection with whose visit to the Champaran District he was even at that moment on special duty. He tells us that although he saw these two persons and Mangal and Basudeo wrongfully restraining the prosecutor he took no steps to prevent them from doing so. His explanation is that he did not say anything at first, because he thought that when they had actually confined the complainant in Baidyanath's house he would have a better case against them.

He modifies this statement by saying that on reaching Kurban Ali's house he changed his mind, as it struck him that that was a good opportunity of calling the Sub Inspector out and getting the offenders caught redhanded. To my mind both these explanations are false. I think the constable was a consenting party at the outset to the taking of the prosecutor to the house of Debi Prasad; that he saw nothing wrong in it; and that on reaching Kurban Ali's house he asked the others to go away and took the complainant into Kurban Ali's house merely for the purpose of informing the Sub-Inspector of what he was doing. The idea of instituting a prosecution under S. 330, I. P. C., seems to have then entered the brain of the Sub-Inspector, as the appellant had made himself obnoxious to the authorities for various reasons into which it is not necessary to enter. It seems clear that if the appellant had not otherwise incurred the displeasure of the authorities, no one would have ever thought of committing him to the Sessions on the present charge. The appellant arrived at the Police Station shortly after the complainant had been despatched to the house of the Superintendent of Police and he told the Sub-Inspector that he was afraid that the prosecutor would do him some injury and requested that either the prosecutor should be delivered into the appellant's custody or arrangements made by the Police for keeping him in custody for the night. This conduct is consistent with

the case put forward by the defence, and in my opinion the appellant did not act with the intention alleged by the prosecution. The fact appears to be that he lost his temper at the somewhat aggressive attitude adopted by the prosecutor and struck him in anger.

In my opinion the proceedings against the appellant have from the outset been misconceived. The injury according to the Civil Surgeon's deposition was very slight and the conviction in this case ought to have been one under S. 323, I. P. C. The conviction and sentence passed upon the appellant Satya Deva Swami are accordingly set aside and in lieu therefor he is convicted under S. 323, I. P. C., and sentenced to pay a fine of Rs. 25 or in default to undergo simple imprisonment for seven days.

Thornhill, J.—I agree.

V.S./R.K. *Order modified.*

A. I. R. 1918 Patna 646 (1)

ROE AND JWALA PRASAD, JJ.

Sarab Narain Das and *others*—Plaintiffs—Appellants.

v.

Top Ojha and *others* — Defendants — Respondents.

Appeal No. 1201 of 1915, Decided on 7th July 1916, from appellate decree of Sub-Judge, Chapra, D/- 27th February 1915.

Limitation Act (1908), S. 20—Payment of interest by one of several co-mortgagors does not bind others.

A payment by one of several co-mortgagors owning separate interests in the mortgaged property does not extend limitation against the others. [P 646 C 2]

Sorashi Charan Mitter and *Baikuntha Nath Mitter*—for Appellants.

Harnandan Sahay—for Respondents.

Judgment.—The facts of this case briefly are that two widows mortgaged for necessity the lands now in suit. The five defendants are their reversioners, the widows being dead. The mortgagee sues to put the property up for sale on a date well past the period of limitation, on the ground that limitation has been saved by a payment made by one of the reversioners as interest at a moment which brings the suit within limitation. The defence taken to the suit was by one of the reversioners only. He pleaded that payment by one reversioner could not bind the whole body of reversioners. The learned Munsif decreed the suit on the ground that the whole property was bound by the acknowledgment. The learned Subordinate Judge set aside that decree and substituted for it a decree against the right, title and interest of the acknowledging reversioner only. Against that decree the mortgagee appeals. He claims firstly, that the acknowledgment binds the whole mortgaged property, and secondly, that even if it binds only the acknowledging reversioner, it must be held to bind not only the reversioner who made the acknowledgment but also three of the reversioners who have not contested the suit in any way. Upon the first ground reliance is placed on the case of *Saroda Charan Chuckerbutty* v. *Durga Ram De Sinha* (1). But that case is easily distinguishable from the present case. The present case is one of five reversioners inheriting separate and distinct shares in the property. They are not a joint family; they have separate interests. In the case quoted the acknowledging representative of the mortgagor was one of four sons still joint inheriting an indivisible liability in an indivisible debt.

The principle underlying the whole decision was that the payment was made by the karta or agent of the whole family authorized to bind the whole property. In the present case there is no such question. We must regard the five reversioners as co-mortgagors by right of succession to the interest of the original mortgagors. The acknowledgment by one of them cannot bind the others, even though in the written statement set before the Court no exception is taken by three of the reversioners to the suit in which it is sought to obtain a decree. We hold that the decision of the learned Subordinate Judge is correct. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

1. (1910) 37 Cal 461=5 I C 484.

A. I. R. 1918 Patna 646 (2)

MULLICK AND THORNHILL, J.

Balbir Prasad—Judgment-debtor—Appellant.

v.

Jugul Kishore — Decree-holder—Respondent.

Appeal No. 179 of 1917, Decided on 14th May 1918, from appellate order of Dist. Judge, Monghyr, D/- 26th May 1917.

(a) Evidence Act (1 of 1872), S. 115—Estoppel—Fraudulent intention is not necessary.

In order to create an estoppel it is not necessary to show that the person who made the representation acted with a fraudulent intention. [P 647 C 2]

(b) Evidence Act (1 of 1872), S. 115—Decree—Death of judgment debtor—Execution against legal representative—Execution withdrawn on admission of liability and promise to pay—Subsequent repudiation — Legal representative is estopped from denying liability.

After the death of a judgment-debtor, the decree-holder took out execution against one *B* as the legal representative of the deceased judgment-debtor B came to a compromise with the decree-holder admitting that he was liable for the decree and promissing to discharge the balance if the decree-holder would take a cash payment of a certain sum. The decree holder agreed to take the sum and withdrew the execution. *B* subsequently repudiated the compromise and set up the objection that he was not the legal representatives of the judgment-debtor and that therefore the decree could not be executed against him:

Held: that the decree-holder having changed his position in consequence of the admission of *B* and that prejudice having been caused to him by the conduct of B, the latter was estopped from denying his liability. [P 647 C 2]

Abani Bhushan Mukherjee — for Appellant.

Khurshaid Husnain—for Respondent.

Mullick, J.—The plaintiff got a decree for money against one Bharath Lal and took out execution against him and after his death against his minor son, Japsu Lal. In that execution Japsu Lal was represented by Balbir Prasad as guardian ad litem. After Japsu Lal's death execution was taken out against a lady named Mt. Lalita and Balbir Prasad himself. In this execution proceeding Balbir Prasad came to a compromise with the decree-holder admitting that he was liable for the decree and promising to discharge the balance if the decree-holder would take a cash payment of Rs. 200. The decree-holder agreed to take the sum of Rs. 200 and withdrew the execution. Balbir Prasad failed to carry cut his promise to satisfy the decree as to the balance and the decree-holder brought the execution case, out of which the present appeal arises. In this execution case Balbir Prasad repudiated the previous compromise and set up the objection that he was not the legal representative of the judgment-debtor Bharath and that the execution case could not be maintained against him. Both the Courts below have decided against the judgment-debtor and hence this second appeal.

Now the only point is whether Balbir Prasad is estopped from raising the defence which he now raises. It is quite clear that the decree-holder has changed his position because when Balbir Prasad paid the sum of Rs. 200 and promised to pay the balance the decree-holder withdrew the execution, although he might have, if he had not been deceived by the judgment-debtor, asked the Court to proceed to adjudicate upon his right to execute the decree against Balbir Prasad as the legal representative of Bharath. Thus there was a change of position, and not only was there a change of position but prejudice has been caused to the decree-holder by the conduct of Balbir Prasad In my opinion the principle of estoppel clearly applies and the case cited by the ower appellate Court: *Coventry* v. *Tulshi Persad Narayan Singh* (1), is clearly in point. An attempt has been made before us to rely upon *Ganga Sahai* v. *Hira Singh* (2), but in regard to that case the opinion of the Court to the effect that in order to justify an estoppel it must be shown that the person who made the representation acted with a fraudulent intention was long ago overruled by the High Court of Calcutta. It is not necessary. according to the law as at present accepted, that there should be any fraudulent intention established in connexion with the representation which is the subject of the estoppel. The judgment-debtor's appeal is without any merit and is dismissed with costs.

Thornhill, J.—I agree.

V.S./R.K. *Appeal dismissed.*

1. (1904) 31 Cal 822.
2. (1878-80) 2 All 809 (FB).

A. I. R. 1918 Patna 647

MULLICK AND ATKINSON, JJ.

Kishun Deyal Rai and *others*—Petitioners.

v.

Mt. Kulpati Kuer and *another*—Opposite Parties.

Civil Revn. No. 339 of 1917, Decided on 23rd March 1918, from order of Munsiff, Arrah, D/- 3rd November 1917.

Civil P. C. (1908), S. 11—Rent suit—Decree does not operate as res judicata as to rate of rent payable for years other than those covered by decree.

A decree in a rent suit does not operate as res judicata as to the rate of rent payable for years other than the years covered by the decree. [P 649 C 1]

Per *Mullick, J.*—The question whether a decision as to the rate of rent operates as res judicata depends on the frame of the issue. [P 649 C 1]

Fakhruddin—for Petitioners.

Lakshmi Narain Singh—for Opposite Parties.

Atkinson, J.—This application comes before us in revision under S. 115, Civil P. C., against an order of the learned Munsif, dated 3rd November 1917, refusing an application for review of a judgment passed by the learned Munsif on 29th May 1917. The action was one for rent, and the rent sought to be recovered was in respect of the years 1320 to 1323. The plaintiffs claimed that the rate of rent was Rs. 124 odd per annum; the defendants on the other hand contended that the rate of rent payable was only Rs. 63 odd. The plaintiffs' case was based upon an entry in the Record of Rights., which disclosed that the rent as recorded was Rs. 124 odd. On the other hand there was a proceeding under S. 106, Ben. Ten. Act in which the Settlement Officer found that the rate of rent actually payable was Rs. 63. No appeal appears to have been taken from the order of the Settlement Officer in the S. 106 proceeding by either party, and therefore the order of the Settlement Officer would appear to be final and conclusive as between the parties to that proceeding. There have been previous rent suits between the same parties. A suit for rent was decreed by the Subordinate Judge in the year 1912 upon the basis of the order of the Settlement Officer. That decree was subsequently set aside by an order of the Calcutta High Court; and their Lordships in that case suggested to the parties that the proper course to adopt would be to have the Settlement Officer's order reviewed; but notwithstanding the intimation that was given by their Lordships neither party did anything to impeach or challenge the order of the Settlement Officer; hence the difficulty that has arisen.

With the above suggestion the learned Judges of the Calcutta High Court remanded the case to the Subordinate Judge who on 12th February 1916 affirmed the decision of the Munsif awarding a decree to the plaintiffs at the rate of Rs. 124 odd per annum. That decision came before us in second appeal; and while that second appeal was pending, the judgment now complained against was passed on 29th May 1917. Our judgment was pronounced on 11th July 1917 and by that judgment was confirmed the order of the lower appellate Court on the ground that it was only a judgment for rent for the years in suit and no more; and that a judgment in a rent suit did not in point of law amount to an estoppel and did not accord with the principles of res judicata unless the rent was payable at a rate stipulated by contract. We also intimated in our judgment that we thought that great weight should be attached to the order made by the Settlement Officer in the S. 106 proceeding. After our judgment was pronounced the defendants in the rent suit, who are the present petitioners before us, applied to the learned Munsif to review his order, dated 29th May 1917. At the time that the application for review was filed, the learned Munsif who had tried the case had left Arrah and was succeeded by the present Munsif Mr. Syed Hasan. Mr. Syed Hasan considered that in pursuance of the provisions of O. 47, R. 2, he, not having been the Judge who tried the suit, had no jurisdiction to entertain the present application for review, as the application presented to him did not come within the four corners of the rule. He held that no new or important matter had been discovered, and that there was no clerical or arithmetical error such as to justify him in interfering with the order of his predecessor. The ground upon which the petitioners based their application for review was that new and important matter had come into existence in the shape of our judgment and that that judgment was material in considering what were the relative rights of the parties.

The learned Munsif, however, appears to have failed to appreciate the nature of the new and important matter indicated by O. 47, R. 2. Clearly our judgment was a new and important matter which he should have properly considered with a view to ascertaining whether or not it afforded sufficient ground for re-considering the order which had been previously passed on 29th May 1917. The learned Munsif has also clearly fallen into an error in two other respects. He has held that the judgment of the Subordinate Judge of 12th February 1916 amounts to res judicata so far as that judgment establishes that the rate of rent payable by the defendants is Rs. 124 odd per annum.

Clearly in holding that that judgment amounted to res judicata between the landlord on the one hand and the tenants on the other the learned Munsif fell into an error. A decree in a rent suit is not res judicata as to the rate of rent payable for years other than the years covered by the decree. Another error which the learned Munsif has made is as regards the weight to be attached to the order of the Settlement Officer. He considers that it has very little weight because it is founded on a judgment of the Subordinate Judge which was subsequently set aside by the Calcutta High Court. That is obviously an error, because though the Settlement Officer's order may have been based upon an order of the Subordinate Judge which was set aside, yet it has, by lapse of time, crystallised into a binding decree between the parties and therefore is entitled to great weight.

We think therefore that the view which the learned Munsif took of O. 47, R. 2, is erroneous and that there was new and important matter in the shape of our judgment which he should have considered having regard to the legal directions contained therein We feel therefore that we must set aside the order of the learned Munsif dated 3rd November 1917 and direct him to re-try the whole case. The original decree of 29th May 1917 is also set aside and the learned Munsif is directed to re-hear the whole case, having due regard to the order of the Settlement Officer which has crystallised into a binding decree between the parties; and also bearing in mind that a rent-decree is not res judicata upon the question of the rate of rent payable in respect of years other than those covered by the decree. This application is accordingly allowed with costs, hearing fee one gold mohur.

Mullick, J.—I agree the question whether a decision as to the rate of rent operates as res judicata depends on the frame of the issue. Here the order of the High Court did not permit the Subordinate Judge to determine anything more than the rent of the years in suit.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 649

JWALA PRASAD, J.

Sukhnandan Rai and *others* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 381 of 1917, Decided on 4th December 1917. from order of Dist. Magistrate, Shahabad.

(a) Penal Code (1860), Ss 71 and 143 — Illegal rescue of cattle causing damages to embankment— Separate sentences in same trial under S. 143 and S. 24 Cattle Trespass Act is illegal—Criminal trial, Sentence.

The accused were tried for forcibly rescuing their cattle seized by the complainant with a view to take them to the pound, as they were causing damage to the earthwork newly thrown on an embankment of the complainant's master, and were convicted and separately punished for offences under S. 24, Cattle Trespass Act, and S. 143 of the Penal Code:

Held: that a separate punishment under the Penal Code as well as under the Cattle Trespass Act were illegal: 38 *I. C.* 433, *Foll.* [P 649 C 2]

(b) Penal Code (1860), S. 71— It contemplates separate punishment for offence under same law and not under different Acts.

Section 71 contemplates separate punishments for an offence against the same law and not under different laws. [P 649 C 2]

(c) Cattle Trespass Act (1871), Ss. 10 and 24—Trespass or damage under S. 10 must be proved for offence under S. 24.

For a conviction under S. 24 there must be a finding as to trespass or damage as contemplated by S. 10 of the Act. [P 650 C 1]

S. P. Varma and *Hari Bhusan Mukerji* —for Petitioners.

Parmeshwar Dyal—for the Crown.

Judgment. — The petitioners have been convicted for having forcibly rescued their cattle seized by the complainant with a view to take them to the pound, as they were causing damage to the earthwork newly thrown on an embankment of the complainant's master. The accused have been convicted under S. 143, I. P. C., as they were five in number, and also under S. 24, Cattle Trespass Act, 1 of 1871. The separate punishment under the Indian Penal Code as well as under the Cattle Trespass Act is illegal. Separate punishments for different offences committed and constituted by a set of facts are contemplated by S. 71, I. P. C. That section obviously contemplates separate punishment for an offence against the same law, and not under different laws. S. 26, General Clauses Act, expressly prohibits punishment being given twice for the same offence, though it permits a joint trial for both the offences. Similar was

the view taken in the case of *Rahmatulla* v. *Emperor* (1) by Roe, J., and myself.

I therefore set aside the conviction under the Cattle Trespass Act. It must be mentioned that the Magistrate in this case omitted to record a finding as to whether there was a trespass or damage as contemplated by S. 10, Act 1 of 1871 (Cattle Trespass Act), which finding was necessary for the conviction of the accused either under S. 24, Cattle Trespass Act or under S. 143, I. P. C., for the common object stated by the Magistrate in his judgment is the forcible rescue by a show of force of the cattle. The rescue of cattle is punishable only when they are liable to be seized or were lawfully seized under the Act, that is, that they were seized in the act of trespassing and doing damage. In this view of the case it would have been necessary to set aside the conviction and send back the case to the Magistrate for a re-trial and a clear finding and then to convict the accused either under the Indian Penal Code or under the Cattle Trespass Act. In view of the trouable and expense that a remand would entail the learned Counsel for the petitioners has waived his objection as to the defect in the finding in the judgment of the Magistrate. I therefore set aside the conviction under S. 24, Act 1 of 1871 and direct that the fine if realized be refunded to the petitioners. I maintain the conviction under S 143, I P. C., and the sentence passed thereunder.

V.S./R.K. *Petition partly accepted.*

1. (1917) 1 P L J 373=38 I C 433= 18 Cr L J 321.

A. I. R. 1918 Patna 650

THORNHILL, J.

Subh Narayan Kuer and *others*—Petitioners—Applicants.

v.

Lakshmi Narain Kuer — Opposite Party.

Criminal Revn. No. 134 of 1918, Decided on 30th April 1918, from order of Dy. Magistrate, Motihari.

Criminal P. C. (1898), S. 145—Conflict of evidence of possession—Evidence of title can be looked into.

In a proceeding under S. 145, if there is substantial evidence of possession or a conflict of evidence on that question the, Magistrate is justified in looking to the evidence of title in corroboration of the evidence of possession. [P 659 C 1]

P. R. Das and *A. P. Upadhya*—for Applicants.

Siva Nundan Rai — for Opposite Party.

Judgment.—This case comes up in revision under S. 435, Criminal P. C. It appears that an order has been passed under S. 145, Criminal P. C., declaring the first party in possession of the disputed plot. The case for the petitioners is that they and the first party are descendants of one Ajodhya Kuer and all the lands which belong to the family are joint and are in joint possession of the members of the family, and that there has been no partition of any kind. They also allege that the lands shown to be in joint possession in the revisional survey conclusively show that they still are in joint possession. The lands mentioned in the survey are 18 bighas odd and include plot No. 1669, the subject-matter of these proceedings. The judgment of the learned Deputy Magistrate has been attacked on the ground that possession of the land is joint and therefore no order under S. 145, Criminal P. C., could be made. The case of *Tarujan Bibee* v. *Asamuddi Bepari* (1) has been referred to in support of this argument. In that case the Magistrate found that the lands were actually in joint possession of both the parties. In the present case it appears to be admitted by the Deputy Magistrate that the lands were originally joint, but he points out that the first party has proved an ekrarnama by which all the parties appointed a panchayat to decide the dispute. The award of the panches was proved, and the award allotted to each pattidar the land which was in his name in the rent roll. The learned Magistrate also points out that the second party Subh Narain executed a lease in favour of the Karnaul Factory leasing certain lands, which he would not have been entitled to lease by himself had the award of the panches not been acted upon. This Subh Narain although summoned has refused to come forward and state that the award of the panches was not acted upon and separate possession had not been taken thereunder. The case of *Kali Kristo Thakur* v. *Golam Ali Chowdhry* (2) has also been relied upon for the petitioners. Counsel say. that the learned Magistrate has decided the case on the evidence of title alone. It

1. (1900) 4 C W N 426.
2. (1881) 7 Cal 46.

is true that the case referred to lays down where no sufficient evidence of possession was produced before the Magistrate but evidence as to title of the person in whose favour the Magistrate found was given and where the Magistrate based his decision upon the evidence of title, the Magistrate was wrong in coming to a finding of possession. Counsel says that on the authority of that case if the learned Deputy Magistrate came to the conclusion that the evidence on the question of possession was unsatisfactory he should have passed no order under S. 145. It appears from the judgment of the learned Magistrate that the evidence of possession is not oversatisfactory on either side, but it is clear that such evidence as was given he took to be altogether in favour of the possession of the first party. In the judgment of Pontifex, J., in *Kali Kristo Thakur* v. *Golab Ali Chowdhry* (2), he distinctly states,

> "I also wish to add that if there had been substantial evidence of possession or a conflict of evidence on that question, the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession".

It appears to me that this is exactly what the learned Deputy Magistrate has done. He states the only question is the question of possession and has found such possession to be with the first party. The learned counsel for the first party has referred me to the case of *Parmessar Singh* v. *Kailaspati* (3), where the law relating to S. 145 is summarised, and also to Art. 377 of Doyce's Criminal Procedure Code. In my opinion the judgment of the learned Deputy Magistrate is right and strictly in conformity with law. The application is rejected and the rule is discharged.

V S./R.K. *Rule discharged.*

3. (1916) 17Cr. LJ 369= 35 I C 108.

A. I. R. 1918 Patna 651

CHAMIER, C. J. AND SHARFUDDIN, J.

Lachanbati Koeri and *others*—Plaintiffs—Appellants.

v.

Bodhnath Tewari and *others* —Defendants—Respondents.

Privy Council Appeal No. 18 of 1916, Decided on 22nd February 1917, against judgment of Roe and Jwala Prasad, JJ., D/- 27th June 1916.

Landlord and Tenant—Merger — Merger depends on intention — Question whether Mokarrari griht merged in Patni tenure—Intention and interest of Mokararridar must be considered.

In a Court of Equity the question of merger or no merger is always considered to depend upon the express or implied intention of the parties.

Where the question is whether a mokarrari right has merged in a patni tenure granted to the mokarraridar, the Court ought to consider whether the evidence shows an intention to keep the two interests apart or whether it was to the interest of the mokarraridar to keep them apart. [P 653 C 1]

Lachminarayan Singh and *Shivanandan Rai*—for Appellants.

Lal Mohan Gangule — for Respondants.

Chamier, C. J.—The is an application for leave to appeal to His Majesty in Council. The plaintiffs in the case are purchasers of a patni tenure granted by a zamindar in 1856 to two persons, Kalitnath Tewari and Tejnath Tewari. The last named in 1858 transferred his interest in the tenure to Kalitnath Tewari. The plaintiffs claim to be entitled to khas possession of all the lands included in the patni tenure. The Tewari defendants claim to be entitled to retain possession of 1,242 bighas lying within the patni tenure on the strength of a permanent mokarrari lease granted by the zamindar to their ancestors in 1846. Both the Subordinate Judge and this Court held that the mokarrari lease was granted to the defendants' ancestors in 1846 as alleged. On this question of fact there are, therefore concurrent findings which will probably be accepted by their Lordships of the Privy Council, and we must deal with this application on that footing. The plaintiffs contend that the mokarrari merged in the patni when both become, as has been found, vested in the same persons. Both Courts held that no merger took place.

The Subordinate Judge said:

> "I hold, therefore that the makarrari right did not merge in the patni right as the patni and the mokarrari rights were not acquired in the same names and as the mokarrari right was kept separate from the patni right by keeping separate collection papers for the mokarrari and by granting separate rent receipts to the tenants as mokarraridars."

This Court said:

> "The last point argued by Mr. Pugh is that there was a merger of the patni and mokarrari rights upon the purchase of Tejnath's interest or if not from that date, then from the date of the death of Kalitnath. Upon the question of merger modern case law in India is conflicting, but ancient case law is clear that there was no law of merger in the mufassal prior to the passing

of the Transfer of Property Act. We agree with Teunon J., in *Abdul Karim* v. *Ahammad Ali Meaji* (1) that prior to the year 1882 when the Transfer of Property Act was passed, there was no merger in the mufassal."

It may be that what the learned Judgs meant by saying that there was no merger or law of merger in force in the mufassal prior to 1882, was that there did not prevail in the mufassal any rule of merger such as was in force as law in England prior to the passing of the Judicature Act. In a Court of Equity the question of merger or no merger has always been considered to depend upon the express or implied intention, of the parties. It appears to me that the learned Judges of this Court ought to have considered the question whether the evidence showed an intention to keep the two interests apart or it was to the interest of the mokarraridars to keep them apart. They seem to have decided against the alleged merger merely on the ground that previous to 1882 there was no law of merger in the mufassald. On the whole, though I confess, not without some hesitation, I have come to the conclusion that the proposed appeal does inrolve a substantial question of law. I would, therefore direct that a certificate be issued that as regards value and nature, the case fulfils the requirements of S. 110, Civil P. C.

Sharfuddin, J.—I agree.

V.S /R.K. *Certificate granted.*

1. A I R 1914 Cal 439=23 I C 612.

A. I. R. 1918 Patna 652

JWALA PRASAD, J.

Mushari Ram Manhari—Petitioner.

v.

Raj Kishore Lal and *others*—Opposite Parties.

Criminal Revn. No. 477 of 1917, Decided on 26th February 1918, against order of Sess. Judge, Monghyr, D/- 12th November 1917.

(a) Criminal P. C. (1898), S. 202—Issue of process postponed—Magistrate must record reasons.

It is imperative for a Magistrate to give reasons under S. 202 before postponing the issue of process against the accused. [P 653 C 1]

(b) Criminal P. C. (1898), Ss. 202, 203, 204—Judicial inquiry before issue of process—Court should not allow accused to attend at preliminary inquiry and cross examine prosecution witnesses.

It is not right for a Court in a judicial inqury before process has been issued against the accused to allow the latter to attend at the preliminary inquiry and cross-examine the prosecution witnesses. [P 653 C 1]

(c) Criminal Trial—Procedure—Error of procedure does not vitiate proceeding unless failure of justice is coused.

An error of procedure does not vitiate a proceeding or an order passed therein, unless it occasions a failure of justice. [P 653 C 2]

Pugh and *Sambhu Saran*—for Petitioner.

Government Advocate — for Opposite Parties.

Judgment.—This is an application against the order of the Sessions Judge of Monghyr, dated 12th November 1917, upholding an order of the Deputy Magistrate of that district, dated 31st August 1917, dismissing the complaint of the petitioner under S. 203, Criminal P. C. The grounds urged in support of the petition are as follows: Firstly that the Magistrate should not have postponed the issue of process against the accused and held the inquiry under S. 202, Criminal P. C., without recording his reasons for distrusting the complaint of the petitioner. Secondly that the Magistrate acted illegally in ollowing the accused to be present during the inquiry and to be represented by counsel in order to examine the prosecution witnesses and also in examining defence witnesses. The complaint was lodged in the Court of the Magistrate in charge, Mr. A. Majid on 13th August 1917 and was made over to N. S. E. Hussain for disposal, with a suggestion that a local inquiry should be quickly made under Government Standing Order as the complaint was against police officers. On 14th August 1917 Mr. Hossain examined the complainant on oath and passed the following order:

"I will hold a local inqury on the 16th instant. Send a copy of the complaint to the S. P. for the needful."

It is contended by the learned Government Advocate that this amounts to a recording of reasons for not issuing process against the accused, as the Magistrate thought in his mind that a local inquiry was necessary in order to satisfy himself as to the necessity of issuing any process. Reading the above order regarding the holding of the local inqury in aonjunction with the order of the Magistrate in charge of the 13th August suggesting a local inquiry to be made, it appears to me that the Deputy Magistrate acted upon the suggestion offered to him and not because he distrusted the complaint of the petitioner. I do not think that in the circumstances of the case he exercised any judgment in the matter and held upon a

consideration of the complaint and the statement made on oath by the petitioner that it was a case in which process against the accused ought not to issue. It was to my mind an automatic order made by him. This no doubt is a contravention of the requirements of S. 202, which is imperative in requiring the Magistrate to give reasons before postponing the issue of process. The point is so well settled that I need hardly quote authorities in support of it. The second point urged by the learned counsel for the petitioner also appears to be well founded. It is not at all right for the Court that in a judicial inquiry, before a process has been issued against the accused under S. 204, Criminal P. C., the accused should be required to attend at a preliminary inquiry and to cross-examine the prosecution witnesses. So far as the accused is concerned, it is clear that it is unfair to call upon him to appear and to undergo the trouble and expense of conducting the case, unless the Magistrate had found upon the complaint in the inquiry made by him that there was a prima facie case and that he should be summoned as an accused in the case. And what is true as to the accused is also true so far as the complainant is concerned. It was pointed out in the case of *Emperor* v. *Bhika Hussein* (1) that there is no justification to call upon the accused to be present at a judicial inquiry under S. 202. It was observed as follows:

"Now that would be as unfair to the complainant as the converse procedure would be to the accused."

There can be no manner of doubt that the procedure adopted by the Magistrate was unwarranted by the Code. In this matter also it appears to me that the Magistrate was misled by the wrong interpretation of the meaning of the Government Circular regarding investigation into a complaint made against police officers of certain grades. I agree with what has been said in the ruling quoted above regarding the Government Circular at p. 887 that it was never intended that the Circular was in any way to affect the procedure prescribed by the Code of Criminal Procedure. I therefore agree with the contention of the learned counsel for the petitioner that the procedure adopted by the Magistrate was against the procedure prescribed by law.

The question then arises whether it is a case in which this Court should interfere in revision and set aside the order of dismissal passed by the Magistrate and direct a fresh inquiry into the complaint of the petitioner. Both the errors complained of relate to the procedure adopted by the Magistrate in ordering and conducting the inquiry before him under S. 202. It is a well-settled principle of law that errors of procedure would not vitiate the proceeding or order passed therein unless it has occasioned failure of justice. In the present case, on behalf of the prosecution, witnesses numbering about 10 were examined by the Magistrate and no complaint has been made by the learned counsel for the petitioner before me that any evidence on behalf of the prosecution was shut out,. The learned Sessions Judge has carefully considered the evidence in the case and has written a lengthy judgment consisting of over three typed pages. He has also left out of consideration the evidence adduced by the defence in the case and on a consideration entirely of the evidence offered by the complainant has come to the conclusion that the complainant has failed to make out any case against the accused. The case has therefore been considered on merits and I do not think that the petitioner was any in way prejudiced on account of the errors referred to above. The principle enunciated in the case of *In the matter of Turibullah* (2) appears to me to apply to this case. None of the cases referred to on behalf of the petitioner shows that all the evidence on behalf of the prosecution was taken by the Magistrate and the case was disposed of on a full consideration of the evidence. I therefore reject the application

V.S./R.K *Rule discharged.*

1. (1912) 15 I C 484.

2. (1879) 4 C L R 333.

A. I. R. 1918 Patna 653

ROE AND IMAM, JJ.

Sukhdeo Pathak—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 394 of 1917, Decided on 18th December 1917, from order of Dist. Magistrate, Chapra.

(a) Penal Code (1860), S. 170—Some act must be attempted to be done under personation — Entering station platform without ticket is not such act.

The mere assumption of false character without any attempt to do an official act is not sufficient to bring the offender within the meaning

of S. 170. Accused avoided paying a one-anna platform charge by pretending upon entering the station platform that he was a C. I. D Officer :

Held : that this did not constitute an offence under S. 170. [P 654 C 1]

(b) Criminal P. C. (1898), S. 421—When can record of a case be dispensed with stated —It must be called when some question of law is raised or judgment is intricate.

A Magistrate is not required to call for the record in an appeal in which the only question is a mere question of fact and the judgment of the Court below is so plain and clear that calling for the record would be mere waste of time, but it is not right to reject an appeal summarily when a point of law, which on the face of it is not without substance, has been raised. Nor is it right to refuse to call for the record when the judgment under consideration is a long and intricate judgment requiring obviously careful consideration. [P 654 C 2]

S. P. Varma and *Mahabir Prasad*—for Applicant.

Manohar Lal—for the Crown.

Judgment.—In this case, the applicant has been convicted under S. 170 and sentenced the suffer three months rigorous imprisonment and to pay fine of Rs. 50. The charge against him is that he avoided paying one anna platform charge by pretending upon entering the station platform that he was a C. I. D. Officer, it being a custom of the railway not to require from C. I. D. Officersa platform ticket. This does not seem to us to consititute an offencer under S. 170. It is not a power peculiar to a C. I. D. Officer to go on to a platform without a ticket. Probably, if the applicant had said that he was a Maharaja or a high priest or any person of importance, the ticket collector would have let him through. There is overwhelming authority for the proposition that the act done must be one which assumes an official authority. The mere assumption of a false character without any attempt to do an official act is not sufficient to bring offender within the meaning of S. 170. We therefore set aside the conviction and direct that the fine, if paid, be refunded and the accused be discharged from his bail.

We invite the attention of the District Magistrate to the long series of cases dealing with the question of dismissing appeals summarily. He is not required to call for the record in a case in which the only question is a mere question of fact, and the judgment of the Court below is so plain and clear that calllng for the records would be a mere waste of time, but it is not right to reject an appeal summarily when a point of law, which on the face of it is not without substance. has been raised. Nor is it right to refuse to call for the record when judgment under consideration is a long and intricate judgment requiring obviously careful consideration.

V.S./R.K. *Conviction set aside.*

A. I. R. 1918 Patna 654

IMAM, J.

Srikishun Lal and *another*—Plaintiffs —Appellants.

v.

Sheobalak Gope—Defendant—Respondent.

Appeals Nos. 394 and 395 of 1917, Decided on 4th February 1918, from appellate decrees of Addl. Dist. Judge, Gaya, D/- 11th January 1917.

(a) Registration Act (1908), S. 17 (1), (d)—Compromise between landlord and tenant creating lease not incorporated in decree of Court requires registration.

A compromise between landlord and tenant creating a lease and not incorporated in a decree of Court requires registration under S. 17 (1), (d). and is not admissible in evidence unless so registered. [P 655 C 1]

(b) Bengal Tenancy Act (1885), S 25—Compromise enhancing rent in contravention of S. 29 is illegal.

An enhancement of rent of an occupancy holding in excess of that allowed by S. 29, agreed to by means of a compromise is illegal. [P 655 C 1, 2]

K. P. Jayaswal and *Lakshmi Kant Jha*—for Appellants.

B. Bose—for Respondents.

S. A. No 394 of 1917.

Judgment.—The plaintiffs-appellants instituted the suit for a declaration that the annual jama of the land in suit was Rs. 39-4 6, including road cess and public works cess and that the orders of the survey authorities giving in the Record of Rights the jama at Rs. 20 with cesses may be cancelled. The defendant-respondent resists the suit and contends that the amount of the jama mentioned in the Record of Rights is the correct amount. The plaintiffs-appellants base their claim to the higher jama on the ground that in a previous suit between the parties a compromise had been effected and that the petition of compromise filed in that case contains the clear agreement between the parties that the jama to be paid to the plaintiffs-appellants would be Rupees 39-4-6 with cesses per year. The Munsif who tried this case dismissed the suit. The learned Additional District Judge. who heard the appeal has delivered a judgment confirming the decision given

by the Munsif. There are two grounds on which evidently the suit of the plaintiffs-appellants failed before both the Courts below. The first ground is whether the petition of compromise filed in a previous litigations litigation does not amount to a lease and as such was it not a document that should have been registered under S. 17, Cl. (d), Registration Act. The second ground taken is that the agreement would be invalid, inasmuch as it was to secure an enhancement of rent contrary to the provisions of S. 29, Ben. Ten. Act.

As regards the first point Mr. Jayaswal appearing on behalf of the plaintiff-appellants has contended that the petition of compromise was not a lease and that it amounted to no more than a mere agreement. He has relied for this contention on *Panchanan Basu* v. *Chandi Charan Misra* (1). The facts of that case are different from those of the present one. In that case the compromise petition did not amount to a lease within the meaning of Cl. (d), S. 17, Registration Act, because it was no more than a mere agreement to create a lease at a future date. This distinction was kept in view when that case was finally decided. In order to understand the compromise petition on which the contention of the plaintiffs-appellants is based, I have had the original read out to me and it seems to me that a proper construction of the intent, the meaning and purpose of that petition can leave no doubt in one's mind that it was a lease and not an agreement to create a lease in future. In this connection it may also be mentioned that the terms of this petition of compromise were not embodied in the decree that was drawn up in that suit. Therefore the defect regarding non-registration of this petition of compromise remains insurmountable. In the circumstances it was rightly rejected as any evidence in this case.

With reference to the second ground, learned counsel contends there is nothing to show that any enhancement within the meaning of S 29, Ben. Ten. Act has teken place. In this connection the presumptive evidence of the correctness of the Record of Rights must be taken against the plaintiffs-appellants. The lower appellate Court points out that there was no evidence to rebut the presumption. In the absence of such evidence it is not open to me to hold that the rent of this holding was not that which is contained in the Record of Rights. That being so the question then is whether there has been an enhancement and whether that enhancement is contrary to the provisions of the Bengal Tenancy Act Evidently it is far in excess of that which is permitted by the section. The Record of Rights shows that the holding in question is in the occupancy right of the defendant and there is nothing to show that the defendant is not an occupancy raiyat. The enhancement therefore is illegal. I therefore hold that the view taken by the two lower Courts of the two points of law raised before me by the learned counsel on behalf of the plaintiffs appellants was the correct view. The appeal is dismissed with costs. The learned counsel appearing on behalf of the plaintiffs-appellants has asked me to give him at least a modified decree in respect of the rent of the years in suit, His contention is that even if it be held against him, as I have already held, that the rent was Rs. 20 including cesses, he ought to get relief in respect of that, I am wholly unable to consider this question at the present stage of the hearing of this case. I also notice that no such claim was advanced as a ground in the memorandum of appeal filed in this Court.

S. A. No. 395 of 1917.—The plaintiffs-appellants in this case instituted this suit basing their claim on the reliefs contained in the plaint on a kabuliyat alleged to have been executed by the defendant-respondent. The whole basis of the plaintiffs' case is this document. The lower appellate Court has declined to place any reliance on this kabuliyat which is unregistered. The finding of fact therefore with regard to the genuineness of the kabuliyat is against the plaintiffs-appellants. One of the grounds taken by the learned Judge in refusing to accept this document as a genuine one is that although there was a previous suit between the parties the plaintiffs had not dared to use this document in evidence, though they have relied on it in this case as the very basis of their suit. As a finding of fact the trying Court also came to the same conclusion and alluded to the fact that this kabuliyat had never been in the previous proceeding between the parties put forward, and that the first

1. (1910) 37 Cal 808=6 I C 443.

time it saw the light of day was in the trial of the present suit. The learned counsel appearing on behalf of the plaintiff-appellants has invited me to examine the document in question and drawn my attention to two seals—one of them purports to be of 1912 and the other of 1914. The present suit was instituted in 1915. Evidently therefore, if these two seals are authentic, the impressions contained therein were impressions that were made before the institution of this suit. It is contended that these two seals represent the seals of Courts that decided the previous proceedings between the parties and that the impressions ought to be sufficient in themselves to establish the error into which on this point both the lower Courts have fallen.

I have looked at these two seals with some care, but even accepting that these two are genuine impressions there is nothing before me to satisfy me that these two seals were put down firstly by the authorities of the Courts they purport to be seals of; secondly that they were made at or about the time when they purport to have been made; and thirdly that they are seals of Courts that tried the previous proceedings between the parties. In the circumstances I am unable to get any help from an examination of the seal impressions that might support the contention of the learned counsel appearing on behalf of the plaintiffs-appellants. In the course of the address on this point I was invited to look into a certified copy of some deposition that was taken in some of these previous proceedings. It was suggested that if I looked into these copies it would have appeared that the kabuliyat in question had as a matter of fact been used in the trial of proceedings between the parties on previous occasions. I declined to look into this deposition inasmuch as it was not brought on the record in the trial of this case, nor did I feel disposed to allow this deposition to be put in at this stage of the case without the other side having an opportunity of meeting any conclusion that might be deducible from an examination of this document. In the circumstances and in the absence of any other point of law disclosed in the hearing of this second appeal, I have no option but to dismiss it with costs. The learned counsel appearing on behalf of the plaintiffs-appellants has asked me to give him at least a modified decree in respect of the rent of the years in suit. His contention is that even if it be held against him, as I have already held, that the rent was Rs. 20 including cesses, he ought to get relief in respect of that. For the same reasons as given in Second Appeal No. 394 of 1917 I am unable to allow the plaintiffs-appellants any relief for the admitted rent of the years in suit.

V.S./R.K. *Appeals dismissed.*

A. I. R. 1918 Patna 656

MULLICK, J.

Ragunandan Prasad—Petitioner.

v.

Ramadhin Singh—Opposite Party.

Criminal Revn. No 15 of 1917, Decided on 23rd April 1917, againsr order of Dy. Magistrate, Gaya.

(a) Criminal P. C. (1898), S. 526—Award of compensation by way of costs—Adjournment is no ground for transfer.

The Code authorises Magistrates to give compensation whenever they think proper by way of costs for adjournments, and the passing of such an order against a party does not disclose any prejudice on the part of the Magistrate and is not a valid ground for the transfer of the case to another Magistrate. [P 657 C 2]

(b) Criminal P. C. (1898), S. 344—Magistratc cannot in local inspection bring upon record statements of persons which accused can have no chance of submitting to cross-examination—Criminal trial, Local inspection.

The law allows a trying Magistrate to make local inspection for the purpose of understanding the evidence. It does not limit the power of making such local inspection to a period subsequent to the commencement of the hearing of witnesses All that is required is that the inspection should be limited to actual observation and should not include the taking of depositions. It is however not competent to a trying Magistrate in the course of a local inspection to bring upon the record the statements of persons which the accused can have no chance of submitting to the test of cross-examinatcn. [P 657 C 2; P 658 C 1]

Hasan Imam and *Gour Chandra Pal*—for Petitioner.

Manuk and *Panchanan Banerjee*—for Opposite Party.

Manohar Lal—for the Crown.

Judgment.—It is admitted that one Kedar Nath Banerjee, who was proprietor of Mauza Tranwan, died leaving a nephew named Haridass Banerjee and a widow named Hamangni Devi. This nephew has taken out probate of a will alleged to be that of the deceased Kedar Nath Banerjee; that will has since been impeached and proceedings for its revocation appear to be now pending before

the Court of the District Judge of Patna. The first party in the proceedings under S. 107, Criminal P. C., to which I shall presently refer is the servant of the alleged executor Haridass Banerjee, while the second party are mostly lessees alleged to have derived their title from the widow. It appears that in January 1917, notices under S. 144, Criminal P. C., were issued by the District Magistrate of Gaya calling upon both parties not to create a disturbance in respect of Mauza Tranwan, Cause was shown by the first party with the result that on 12th and 13th February 1917, the District Magistrate recorded a proceeding under S. 107, Criminal P. C., calling upon the second party to show cause why they should not be bound down to keep the peace for a period of one year.

The case was then transferred to the file of a Deputy Magistrate at Gaya named Moulvi Habibur Rahman. It appears that on 25th February the learned Deputy Magistrate made a local inspection of the Kutchery at Tranwan and on 26th February adjourned the case to 5th March for trial at a place called Wazirgunj. On 5th March, when the case was up for trial, a petition was filed on behalf of the second party stating that no one on behalf of the second party was present at the local inspection made by the learned Deputy Magistrate, and requesting the Deputy Magistrate to record a memorandum of his local inspection, in order that the second party might know exactly what had happened at that inspection. The learned Deputy Magistrate complied with this request and recorded what he had seen. The second party were not satisfied with this and immediately filed a petition before the learned Deputy Magistrate, asking him to stay proceedings in order that they might move the High Court for a transfer of the case from his file. The learned Deputy Magistrate complied with this request also, but he directed the second party to pay to the first party a sum of Rs. 100 by way of compensation.

The matter now comes before me upon a Rule issued upon the first party to show cause why the application for the transfer of the case from the file of Moulvi Habibur Rahman should not be allowed. Mr. Hasan Imam, who appears in support of the Rule, urges that the learned Deputy Magistrate is prejudiced and that his proceedings of 5th March 1917, ordering the second party to give costs to the first party, discloses the biassed state of his mind. It appears however that this compensation was allowed on the petition of the first party, who complained that if the second party had intimated their intention of applying for a transfer earlier, the first party would have been saved the trouble and expense of bringing their witnesses to Court on 5th March 1917. I agree that the learned Deputy Magistrate was right in holding that it was possible for the second party to give timely notice to the first party of such intention, and that it was proper and reasonable that the second party should pay compensation to the first party, when the learned Deputy Magistrate granted an adjournment for the purposes of moving the High Court. The Criminal Procedure Code does authorise Magistrates to give compensation whenever they think proper by way of costs for adjournments and so far as this order is concerned, I do not think that it disclosed any prejudice on the part of the learned Deputy Magistrate. The second ground is that by making the local inspection on 25th February 1917 the learned Deputy Magistrate has rendered himself incompetent to try the case.

Now it is to be observed that no evidence has yet been recorded and that all that the learned Deputy Magistrate did was to inspect the Kutchery and to record what he found there. He has said in his memorandum that certain persons were in the Kutchery, who informed him that they were the servants of the first party, and that there was no one who claimed to be a servant of the second party. The law allows trying Magistrates to make local inspection for the purpose of understanding the evidence. It does not limit the power of making such local inspeetion to a period subsequent to the commencement of the hearing of witnesses. There was no reason why the trying Deputy Magistrate should not have inspected the locality before the witnesses had been examined, in order that he might understand the evidence which was about to be given. All that the law requires is that the inspection should be limited to actual observation and should not include the taking of depositions. The accused has a right in every case to require that the evidence upon which the decision is

pronounced shall be legal evidence; and it is not competent to a trying Magistrate in the course of a local inspection to bring upon the record the statements of persons which the accused can have no chance of submitting to the test of cross-examination. So long as the trying Magistrate refrains from doing this, and makes such inspection as would enable him to understand the evidence, he is acting according to law. Mr. Hasan Imam relies upon the case of *Bobbon Shaik* v. *Emperor* (1), but that case really goes no further than reiterating the principles which I have just enunciated. There is nothing therefore in my opinion, illegal in the trying Magistrate's inspection in the present case and the charge of prejudice is unfounded. In my opinion the application has no merits and should be dismissed. I accordingly discharged the Rule and direct that the trial do proceed according to law.

V.S./R.K. *Rule discharged.*

1. (1910) 37 Cal 340=5 I C 365.

A. I. R. 1918 Patna 658

JWALA PRASAD, J.

Dwarka Rai—Petitioner.

v.

Nathuni Koeri—Opposite Party.

Criminal Revn. No. 191 of 1918, Decided on 20th June 1918, from order of Magistrate, Mozuffarpore, D/- 28th March 1918.

(a) Criminal P. C. (5 of 1898), S. 145—Proceedings under S. 145—Refusal to admit documents of title—Jurisdiction is not properly exercised.

In a proceeding under S. 145 documents of title are often of great assistance in arriving at a right conclusion upo then question of possession. Therefore where a Magistrate refuses to admit documents of title proposed to be filed by a party to a proceeding under S. 145 he commits an error in the exercise of his jurisdiction.

[P 659 C 2]

(b) Criminal P. C. (5 of 1898), S. 148—Costs cannot be awarded without notice to opposite party.

No order as to costs can be passed under S. 148 without notice being given to the opposite party against whom the order is proposed to be made.

[P 660 C 1]

Gour Cnandra Pal—for Petitioner.

Hari Nandan Sahay — for Opposite Party.

Judgment.— This is an application against an order of the Magistrate, dated 26th March, 1918, passed under S. 145, Criminal P. C., declaring the first party to be in possession of the property in dispute. The first ground is that the Magistrate has not received the evidence both oral and documentary on behalf of the second party in order to prove his possession. This application is based upon the following facts. After the preliminary proceedings and adjournments, the case was ultimately fixed for hearing for 21st March. On that date the parties filed their hazris or list of witnesses in attendance. In that list on behalf of the petitioner seeond party there were the names of two witnesses Baburam Chamar and Kodai, 1 and 2. On 21st March the case was not taken up, as the Court was busy in some other case, and consequently the present case was adjourned to the next day 22nd March. On that date, two witnesses, one on behalf of the first party and another on behalf of the second party appear to have been examined, and the case was ordered to be taken up on Sunday at 9 a. m. (24th March). On 24th March some witnesses on both sides were examined. Dwarika Rai the second party was ill on that date, and on his behalf Raghu Rai, Bartu Chamar and Kari Teli were examined. The case was then adjourned to 26th March for orders. No list or hazri of witnesses was filed on that date apparently as the list filed on 21st March was continued up to that date Two of the witnessess in that list, namely, Baburam and Kodai were not examined, nor the Kobala and the receipts on behalf of the second party were proved. These documents were filed on 18th October 1917 when the proceeding was in the stage of S. 144. The present proceeding under S. 145 was drawn up on that very date 18th October. The contention of the second party is that on account of the illness of Dwarika Rai (second party), he wanted an adjournment of the case in order to examine the witnesses and to prove the documents. The Magistrate in his first explanation of 20th May reports that 'the petitioners did not really pray for an adjournment as he was away ill. This must be accepted to be correct, but something did transpire on account of the illness of the second party as it appears that the first witness examined on 24th March on his behalf was Raghu Rai who said that Dwarika Rai was ill, and the Magistrate noted "second party being ill, is not able to attend."

After the close of the evidence of the second party, this witness Raghu Rai ap-

pears to have been re-called simply with a view to prove the illness of Dwarika Rai. At this time he says: "Dwarika Rai is very ill of saree (asthma); Janki is look ing after him." There was then cross-examination on behalf of the first party to show that there were other members in the family to look after him, and all that was disclosed in the cross-examination, was that Dwarika Rai had two minor sons only. Thus from the evidence on the record, it is clear that the illness of the second party petitioner was raised and prominently brought to the notice of the Magistrate in order to show that the case could not be properly looked after on that date on behalf of the second party. It is said that no petition was filed 24th March was a Sunday and no stamp and cartridge paper were available. Be that as it may, it is certain that two of the material witnesses on behalf of the second party mentioned in the list of the 21st were also shown to be present on every preceding day as witnesses on behalf of the second party. Kodai Mahto is also a marginal witness on the Kobala of the second party. I therefore hold that the second party was not able to give all the material evidence in the case both oral and documentary to prove his possession. It was mentioned in the petition filed by the second party in this Court that the Magistrate refused to admit the Kobala and the rent receipts produced by the petitioner and did not examine the material witnesses on his behalf. In the second explanation called for by this Court, now submitted, the Magistrate does not deny the above allegation of the petitioner. The Magistrate however says that these documents

"would more probably be filed in a civil suit regarding the land and that proceedings under S. 145 should not be allowed to develop into quasi civil suits. Even if that were proved, the question is not that of title but that of possession."

This apparently might be the reason why the Magistrate did not consider it necessary to allow the second party to prove the documents or to examine the witnesses in question. The Magistrate is certainly right that S. 145 concerns itself only with possession and not with title. But I do not appreciate the contention of the Magistrate that the documents had nothing to do with possession. The rent receipts were certainly evidence of possession and would have proved if admitted that the receipts were granted in respect of the land in dispute by the landlord, because the second party was in possession of the land. The Kobalas, it is contended, recite that the second party was in possession from before their execution. The Magistrate in his order under S. 145 has felt difficulty in coming to a conclusion upon the oral evidence of the parties. He opens out his order with the words: "There are discrepancies in the evidence on both sides in this case." The receipts and the documentary evidence that the second party wanted to file in the case, might have thrown light upon the evidence offered by the second party and might have perhaps assisted the Magistrate in coming to a conclusion regarding the possession of the land. So it cannot possibly be said that these documents were documents relating to the title and had nothing at all to do with possession that the Magistrate had to enquire under S. 145. Even documents of title pure and simple are often of great assistance in arriving at a right conclusion upon possession. I therefore think that there has been an error in the exercise of jurisdiction by the Magistrate in this case in not admitting the documents proposed to be filed by the second party and in not examining the witnesses in connection therewith. *Paitali Singh* v. *Ganapati Kuer* (1). The order of the Magistrate is therefore set aside and the case remanded for a redetermination as to the possession of the contending parties under S. 145, Criminal P. C., after taking the remaining evidence both oral and documentary on behalf of the second party.

The order of the Magistrate regarding costs in this case cannot certainly be supported. The order under S. 145 was passed on 26th March. On that date an application was made by the first party asking for costs to be allowed with the details of the costs entered therein. This was disposed of by an order of 5th April on the margin of the petition "Rs. 60 allowed." This order was passed without any notice to the petitioner. In the explanation to this Court the Magistrate says that such notice is not required by S. 148. Certainly no notice is expressly required because S. 148 contemplates that an order for costs should be passed then and there in the presence of the parties:

1. (1918) 19 Cr L J 529=45 I C 337

but if the order is not passed on that date, an application made subsequent to the order under S. 145 regarding costs, cannot be disposed of without fully hearing the opposite party against whom the order under S. 145 is to be directed. This need not have been provided for in S. 148 but it is consistent with the principle that no order can be passed against any person without giving him an opportunity to be heard. This view was adopted in a series of cases which appears to be a settled point, vide, *Prokash Chunder Sarkar* v. *Ram Prasad Pattack* (2) and *Dowlat Koer* v. *Siva Pershad* (3). This Court also has in agreement with the views of the authorities mentioned above in more cases than one, held that no order as to costs can be passed under S. 148 without notice being given to the opposite party against whom the order is made. The order as to costs is also set aside, and as the Magistrate has been directed to re-try the case under S. 145, if he comes to a conclusion in favour of any party he might pass an order against the losing party on compliance with the above directions.

V.S./R.K. *Order set aside.*

2. (1901) 28 Cal 302.
3. (1911) 12 Cr L J 319=10 I C 615.

A. I. R. 1918 Patna 660 (1)

IMAM, J.

Ram Kant Pandit—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 33 of 1918, Decided on 7th February 1918, from order of Dist. Magistrate, Shahabad.

Criminal P. C. (1898), S. 421—Summary dismissal of without giving reason is not legal.

In dismissing appeals under S. 421, Criminal P. C., some reason should be given and without such reason the summary dismissal would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by the High Court. [P 660 C 1, 2]

Rajendra Prasad—for Petitioner.

Judgment.—The order of the learned District Magistrate of Shahabad dismissing the appeal of Ram Kant Pandit is composed of one line. "This appeal is summarily dismissed." This order of the learned Magistrate is ultra vires of the Code of Criminal Procedure and the point is concluded by authority. It was held in *Gurubari Behera* v. *Emperor* (1) that in dismissing appeals under S. 421 of the Code some reason should be given and that without such reason the summary dismissal would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by this Court. The learned Magistrate of Shahabad has not acted in accordance with the principle laid down in this ruling. His order of summary dismissal of the appeal is set aside and the case is sent back with directions to the District Magistrate to admit the appeal and try it.

V.S./R.K. *Order set aside.*

1. (1918) 43 I C 439.

A. I. R. 1918 Patna 660 (2)

MULLICK AND ATKINSON, JJ.

Mahendra Narayan Ray—Defendant—Appellant.

v.

Girish Chandra Kar and *others*—Plaintiffs—Respondents.

Second Appeal No. 117 of 1916, Decided on 10th December 1917, from decision of Dist. Judge, Cuttack, D/- 7th June 1916.

(a) Bengal Tenancy Act (1885), Ss. 105-A and 107—Issues once settled in a dispute under S. 105 A are final.

The effect of S. 107 as amended is to bar for all time the possibility of raising any issue which is once settled in a dispute under S. 105-A, Ben. Ten. Act, between the same parties, and to make it incapable of being re-opened and incapable of being challenged. [P 663 C 1, 2]

(b) Bengal Tenancy Act (1885), S. 105-A—Proceedings uuder S. 105-A—Relationship of landlord and tenant held not to exist—Suit for ejectment as trespasser — Issues raised and determined in previous proceeding held res judicata — Civil P. C. (1908), S. 11.

When in a proceeding under S. 105-A, Ben. Ten. Act, it was decided that the relationship of landlord and tenant did not exist between the parties, and thereafter the plaintiff brought a suit to eject the defendant as a trespasser :

Held : that it was not open to the defendant to re-agitate and re-litigate as a defence to the suit the issue which was raised and determined in the proceeding under S. 105-A. [P 603 C 2]

J. N. Bose, S. N. Rai and *S. C. Ghose*—for Appellant.

B. N. Sinha and *S. N. Sen Gupta*—for Respondents.

Judgment.—The plaintiffs bring this action against the defendants mainly for the recovery of possession of 44.79 acres of land stituated in Mauzas Bagada and Bahabalpur. Defendant 1 is the main contesting defendant and the issues that have been framed between the parties are quite clear. The plaintiffs claim that by virtue of a decision passed by the

Revenue Court under S. 105-A, Ben. Ten. Act, they are entitled to maintain the present suit for the ejectment of the defendants as a body. The defendants on the other hand contend that the proceeding under S. 105-A. Ben. Ten. Act, affords the plaintiffs no right whatever to eject them from the lands in suit and that it is open to them to re-agitate and re litigate the same matter which was the subject-matter of dispute and decision under S. 105-A, Ben. Ten. Act.

It is only necessary to state a few facts in order to assertain what is the point for our consideration and determination. The plaintiffs are a portion of a body of cosharesr who owned a certain mehal which in the year 1900 was not partitioned. Some of the cosharers of this mahal, in 1900, let out by an amalnama 400 acres to four persons of whom defendant 1 was one. That document, which is referred to as Ex. A, purports to let 400 accres of land for the purpose of reclamation and cultivation. The learned Judge finds that that document was never acted upon and apparently in 1904 after partition proceedings had been commenced in 1901, a cosharer, other than the cosharers who made the grant or letting comprised in Ex. A, made a registered lease to two persons, one of whom was one of the grantees under Ex. A and one other person, his brother, named Najibulla. As I have said, the learned Judge has held that Ex. A was never acted upon and the two persons who held under the lease of 1904 were subsequently recorded at the Revisional Settlement as tenure-holders in respect of this land. The partition proceedings were not terminated until May 1909 and on 14th July 1908 defendant 1 seems to have adopted, having regard to his present contention the peculiar course of purchasing the interests af the lessees under the lease of 1904. The title he now seeks to set up is not by virtue of this purchase but his right and title, if any created by the amalnama Ex. A. The lands in suit formed a part of the 302 acres originally demised by the registered lease of 1904, and these lands on final partition were allotted to the plaintiff's share. The plaintiffs were not parties to the granting the lease of 1904.

Having purchased the interest of the lessees in 1908, defendant 1 applied under S. 105-A, Ben. Ten. Act, to have a fair rent assessed in respect of the lands demised by that lease. I should have observed that the land comprised in the demise created by the lease of 1904 was different in area to that comprised in Ex. A. Ex. A purports to let 400 acres while the land let by the lease of 1904 was 302 acres and the latter formed the subject-matter of the application by defendant 1 and his co-defendants under S. 105-A, Ben. Ten. Act. That proceeding came before the Revenue Settlement Officer and the matter was hotly contested and litigated between the parties and in the course of the trial the issue was clearly raised and pressed, namely. What was the status of the defendants? In other words, were the defendants tenants holding under the plaintiffs? The plaintiffs were the cosharers other than the cosharers who had made the letting or grant contained in Ex. A and the lease of 1904. In that proceeding the Revenue Settlement Officer held that defendant 1 and his co-defendants were not the tenants of the plaintiffs. That decision was appealed from; and it came on appeal before the Special Judge; and the Special Judge, so far as that issue was concerned, affirmed the finding of the Revenne Officer. Thus now it is on record by a Court whose decree has the force and effect of a decree of the civil Court that defendant 1 and his co-defendants are not the tenants of the plaintiffs in respect of the lands in suit. The decision of the Special Judge was given in the year 1912.

In the year 1913, the plaintiffs instituted the present suit and the plaintiffs seek in effect nothing more than to recover possession of the lands from defendant 1 and his co-defendants who, by virtue of the decision under S. 105 (A), are in no better position than mere trespassers; because it was held that the relationship of landlord and tenant did not exist as between the plaintiffs, on the one hand and the defendants on the other. The learned Judge before whom this case came on appeal, Mr. Allanson, has held, agreeing with the trial Court that the decision is barred upon the principle of res-judicata; and the learned Judge has further held that on the merits defendant 1 has no case. Having been beaten upon his title based on the assignment which he claims to have obtained in 1908, defendant 1 has now fallen back upon his title under Ex. A which was never acted upon

by any of the parties to it. The learned Judge has overruled the defendant's contention and decreed the suit in favour of the plaintiffs.

We are not now concerned with the merits of the case. Mr. Bose who appears on behalf of the appellant, viz., defendant 1, has raised two legal issues for our determination : First of all he contends that the principle of res judicata, which has been held to be applicable by the learned Judge, has no application to the facts of this case having regard to the construction which he seeks to put upon S. 11, Civil P. C. He further contends that the learned Judge was wrong on the merits in disregarding defendant 1's claim of title which was amply supported and justified by virtue of the decision in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (1) and also by a decision of their Lordships of the Privy Council. These are the two matters for our consideration. The first one is of great importance and we must consider it first, Mr. Bose's contention, shortly put is that the principle of res judicata does not apply because the Court which determined the issue under S. 105 (A), Ben. Ten. Act was not a Court competent to try the issues raised in this suit and that therefore on the line of authorities cited the principle of res judicata does not apply. Two cases are referred to: one is the decision in *Dharani Konta Lahiri* v. *Gaber Ali Khan* (2); and Mr. Bose strongly relies on this case; and apparently at first sight it would appear as if it was an authority in his favour. That case, which is a decision of the Full Bench of the Calcutta High Court, decided that S. 13, of the old Civil P. C., was not inapplicable to proceedings under the Bengal Tenancy Act ; and that, therefore a decision arrived at by the Revenue Settlement Officer or by the Special Judge was not of necessity a decision which would not operate as res judicata in subsequent civil proceedings. But the ratio decidendi of that decision is, as the learned Judges say that there is nothing in the Bengal Tenfincy Act to show that the intention of the framers of that Act was to make a decision of the Revenue Settlement Officer or of the Special Judge final. We agree with that expression of opinion so far as the law then was. This decision was given under the Bengal Tenancy Act as it stood prior to the year 1898. In the year 1898 material changes were made in the wording of S. 107, Ben. Ten. Act. It is clear from the wording of the new section that the words "shall be final" were imported into that section with a view to give finality to a decision arrived at by the Revenue Court or by the Special Judge on appeal. So that the amending enactment in the year 1898 supplies what was lacking at the time when the decision of the Full Bench in *Dharani Kanta Lahiri* v. *Gaber Ali Khan* (2) was given. What their Lordships in that case held to be necessary to exclude the application of S. 13, of the old Civil P. C., was incorporated in the Bengal Tenancy Act by the amendment of 1898. Therefore the case of *Dharani Kanta Lahiri* v. *Gaber Ali Khan* (2) appears to us to afford no authority in support of Mr. Bose's contention in this case. Reliance is also placed upon a decision of their Lordships of the Privy Council in *Gokul Mandar* v. *Pudmanund Singh* (3). At p. 715 their Lordships draw attention to the law as it then stood with regard to the application of S. 13 of the old Civil P. C. ; and their Lordships indicate that a decision of the Revenue Settlement Officer is not necessarily a decision which operates as res judicata in a subsequent civil proceeding. The observation of their Lordships is more in the nature of an obiter dictum than an express decision ; but it is quite clear that at the time when their Lordships made the observation referred to, the law as I have said was essentially different to what it is now ; and, therefore, the observation of Lord Davey does not seem to be applicable to the law as it now prevails. We have to construe the Bengal Tenancy Act as we find it to-day in the light of the facts of this particular case.

Now, S. 105 (A) is a new section and jurisdiction is given by this section to the Revenue Court to decide, amongst other matters whether the relationship of landlord and tenant exists between the parties applying to the Revenue Court for relief. Defendant 1 and his co-defendants applied to the Revenue Settlement Officer seeking to have a fair rent assessed upon the lands in suit on the basis of the existence of the relationship of landlord and tenant. The Settlement Officer held that no such re-

1. A I R 1914 Cal 232=41 Cal 990=23 I C 337
2. (1903) 30 Cal 339.
3. (1902) 29 Cal 707=29 I A 196 (P C).

lationship did in fact exist between the plaintiffs and defendant qua the lands sought to be recovered in this suit ; and that decision was maintained on appeal. Now, S. 107, is the next .section to be consideration. The section is important in that it has been twice amended: once in 1898 and again in 1907. The material amendment so far as this case is concerned is that made in 1898 ; and that section as it now reads provides that a decision of the Revenue Officer or the Special Judge shall have the force and effect of a decree of the civil Court between the parties and subject to the provisions of Ss. 108 and 109, "shall be final." We consider that the effect of this enactment as amended is to bar for all time the possibility of raising any issue which was once settled in a dispute under S. 105 (A), Ben. Ten. Act between the same parties and to make it incapable of being re-opened and incapable of being challenged. S. 109 is worthy of consideration in support of this view because that section enacts that a plaintiff shall not institute any proceeding, suit or application, touching and concerning any matter decided under S. 105-A, or similar sections, of the Bengal Tenancy Act.

When a plaintiff is debarred from instituting any proceeding touching or concerning any matter decided under S. 105 (A), why should a defendant be allowed by way of defence to reopen any issue which was the subject matter of decision in a proceeding under S. 105 (A), Ben. Ten. Act ? In my opinion it would be an anomaly to debar a plaintiff from instituting any proceeding or application touching or concerning any matter which was decided under S. 105 (A), Ben. Ten. Act ; and at the same time to allow the defendant to raise by way of defence an issue which was finally decided by the Revenue Court or Special Judge on appeal under S. 105 (A). Therefore, we must hold that S. 107, Ben. Ten. Act operates as a bar between the parties and that the defendant cannot now be allowed to raise an issue as a defence to this suit which was raised and determined in the proceeding instituted under S. 105 (A), Ben. Ten. Act. It is contended that this view is inconsistent with the provisions of S. 11 of the present Civil P. C. That may be so ; but we think that the modern Bengal Tenancy Act was framed and amended distinctly for the purpose of excluding the application of S. 11, Civil P. C., to cases within the provisions of S. 105 (A), Ben. Ten. Act. The test is : can these two enactments stand together and be read together consistently ? It is quite impossible to read S. 11, Civil P.C., with the Bengal Tenancy Act, having regard to the provisions of Ss. 107 and 109, of the latter Act. The learned vakil appearing on behalf of the respondents had some difficulty in admitting the proposition that S. 11, Civil P. C., was excluded in its application to the provisions of the Bengal Tenancy Act. I do not see why he should have been so timid in admitting this proposition. Indeed I do not think that he admitted it at all in the ordinary sense. He rather contended that the effect of S. 107 was really to give the Revenue Court the status and jurisdiction of a civil Court for the purpose of giving it the character of a Court of competent jurisdiction within the meaning of S. 11, Civil P. C. We do not think that this contention is well founded.

Section 107 does not in any way raise the status of the Revenue Court ; it leaves it exactly as it was before the section was amended; but it gives its decree the character or finality which attaches to a decree of the civil Court. Therefore in our opinion the principle of res judicata is applicable to the present case, and it is not open to the defendant to reargue or re-open any matter which has been the subject of a decision between the parties under S. 105 (A), Ben. Ten. Act. It is clear, therefore, that the defence put forward by the defendant in this case must fail and that the decision of the learned District Judge is correct.

In this view of this case it becomes unnecessary for us to oonsider the second contention put forward by Mr. Bose. Accordingly we dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

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* A. I. R. 1918 Patna 693

ROE AND IMAM, JJ.

Mt. Kaniz Amina and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 5 of 1918, Decided on 1st March 1918, against order of Sub-Divl. Migistrate, Gaya, D/- 13th January 1918.

(a) Criminal P. C. (1898),. Ss. 144 and 145 —Proceedings under S. 144 should not be substituted for proceedings under S. 145 to evade provisions of law requiring enquiry into question of possession.

The provisions of S. 145 were enacted with the specific intention of definitely settling a quarrel after a fair hearing of each side, and proceedings under S. 144 of the Code should not be substituted for proceedings under S. 145 in order to evade the provisions of law which require an inquiry into the question of possession with reference to the evidence adduced by the parties.

[P 665 C 1]

*(b) **Criminal P. C. (1898), Ss. 144 and 145—Facts on record indicating necessity of proceedings under S. 145—Magistrate has no jurisdiction to take action under S. 144.**

The use of S. 144 is a suitable method of avoiding a breach of the peace only if it is clear, upon a reading of the Police reports, that the claim of the party creating the disturbance is not a claim made in good faith. Where however the facts on the record clearly indicate that a proceeding under S. I45 is necessary, the Magistrate has no jurisdiction to take action under S. 144.

[P 665 C 1]

M. N. Huda—for Petitioners.

Sultan Ahmad—for the Crown.

Judgment.—We are asked in this case to set aside proceedings under S. 144 and to direct that the Deputy Magistrate take proceedings under S. 145, Criminal P. C. The learned Government Advocate has put before us the facts of the case and the case-law bearing thereon. The facts are that the Police received information that there was a likelihood of a breach of the peace with regard to possession of standing crops in two villages and also with regard to the Mokarrari rights over a considerable area in those villages. A head constable of police made a report on 19th December 1917 to his superior officer recommending that orders under S. 144 be issued upon both parties. Upon this the Inspector reported that proceedings under S. 144 alone were not snfficient in such a case and that action under S. 145 should be taken. In the meantime one of the parties had appeared before the Court and had reported to the Magistrate that the enquiry before the police was going on and had urged that it was advisable that an officer superior to the head constable should be deputed to superintend the investigation and also that suitable action should be taken to prevent a breach of the peace. Upon these reports the learned Magistrate passed orders, purporting to be under S. 144 ex parte against both parties, at the same time intimating that he would consider on the date fixed whether proceedings under S. 145 should be taken. The question whether proceedings under S. 145 should be taken was not further considered. On the date fixed the parties appeared and filed written statements and a mass of documents. Upon a consideration of the written statements and one document on each side out of the mass filed, the learned Magistrate made absolute the order under S. 144 against one party and cancelled the order as against the other.

There is authority in the case of *Parkar Mahton* v. *Ram Khelwan* (1) for the proposition that the Magistrate had no jurisdiction to act under S. 144 where the facts on the record clearly indicated that procedure under S. 145 was necessary. It was held that the words of the latter section left no other course open to the Magistrate than to take proceedings under S. 145, when he had information that a dispute existed regarding land within his jurisdiction likely to result in a breach of the peace. The whole case law bearing on the distinction between proceedings under Ss. 107 and 145 was clearly set forth in the order of reference to a Full Bench made by Caspersz, J., and Ryves, J. in the case of *Emperor* v. *Abbas* (2). The Full Bench were not prepared to lay down any hard and fast rule on the subject. All that was said was that there was no conflict between Ss. 107 and 145, Criminal P. C., but that the question whether after proceedings under S. 107 had been taken it would be proper for the Magistrate to act under S. 145, must depend on the circumstances of each case as it arises.

It might be that after an order under S. 107 no likelihood of a breach of the peace would continue. There was no question in this case, nor in the decisions quoted in the order of reference of the Magistrate's powers under S. 144, but the decision seems to have been since regarded as justifying Magistrates in declining to take action under 145 until it has been ascertained that proceedings under S. 144 have been insufficient to allow the dispute. Had the matter rested there we should see no reason to interfere. But it has gone further and as we think too far. In order to avoid the taking of evidence and the making of a definite order under

1. (1907) 11 C W N 271=5 Cr L J 76.
2. (1911) 39 Cal 150=12 I C 833=12 Cr L J 569.

S. 145 a summary procedure under S. 144 has been substituted in very many cases in which without possible doubt proceedings under S. 145 should have been taken. We have noticed the practice growing in this province. After a series of such cases in Darbhanga, we ascertained that the then Magistrate of that district had issued a circular order to hte officers subordinate to him directing them to refuse to take action under S. 145 on the ground that the procedure therein involved was tedious and unprofitable. We now find something of the same sort happening in Gaya. One such case from Gaya was recently before the Court in Criminal Revision No. 352 of 1917: *Bansi Singh* v. *Emperor* (3). This case comes from Gaya and there is another case from Gaya pending. The matter to us to be one of great importance. The provisions of S. 145 were enacted with the specific intention of definitely settling a quarrel after a fair hearing of each side. In order that the settlement of the quarrel might be without doubt permanent, it was further enacted that if the decision under S. 145 be not contested in the civil Courts within three years, the party declared to be in possession shall remain in possession for ever.

The substitution of proceedings under S. 144 for proceedings under S. 145 appears to us to have no logical object whatever save to avoid the labour of taking oral evidence of possession. The learned Government Advocate accepts as incontrovertible the following propositions: firstly, that the Magistrate is not required to take proceedings under S. 145 if he is satisfied that by other methods he can avoid a breach of the peace; secondly, that the use of S. 144 is a suitable method of avoiding a breach of the peace only if it is clear upon a reading of the police reports, that the claim of the party creating the disturbance is not a claim made in good faith. This is certainly the view taken in *Mahadeo Kunwar* v. *Bisu* (4) and *Emperor* v. *Ram Baran Singh* (5). There can be no doubt but that in the case before us the dispute between the parties is a genuine dispute and as we understand the decision of the Full Bench in Calcutta already quoted not one which could be settled by an order under S. 107 or S. 144. In spite of the proceedings under S. 144 the dispute still subsists. The Magistrate was required by law in the first instance, and is still required by law, to settle the dispute by an order under S. 145 or S. 146. It is suggested by Mr. Khurshed Husnain for the opposite party that our power of superintendence does not extend to direction to a Magistrate to take action which it is within his discretion to refuse to take. In this connexion the case of *Permessar Singh* v. *Kailaspati* (6) is quoted. Chamier, C. J., in that case said at p. 340 of 1 *P. L. J.*:

"A High Court can and will interfere where there has been a material irregularity which amounts to a refusal to exercise or a usurpation of jurisdiction."

We may refer also to the quotation made at p. 348 from Blackstone's Commentaries:

"It is the peculiar business of the Court to superintend all inferior Tribunals and therein to enforce the due exercise of their judicial and ministerial powers with which the Crown or legislature have invested them, and this not only by restraining their excesses, but also by quickening their negligence and obiating their denial of justice"

and from Bacon's Abridgment:

"The superior Courts having a superintendence over all inferior Courts may in all cases of innovation award a prohibition."

When we come to examine the proceedings now before us it is obvious that they are in reality proceedings under Ch. 12. The notices issued to the parties state that there is a dispute between them regarding land, the boundaries of that land are given, and the parties are given an opportunity to make a statement before the Court on a date fixed. They are ordered not to go near the land meanwhile. The notices are in effect the notices contemplated in the last clauses of S. 145 (1) and (4). In response to the notices the parties appeared and filed written statements and documentry evidence precisely in the manner indicated by S. 145 (1). But under the pretence that the proceedings were under S. 144, the Magistrate did not proceed under Cl. 1, S. 145 (4), but decided, upon summary inspection of the documents before him, that one of the parties should remain in undisturbed possession for two months. It would have been but little less ridiculous to issue a notice in the

3. A I R 1918 Pat 228=43 I C 401=19 Cr L J 113.
4. (1903) 25 All 537.
5. (1906) 28 All 406.
6. (1916) 1 P L J 336=35 I C 801=17 Cr L J 369.

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form required by S. 488 of the Code, and deal with it under S. 144 on the ground that prompt payment of a maintenance would tend to prevent danger by starvation to human life. In the exercise of our power of superintendence we are required to prohibit this innovation, and by quickening the negligence of the inferior Court to obviate a denial of justice. The Magistrate has issued an order which having regard to the action taken by the parties upon it was an effective order under S. 145, Cl. (1), read with the third part of Cl. (4). He will now proceed to complete the proceedings instituted by this action. Written statements and documentary evidence have been filed. All that is required to be done is to hear such oral evidence as the parties may adduce and make an order under S. 145 (6) or under S. 146, in accordance with his finding upon the question which of the parties was in possession upon the date of the notices issued, that is 29th December 1917.

V.S./R.K. *Case sent back.*

A. I. R. 1918 Patna 666

DAWSON-MILLER, C. J. AND MULLICK, J.

Janandan Prasad Thakur—Appellant.

v.

Mt. Janbhati Thakurain—Respondent.

Privy Council Appeal No. 77 of 1917, Decided on 21st March 1918, against the decision of Sharfuddin and Roe, JJ.

Civil P. C. (1908), S. 110—Applicability of S. 10, Lim. Act to suit by minor against administrator of his estate for accounts is substantial question of law.

In view of the state of authorities in India on the question of the applicability of S. 10, Lim. Act to a suit by a minor against the administrator of his estate for accounts, the question is a substantial question of law within the meaning of S. 110. [P 667 C 1]

Rajendra Prasad and *P. N. Singh*—for Appellant.

L. N. Singh—for Respondent.

Judgment.—In this case the plaintiffs ask for a certificate under S. 110, Civil P. C. that the case complies with the provisions of the section nd is a fit one for appeal to His Majesty in Council. The decision of this Court from which it is sought to appeal, was a decicion of affirmance and the question is whether there is a substantial question of law for decision by their Lordships of the Privy Council. The suit was instituted by the plaintiffs who were in the year 1894 minors and their estate to which they were entitled, was at that time put under the administration of the defendant 1 who was their uncle, he having been appointed administrator by the Court. In the year 1903 the younger of the two plaintiffs attained his majority but no account appears to have been rendered by the defendant as to his management of the estate and no action was taken by the plaintiffs to obtain an account from him until this suit was instituted on 3rd September 1910. In the suit the plaintiffs claimed

"that an account may be taken from defendant 1 of the income and expenditure of the plaintiffs' share of the estate during the management of detendant 1 from the year 1894 to the end of Bhado 1315 M. S. and that he may be ordered to pay to the plaintiffs the sum that may be found due by him on taking such accounts,"

and then there were further prayers in the plaint relating to specific properties in respect of which certain reliefs were claimed and the schedule of the properties was set out. It was found in respect to some of the properties with regard to which relief was claimed that it was not proved that these properties were purchased by the defendant out of the trust fund and as the plaintiffs had no means of ascertaining unless they obtained an account of how the trust fund had been used, it is not surprising that they had no evidence in respect of any particular property to show out of what fund it had been acquired. With regard to these properties the suit was dismissed. With regard to others, that is to say, with regard to property which admittedly formed part of the trust fund, it was held that under the Limitation Act, Art. 120 the period of limitation for suits mentioned in that article being six years, no suit could be brought in 1910 by the plaintiffs because the period of the defendant's administration ended in the year 1903 and no suit having been brought within six years of that time it was found to be barred by statute. The plaintiffs on the other hand contended that S. 10, Lim. Act prevented the operation of Art. 120 this being a case within the provisions of S. 10. It was decided by a Bench of two Judges of this Court when the case was before them that S. 10 had no application to the present case. This matter appears to us to be one which is by no means settled by the decisions in this country although it is claimed that there has been a consensus of opinion for some years with regard to the application of

S. 10 which would govern the present case. Having looked at the cases in question, it does not appear to us by any means certain that these cases are conclusive of the points which arises in the present case and we think that there does arise in this case a substantial question of law and there being no doubt whatever as to the value of the subject-matter in dispute, we agree that this is a fit case for appeal to His Majesty in Council and both as to value and nature complies with the provisions of S. 110. The usual certificate should be granted. This application will therefore be allowed. The costs of this application will be costs in the cause. Hearing fee five gold mohurs.

V.S./R.K. *Appeal allowed.*

A. I. R. 1918 Patna 667

JWALA PRASAD, J.

Sham Lal Lohar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 162 of 1918, Decided on 30th May 1918, from order of Dy. Mag. Motihari.

Penal Code (1860), S. 426 — Mischief — Tenant cutting and appropriating tree under bona fide claim of right — Tenant is not guilty of mischief—Motive, mala fide or dishonest is immaterial.

A tenant who cuts and appropriates a tree standing on his holding under a bona fide claim of right is not guilty of mischief under S. 426 and it is immaterial whether his motive in cutting the tree was mala fide or dishonest.

[P 668 C 1]

Rajendra Prosad, Rai Tribhuban Sahai and *Janak Kishore* — for Petitioner.

Murari Prasad—for Opposite Party.

Judgment.—The petitioner has been convicted by the Deputy Magistrate of Motihari under S. 426, I. P. C., and sentenced to a fine of Rs. 15. The mischief said to have been committed by the petitioner consists in cutting and appropriating and appropriating half a Sisum tree standing upon the occupancy holding of the petitioner. The opposite party is a servant of the landlord of the holding. The rights of the tenant petitiouer and of the landlord have been thus set forth in the Survey Record-of-Rights; "The factory (landlord) shall have a right to half the timber." The othea half belongs to the petitioner. The cutting of the branch of the tree is not denied by the accused. Two pleas have been set up: (1) That the branch was lopped off with a view to increase the length and breadth of the Sisum tree; and (2) that the petitioner had a right to cut the trees and appropriate half the timber thereof. The learned Deputy Magistrate held that the branch cut off was practi. cally half the tree and that its girth at the portion cut is about three cubits and the portion cut off must have been 15 or 16 cubits long. The Magistrate apparently therefore disbelieved the defence story that the branch was very small and was cut off with the object of improving the growth of the tree; but there is no finding that the branch cut off was not fit to be cut at all or that the cutting of the branch in any way destroyed or diminished the value or the utility of the tree or affected injuriously within the meaning of S. 425, I. P. C. There is no finding on this point by the learned Sessions Judge also, whom the petitoner moved before coming to this Court.

A Sisum tree does not bear any fruit and it is grown only with a view to its being cut when ready for use. To my mind no mischief can be done unless the branch cut off was not fit for the use for which it was cut. This view is in consonance with the view expressed in the case of *Shakur Mahomed* v. *Chunder Mohun Sha* (1). That was a case of a bamboo cutting and it was pointed out that the cutting and removing of the bamboo does not amount to obstruction or other injury as defined in S. 425; and that if the cutting and removing was done with a dishonest intention, that is with a vlew of causing wrongful loss to the complainant, the cutting of the bamboo would amount to theft and not mischief. That authnrity was lately considered by me in the case of *Sardar Singh* v. *Emperor* (2). Upon the finding of the Court below therefore the conviction under S. 426 cannot be sustained ard it is more than doubtfnl if a case under S. 379, I, P. C., of theft would lie, inasmuch as the petitioner claimed a right to cut the tree and disputed the right of the malik to interfere with that right. The Survey Record-of-Rights does not show in whom the right of cutting lies; all that it records is that the landlord and the tenant have both an equal share in the timber of trees cut. Under S. 23, Ben. Ten. Act, a tenant is entitled to cut

1. (1874) 21 W R Cr 38.
2. (1918) 19 Cr L J 339=44 I C 461.

trees standing upon his holding and he can only be prevented from so doing on the landlord's showing a custom contrary to the right of the tenant.

The onus of proving such a custom rests upon the landlord. It does not appear from the record that any such custom was set up, pleaded or proved by the landlord in this case; and certainly there is no finding that there was any custom by which the landlord could prevent the tenant from cutting the tree. All that the learned Sessions Judge finds is that as the landlord has a half share in the timber, "trees can only be cut by mutual consent of landlord and tenant." The petitioner disputes this proposition and asserts an absorlute right to cut the tree without the consent of the landlord, The Survey Record does not dispose of this right claimed by the tenant petitioner and in my opinion the criminal Court is not competent to decide it. The matter can only be dealt with by the civil Court. The case to which I have just referred, viz. *Sardar Singh* v. *Emperor* (2), seems to agree in all respects with the present case. That was also a case of mischief. The legal position of a tenant, whether a tenure-holder or a raiyat, has been fully discussed by me in that case and I need hardly repeat the reasons given by me in that judgment, which may be referred to and applied to this case. Here the tenant cut the tree under a claim of right—it does not matter whether his motive in cutting the tree was mala fide or dishonest as pointed out in the case of *Bradford Corporation* v. *Pickles* (3). Therefore in point of law no offence appears to have been committed by the petitioner. The dispute is of a civil nature. The conviction is accordingly set aside and the fine, if paid, is directed to be refunded.

V.S./R.K. *Conviction set aside.*

3. (1895) A C 587=64 L J Ch 759.

A. I. R. 1918 Patna 668

DAWSON-MILLER, C. J. AND MULLICK, J.

Mt. Dulhin Sona Kuer and *others* — Appellants.

v.

Jamil Ahmad—Respondent.

Civil Revns. Nos. 75 and 138 of 1918, Decided on 7th November 1918, from decision of Sub-Judge, Patna.

(a) Civil P. C. (1908), S. 151—High Court's inherent power—Revision application can be treated as memo of appeal if requirements in respect of limitation and court-fee are satisfied.

The High Court has jurisdiction in the exercise of its inherent powers under S. 151, to condone in special cases the misapplication of the provisions of the Code, if the provisions of the law as regards limitation and court-fees are complied with.

The High Court has authority to covert an application for revision into a memorandum of appeal [P 671 C 2; P 672 C 1]

(b) Civil P. C. (1908), O. 40, R. 1, and O. 43, R. 1.

Receiver's possession can be resisted only under Cl. (2), R. 1—Person dispossessed can appeal. [P 671 C 2]

The powers of a Receiver are regulated by O. 40 and the only ground upon which his possession can be resisted is sub-Cl. (2), R. 1, O. 40 of the Code. [P 670 C 1]

Where a person who refuses to deliver possession to a Receiver is ordered by the Court to do so, his remedy is by appeal under O. 43, R. 1, (*s*) [P 671 C 2]

(c) Transfer of Property Act (4 of 1882), S. 76—Subrogation—Condition is whole of prior mortgage must be satisfied.

Before a person can claim to be subrogated to the position of a prior mortgagee, there must be a satisfaction of the whole of the prior mortgage [P 671 C 1]

Kulwant Sahay—for Appellants.

Khurshed Hussein—for Respondents.

Mullick, J.—This application for revision rrises out of a dispute as to the possession of a portion of the property of Mt. Fasihan, a Muhammadan lady, who died on 2nd July 1909, leaving her snrviving two sons Muhammad Umar and Kalimuzaffar and four daughters named Habiba, Fatima Saira and Salima. Shortly before her death the lady had executed various deeds of gift in respect of certain properties in favour of Habiba and her two sons and on 26th March 1912 Fatima and Saira brought a suit in the Court of the Subordinate Judge of Patna seeking to set aside these transactions and praying for the administration of the estate of the deceased. Four separate and somewhat similar suits were lodged by Salima but with these we are not concerned. The suit lodged by Fatima and Saira was transferred to the Court of the District Judge of Patna and numbered 6 of 1913. Salima's suits were numbered 9, 10, 11 and 12 of 1913. In Suit No. 6 of 1913, the District Judge held that all the deeds of gift, except that in favour of Kalimuzaffar dated 7th May 1909, were invalid and he directed a partition of all the lands of the estate with the exception of those covered by the said deed of gift. There was then an appeal to this

Court which was disposed of on 18th July 1917 See *Fazlur Rahman* v. *Muhammad Umar* (1) by Chamier, C. J., and Jwala Prasad, J. The learned Judges held that the deed of gift in favour of Kalimuzaffar was also invalid having been made without the consent of other heirs and contrary to the intention of the donor. The following passages from the judgment of Jwala Prasad, J,, shew the reliefs which were granted to the plaintiffs:

"All the deeds of gift including the Hiba of 7th May must be set aside and declared invalid and inoperative. The deeds of gift the refore do not stand in the way of the heirs of Bibi Fasihan taking their shares under the Mahomedan law. Her husband Sobhan inherited one. fourth share of the the lady's properties: her two sons Muhammad Umar and Kalimuzaffar each took 6132 and each of her four daughters, Habiba Fatima Saira and Salima took 3132 of the properties left by her. The heirs of such of the aforesaid persons as have died since the death of the lady have succeeded to the shares inherited by their predecessors. The properties left by Mt. Fasihan are therefore liable to be distributed among her heirs and heirs of her heirs, unaffected by dealings or transfers of interests in excess of their legal shares. As the donees and the heirs have been dealing with the properties since 1909 and the matter is complicated by the claims of creditors and others and thus the appeal gives each of the heirs a decree for his or her share in the ordinary way. The result of passing such a decree would be endless litigation. The proper course appears to be to direct a general administration of the property of Mt. Fasihan under the orders of the Court."

"I would dismiss with costs Appeals Nos. 73 and 219 arising out of Suit No. 6, Appeal No. 42 arising out of Suit No. 9 and Appeal No. 339 arising out of Suit No. 11. I would allow with costs Appeal No. 112 arising out of Suit No. 6 and Appeal No. 581 arising out of Suit No. 6 and set aside the deed of 7th May 1909. I would declare that the heirs of the deceased are entitled to the shares specified above in the properties of Mt. Fasihan. I would remand Suits Nos. 6 and 9 of 1913 to the Court below in order that in the presence of parties a preliminary decree may be passed with reference to O. 20, R. 13 ordering such accounts and inquiries to be taken and made and giving such directions as may appear to be necessary. It would probably be necessary to appoint a Receiver or Commissioner to carry out the administration. Arrangements must be made to pay off the debts of the deceased as soon as possible. Those heirs or representatives of heirs who have been in possession of parts of the property should be debited with what they or their heirs claiming under them have received."

In consequence of the above decree the District Judge on 22nd September 1917 made a preliminary decree for administration and on 25th January 1918 after notice upon the various mortgages and creditors appointed a Receiver to carry out the same. It appears that on 4th February 1913, that js about a year after Saira and Fatima's suit was instituted Muhammad Umar mortgaged the proprietary interest in certain mauzas to Mt. Dulhin Sona Kuer. The consideration at first was fixed at Rs. 85,000 were out of which Rs. 60,000 to be paid by Mt. Sona Kuer to the creditors of Muhammad Umar and Rs. 25,000 to one Kesho Das, who held a mortgage from Mt. Fasihan of certain properties which included the properties covered by Muhammad Umar's mortgage. Kesho Das refused to take the amount tendered to him, and therefore for all intents and purposes the consideration of Umar's mortgage must be regarded to have been the sum of Rs. 60,000 which was due to be paid and was paid by Dulhin Sona Kuer to his creditors. Sona Kuer sued upon her mortgage and on 25th February 1915 obtained a decree for Rs. 72,958.

On 20th June 1916 she brought the mortgaged properties to sale and purchased them herself. It is alleged that a sum of Rs. 37,000 is still due to her under her decree. In September 1916 she got possession of all the mortgaged properties except three which had subsequently to her mortgage been sold for arrears of Government revenue and had passed out of the possession of the mortgagor. It is not disputed that her possession in consequence of her auction-purchase still continues.

When the Receiver was appointed Sona Kuer refused to deliver up possession to him and upon the matter being referred to the District Judge he on 22nd March 1918 decided in favour of the Receiver. It is against that order that Mt. Sona Kuer prefers the present application for revision, namely, No. 75 of 1918. Revision No. 138 of 1918 has been preferred by another set of transferees, namely Ram Prasad Singh and others and against whom a similar order has been made directing delivery of possession to the Receiver. I will deal first of all with Case No. 75 of 1918 which relates to Sona Kuer's properties. It is unnecessary to consider what would have been the position if the transfer by Muhammad Umar had been made before the institution of the administration suit. Clearly the transfer is affected by the provisions

1. (1918) 43 I C 196.

of S. 52, T. P. Act regarding lis pendens. I agree with the appellant that the transfer does not become ipso facto void but, if the provisions of S. 52 have any meaning at all then as soon as the Receiver was appointed to carry out the administration the Court was entitled if it so chose to consider the transfer a nullity and to regard the property as still in the hands of Muhammad Umar and I do not think there can be any doubt that the Court had full authority to direct the Receiver to take possession. It is contended that under O. 40, R. 1, Sub Cl. 2, the Court is not authorized to remove from the possession or custody of property any person whom any party to the suit has not a right so to remove; that Muhammad Umar as one of the heirs of Mt. Fasihan was a co-owner who had full power to give a mortgage to the extent of his share in the estate and that the other co-owners could only eject him if it was shown that he had taken possession of more than his proportionate share. That is an argument which might have had some force if the transfer had been one before the suit, but it being pendente lite I do not think there can be any doubt that the plaintiffs in the administration suit were competent to ask the Court to take possession of all the properties in the custody not only of the co-owners but also of transferees who had obtained possession by transfers subsequent to the institution of the suit. Muhammad Umar has died since the suit was instituted and it is urged that in the absence of a specific order in the preliminary decree of 22nd September 1917 directing his co-owners to deliver up the properties in their possession, the present order of the Court is ultra vires. I am unable to appreciate this argument. The preliminary decree read with the appellate decree of 18th July 1917 gives power to administer the property generally and to appoint a receiver. The receiver's powers are regulated by O. 40, Civil P. C., and I am of opinion, the only ground upon which his possession can be resisted is sub-Cl. 2, which has already been considered and held to operate in favour of the receiver and not the appellant.

The learned vakil for the appellants next relies upon the judgment of this Court, dated 18th July 1917, and contends that it was the intention of the learned Judges, when directing a general administration, to preserve the possession of the various transferees, as far as possible, to the extent of the shares of their transferors. It is admitted that Muhammad Umar had no right to transfor the specific properties in question and that he had merely an inchoate right to the residue after the estate was fully administered by reason of his joint undivided share in the estate. But it is contended that the intention of this Court was that the administration should be carried on and accounts taken leaving Sona Kuer in possession till it was ascertained that she was holding more than Muhammad Umar's share. I have in vain examined the appellate judgment of this Court for an indication of this intention. The passages I have cited certainly do not support this interpretation and I can find no thers which give us any assistance in the matter. Clearly the administering Court will be put to the gravest inconvenience if it cannot take possession of the properties in the custody of the co-owners, and it is conceivable that under certain circumstances further proceedings may be reduced to a standstill if this procedure were adopted. It may be the Court's management would be more beneficial and more efficient than that of the mortgagee or that the sale of the zerait lands might save the rest of the property. There may be many reasons to support the decision of the learned District Judge to take the property into his own custody and I do not think that the appellant has any cause for complaint, seeing that she took the mortgage with full notice after the institution of the suit and knowing that she would be bound by whatever orders the Court thought fit to pass in the suit.

Mr. Kulwant Sahay on behalf of the appellant has offered to deposit a year's rent in Court as security against the risk of the property being sold for arrears of Government revenue, but I do not think that any arrangement of this kind can be accepted in view of the fact that unless all the properties are brought under the custody of the Court, the Court cannot come to a satisfactory conclusion as to the real value of the assets. Other transferees may make the same claim and the appellant is, in my opinion, not entitled to and ought not to be allowed any special preference as against them. The appellant might perhaps resist the receiver if

she could shew that she had a right to suppose that her vendor was mortgaging for the purpose of paying Mt. Fasihan's debts. She would then be competent to invoke the equitable principle which was recognized in *Price* v. *Price* (2). But in the case before us, although an attempt has been made to shew that a sum of Rs. 25,000 out of the consideration money was intended to pay off Mt. Fasihan's mortgage to Kesho Das, it is quite clear that no part of this money was in fact the consideration for Sona Kuer's mortgage and that the true consideration was the sum of Rs. 60,000 only. This sum of Rs. 25,000 is said to have been, after Kesho Das refused to accept it, deposited in the Bank of Bengal and subsequently withdrawn by the appellant herself.

It is next contended that on 2nd January 1917, Mt. Sona Kuer paid a sum of Rs. 36,000 to Kesho Das to discharge the incumbrance created by Mt. Fasihan on two Mouzas. This payment is said to have come about in the following way. Kesho Das sued upon his prior mortgage from Fasihan, which covers not only the properties now in suit but other properties, and on 26th February 1916 brought the mortgaged properties to sale. On 15th December 1916, the Subordinate Judge set aside the sales on the ground of fraud and dismissed the execution case. Against that order there was an appeal by the auction-purchasers to the High Court, which affirmed the Subordinate Judge's order setting aside the sale upon the judgment-debtor paying to the auction-purchasers a certain sum as compensation. On 2nd January 1917, Sona Kuer came in and paid to Kesho Das the sum of Rs. 36,000 for the purposes of freeing from his charge the properties covered by her mortgage. I fail to see how this payment can be considered sufficient to subrogate Sona Kuer to the rights of Kesho Das. It seems settled that there must be a satisfaction of the whole mortgage before a person interested can claim to be subrogated to the position of a prior mortgagee *Gurdeo Singh* v. *Chandrika Singh* (3)]. Here according to the appellant's own case there was no satisfaction of Kesho Das' full decree but only that portion of it which fell upon the properties covered by the present proceedings. The principle of subrogation therefore does not assist the appellant in respect of the mortgage of Kesho Das. It is however said that Kesho Das agreed to a splitting up of his mortgage. Of this there is no evidence. It is said the point was taken before the learned District Judge, but tho petition of the appellant before him does not disclose any such contention in clear and unequivocal terms. There was certainly no evidence tendered by the appellant on this question of fact. The truth is that a case is now being made in this Court which, even if indicated, was never developed in the Court below. The appellant is not entitled to raise a point of this kind in appeal and much less in revision. Indeed Mr. Kulwant Sahay's argument on this part of the case convinces me that complicated questions as to the rights of transferees are certain to arise and that they can only be satisfactorily decided if the Court is in custody of the whole estate. Mr. Khurshed Husnain agrees that if it is found by the Receiver that Kesho Das has in fact split up his mortgage, the sum paid by the appellant for the two Mouzas will be refunded to her. In the view I take of the merits it becomes unnecessary to consider whether an appeal lies in this case or not. As the point however has been argued I will deal with it shortly. Sona Kuer objects to deliver possession to the receiver appointed by the Court under O. 40, Civil P. C., and in my opinion an appeal lies under O. 43 against the order of the learned District Judge. The appellant, following a decision of this Court which laid down that no appeal lay if the person aggrieved was not a party to the suit, has filed an application for revision. But in a recent case we considered all the authorities and held that the proper remedy of a person in the position of the appellant was by appeal. We have therefore no power to interfere unless we accept the application for revision as a memorandum of appeal.

Now there is ample authority for accepting an appeal which is found incompetent as an application for revision, and there is also some authority for the converse process of converting an application for revision into a memorandum of appeal. In my opinion this Court has ample jurisdiction, in exercise of its inherent powers under S. 151, to condone

2. (1887) 35 Ch D 297=56 L J Ch 530.
3. (1909) 36 Cal 193=1 I C 913.

in special cases the misapplication of the Civil Procedure Code, if the provisions of the law as regards limitation and court-fees are complied with. Here the applicant's fault was that she misconceived her remedy by reason of a judgment of this Court and if she had, instead of describing her application as an application for revision, described it as a memorandum of appeal she would have been competent to invoke the assistance of the Court. It is admitted that there is no defect as regards court-fees and limitation and having regard to the special circumstances of this case, I think the interests of justice require that we should accept the application as a memorandum of appeal. The appellant however must be confined to the grounds taken in her application and she cannot be allowed to urge any ground which she had not taken in it in support of her appeal. The result is that in the view that I take the appeal must be dismissed with costs.

This judgment disposes of Revision No. 138 of 1918 also. That application must also be treated as an appeal. The facts in this case are simpler than in case No. 75. The mortgage of Muhammad Umar in this case was in favour of Ram Prasad and others. It was executed on 3rd November 1913 for Rs. 9,000 and was followed on 21st January 1917 by a sale in favour of the mortgagees by Umar for Rs. 16,000 and the appellants, after satisfying the mortgage charge, are alleged to have paid the balance to Umar in cash. The sale deed mentions the fact that an appeal against the decision of the District Judge is pending in the High Court and it appears that in order to indemnify himself against the risk of Umar's title under the hiba being declared invalid, the mortgagees took a security bond by way of indemnity. So there can be no doubt that the principle of lis pendens is fully applicable in this case and if that is so, the transfer is invalid for the purpose of affecting the rights of the plaintiff and the Receiver is clearly entitled to take possession. The application for revision treated as an appeal as in the last-mentioned case is dismissed with costs. The costs in both appeals will be calculated on the assumption that the value of the appeals is above Rs. 5,000 in each case.

Dawson-Miller, C. J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 672

ROE AND IMAM, JJ.

Ganpat Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 50 of 1918, Decided on 8th March 1918. against order of Dist. Magistrate, Gaya, D/- 11th January 1918.

Criminal P. C. (1898), S. 144 (4)—District Magistrate cannot under Cl. (4) set aside order made by Magistrate against one party and substitute similar order against other party.

Clause (4), S. 144 contemplates only a change in the nature of the order made and not a change in the party against whom it is made. A District Magistrate has therefore no power under this clause to set aside an order made by a Magistrate against one party and to substitute therefor a similar order against the other party. [P 673 C 1]

Jalgovind Prasad Singh—for Applicant.

Sultan Ahmad—for the Crown.

Judgment.—The facts of this case are as follows: On 17th November 1917, the Sub-Divisional Magistrate of Jehanabad acting upon a police report issued notices upon Aotar Singh and his party, only requiring them

"not to put obstruction with regard to the said kasht land in any way if you have any objection to make yon can do so in this Court on 4th December 1917."

The boundaries of the land were then given. On 4th December 1917. Aotar Singh and his party appeared in Court and the learned Subordinate Magistrate in some fifteen lines disposed of his claims to the land as being a mere pretence, and recorded:

"I make the notice under S. 144, Criminal P. C., absolute against the second party."

Aotar Singh being dissatisfied with this decision took it to the District Magistrate under Cl. 4, S. 144. The learned Magistrate after examining the claims of the parties, came to the conclusion that the claim of Aotar Singh's party was not a mere pretence but was the real truth and that Ganpat Singh had no claim to cut the crop which was in dispute. He therefore cancelled the order made by the Sub-Divisional Magistrate, and substituted an order of his own forbidding Ganpat Singh's party to cut the crop. The proceedings of the learned Sub-Divisional Officer were not in our opinion, ultra vires. As we said in the case of *Kaniz Amina* v. *Emperor* (1)

1. A I R 1918 Pat=47 I C 65=3 P L J 213.

if it is clear upon a perusal of the police papers that the claim of the disturber of the peace is a mere pretence, a breach of the peace may often be avoided by making it clear to him that the Court will not permit the disturbance which he has want only created. In such circumstances it is not expedient that the party entitled to peaceful possession be harassed by proceedings under S. 145. In that sense the case as dealt with by the Sub-Divisional Magistrate is distinquishable from that of *Kaniz Amina's* case (1) but the subsequent proceedings of the District Magistrate appear to us to be an even greater innovation than that which we set ourselves to prohibit in the case of *Kaniz Amina* v. *Emperor* (1), An order has been made establishing the claim of Aotar Singh's party which had been stigmatised by the Sub-Divisional Magistrate as a mere pretence, and keeping Ganpat Singh, who had been held to have a genuine claim out of possession for two months. The learned Government Advocate has not been able to find any case upon this point. and indeed, we imagine, it would be impossible to find any precedent upon which the proceedings of the District Magistrate could be supported. Clearly Cl. 4, S. 144, contemplates only a change in the nature of the order made, and not a change in the party against whom it is made. The learned Magistrate's views on this point as expressed in his letter to the Assistant Registrar dated 22nd February, conveniently ignore the existence of Ch. 12, Criminal P. C. We set aside the order of the District Magistrate against Ganpat's party as being without jurisdiction. We do not think it necessary to interfere with his order setting aside the Sub-Divisional Officer's order against Aotar Singh's party, for the reason that it was clearly within the Magistrate's jurisdiction to set aside that order if he thought that it was unnecessary or unjust. The position will therefore be that both orders are set aside. We note that on the papers coming back to the Sub-Divisional Magisrtate he, on 20th December issued notice against both parties restraining them from cutting the disputed crops. On 3rd January on it being represented to him by both parties that the paddy had been cut and removed he was of opinion that no action was called for and the notices issued were concelled. Had they not been cancelled we should have been obliged to say that the notices issued on 20th December 1917 were in no degree distinguishable from notices under S. 145, Cls. (1) and (4), but inasmuch as the Magistrate has taken action cancelling the proceedings on the ground that no further dispute exists, we may say that the proceedings taken on 20th December by the Sub-Divisional Magistrate have been ended by an order which might have been made under S. 145, Cl. (5), and that it is not necessary for us to re-open that part of the case.

V.S./R.K. *Order set aside.*

A. I. R. 1918 Patna 673

MULLICK AND ATKINSON, JJ.

Sarada Prasad Tej and *others*—Appellants.

v.

Triguna Charan Roy—Respondent.

Appeal No. 11 of 1916, Decided on 11th December 1917 from original decree of Dist. Judge, Cuttack, D/- 9th June 1916.

(a) Probate and Administration Act (1881) —Letters of Administation cannot be granted in respect of only part of estate.

The Probate and Administration Act contains no provision for granting Letters of Administration in respect of only a part of the testator's estate. [P 674 C 2]

(b) Probate and Administration Act (1881), S. 50—Executor appointed for administration of particular fund—Executor is entitled to take out probate limited to that particular fund — But if no directions specified, heirs are entitled to letters of Administration for entire estate.

An executor, who has been appointed by the testator for the administration of a particular fund, is competent to take out Probate limited to that particular fund, but where there is no direction as to any particular fund, and where the applicants apply in their capacity as heirs, there is no provision of law which empowers the Court to refuse administration of the whole estate and to limit it to a fractional undivided portion thereof. [P 674 C 2]

(c) Probate—Grant of — Court not concerned with devolution of property—Proof of genuineness and execution of will is essential—Contract in consideration of withdrawal caveator's objection is not enforceable.

In a Probate proceeding the Court has no concern with the devolution of the property. The only issue before it is whether the will has been proved to be genuine and duly executed. It cau record a contract or agreement made between the parties in consideration of the withdrawal of the caveator's objection, but it is wholly powerless to enforce such contract or agreement. [P 674 C 2]

(d) Minor—Contract by guardian—Illegal—Right to repudiate.

It is always open to a minor to repudiate the act of his guardian if it can be shown that the act was clearly illegal. [P 675 C 1]

(e) Probate and Administration Act (1881), S. 50—Guardian applying for letters of administration in respect of moiety of estate — Caveat filed by devisee of other half—Compromise—Letters of Administration in respect of quarter of estate allowed to guardian held illegal—Minors are entitled to repudiate act of guardian—Minor.

The father of certain minors applied, as their guardian, for Letters of Administration with the will annexed, in respect of a moiety of an estate to which the minors were entitled under the will. The devisee of the other half of the estate filed a caveat, but a compromise was made whereby the guardian of the minors was allowed to take Letters of Administration in respect of a quarter of the estate. The Letters were actually taken out by one of the minors who had attained majority and who acted as the natural guardian of the others. The minors subsequently applied for revocation of the Letters:

Held: (1) that the will having been proved and the objection having been withdrawn, it became the duty of the Court to grant Probate or Letters of Administration, as the case might be, in respect of the whole of the estate; (2) that if the guardian of the minors was not willing to administer the whole estate, the application should have been dismissed altogether; (3) that no ratification by the minor who had attained majority could bind the other minors who were entitled to the protection of the Court; (4) that the order of the District Judge granting Letters of Administration in respect of quarter of the estate was illegal, and there was just cause for revocation within the meaning of S. 50, Probate and Administration Act. [P 675 C 1]

S. C. Bose—for Appellants.

S. C. Roy, B. N. Sinha, A. C. Mukherjee and *B. C. Roy*—for Respondent.

Mullick, J.—The testatrix Bhubanmani had a daughter named Annapurna, who left three sons, Sarada, Barada and Annada. The respondent Triguna is the adopted son of Bhubanmani's husband. Annapurna died on 21st November 1907 and Bhubanmani on 2nd September 1910.

On 8th February 1901 a will is alleged to have been made by Bhubanmani in respect of a 4-anna share in Touzi No. 2456, by which she bequeathed a 2-anna share to her daughter and a 2-anna share to Triguna. On 2nd June 1912 Nityanand, the father of Sarada and Annada applied on their behalf for Letters of Administration with will annexed in respect of the 2-anna share to which Sarada, Barada and Annada were entitled as the heirs of Bhubanmani. Triguna filed a caveat, but on 12th December 1912 a compromise is alleged to have been made between him and Nityanand in consequence of which Nityanand was allowed to take Letters of Administration in respect of an 1-anna share in the property Sarada attained majority in October 1913, Barada and Annada are still minors. On 21st February 1916 an application was filed by Sarada on behalf of himself and as guardian of his two minor brothers for revocation of the Letters of Administration for just cause. The learned District Judge is of opinion that no just cause has been established and that the application is not maintainable.

In our opinion the learned Judge's order cannot be maintained. The Probate Act (5 of 1881) contains no provision for giving Letters of Administration in respect of only a part of the testator's estate. It is true that an executor who has been appointed by the testator for the administration of a particular fund is competent to take out Probate limited to that particular fund; but where there is no direction as to any particular fund and where as in this case, the applicants apply in their capacity as heirs, I know of no provision of law which empowers the Court to refuse administration of the whole estate and to limit it to a fractional undivided portion thereof. The learned vakil for the respondent relies upon the principle of equitable estoppel and contends that having on behalf of himself and his brothers taken out Letters of Administration in respect of the 1-anna share, Sarada is now completely debarred from impeaching his own act. He urges that the real object of the petitioners is to go behind the compromise. It may be that the effect of revoking the grant will be to set aside the compromise, but that is not a matter with which a Probate Court has any concern. In a Probate proceeding the Court has no concern with the devolution of the property. The only issue before it is whether the will has been proved to be genuine and duly executed. It can record a contract or agreement made between the parties in consideration of the withdrawal of the caveator's objection but it is wholly powerless to enforce such contract or agreement.

Here the objection was withdrawn and the will duly proved. It became therefore the duty of the Court to give Probate or Letters of Administration, as the case might be, in respect of the whole pro-

perty and nothing less. But the learned vakil for the respondent contends that as Nityanand, the father of the appellants before us, himself applied for only administration of half the property the Court was not competent to give him administration of more. I cannot accede to this argument, if Nityanand was unwilling to administer the whole the Court should have dismissed the application altogether. As for the principle of equitable estoppel upon which the learned vakil for the respondent relies it clearly cannot operate against the minors It is true that although Nityanand got an order for Letters of Administration he did not take out the Letters himself and that it was Sarada who, on attaining majority took out the same on behalf of himself and his brothers. It is also true that he thereafter did certain acts which warrant the inference that he ratified the limited grant, but no ratification by him can bind the minors, who are entitled to the protection of the Court when a clear illegality is proved.

It is then urged that Sarada having acted as the natural guardian of the minors, it is no longer open to them to question the grant. I fail to see the force of this argument, because it is always open to a minor to repudiate the act of his guardian if it can be shown that the act was clearly illegal. Here, in our opinion, the order of the District Judge granting Letters of Administration of only one quarter of the property was illegal and there was just cause for revocation within the meaning of S. 50, Probate Act. That being so, the minors through Sarada are entitled to a revocation of that order. The learned vakil for the appellant has drawn our attention to the case of *Janakbuti Thakurain* v. *Gajanand Thakur* (1), which indicates the extent to which a compromise made in a Probate proceeding is a bar to a future application to set aside the Probate. There is nothing in that decision which debars the minors here from applying for revocation of an illegal order. The order of the learned District Judge is therefore set aside and grant of Letters of Administration in respect of an anna share in the estate in favour of Sarada and his two minor brothers is hereby revoked and set aside. The result of this order will be that until a fresh application is made in respect of the whole, no one will be competent to administer the estate of the testatrix. It will be open to the beneficiaries to apply either jointly or severally and upon proof of the will to take out administration of the whole. The appeal succeeds and decreed with costs.

Atkinson, J.—I agree.

V.S./R.K. *Appeal accepted.*

1. (1917) 1 P L J 377=37 I C 12.

A. I. R. 1918 Patna 675

ROE AND IMAM, JJ.

Gopal Ray—Petitioner.

v.

Hitnarayan Singh—Opposite Party.

Civil Revn. No. 143 of 1917, Decided on 6th November 1917, from order of Dist. Judge, Shahabad.

Bengal Tenancy Act (1885), Ss. 171, 166, and 167—Rent decree—Sale of holding—"Interest voidable on sale", explained—Reversioner or donee, is not entitled to make deposit.

The words "interests voidable on the sale" in S. 171, are confined to such interests as the auction-purchaser might by due application under S. 166 and 167 the Act avoid or anul. A reversioner of or a donee from a tenant of a holding has no such interest in the holding as to entitle him to make a deposit under S. 171.

[P 675 C 2; P 676 C 1]

Panchanan Banerji—for Petitioner.

Harnandan Sahay—for Opposite Party.

Roe, J.—The appiicant in this case is aggrieved by an order of the District Judge of Shahabad, refusing to interfere with an order of the Munsif of Shahabad declining to accept a deposit made by a person claiming, firstly to be the reversioner to the judgment-debtor, and secondly, to be the donee of the judgment-debtor in a decree made under S. 148 (a) in respect of a holding held at fixed rates. The learned Judge held that no appeal lay, inasmuch as the holding was a holding at fixed rates. The applicant, had he been able to prove the deed of gift, might have claimed that he was the representative-in-interest of the judgment-debtor, and we might upon this ground have been inclined to admit the application and direct that the appeal be heard on its merits, had it not been clear from a recent decision of a Full Bench of this Court that the applicant had no locus standi to make the deposit which the learned Munsif refused to accept. In *Mahadeo Lal* v. *Langat Singh* (1) it was held that interests voidable on the sale were confined to such

1. (1917) 2 P L J 457=40 I C 257.

interests as the auction-purchaser might by due application under Ss. 166 and 167 avoid or anul. Clearly the reversioner has not an interest voidable on the sale. Clearly also a donee has no such interest. An auction-purchaser could not take proceedings to avoid or annual a deed of gift. He could merely ignore it if the circumstances of the case so permitted. Being of opinion that the applicant had no locus standi to make the deposit which was refused, we see no reason to go further into the matter. We reject this application with costs. Hearing fee two gold mohurs.

Imam, J.—I concur.

V.S./R.K. *Application rejected.*

A. I. R. 1918 Patna 676

IMAM, J.

Ambika Singh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 111 of 1918, Decided on 17th April 1918, from order of Dist. Judge, Saran.

Criminal P. C. (1898), Ss. 350, 346 and 537—Transfer of case from file of Magistrate not competent to try it—There must be trial de novo of whole case—Failure to hold trial de novo is illegality vitiating trial.

Where a case is transferred from the file of a Magistrate who is not competent to try it under S. 346, there must be a trial de novo of the whole case, and the whole of the prosecution evidence must be recorded afresh. In such a case the accused have no power to waive their right to a trial de novo. The evidence recorded by the Magistrate from whose file a case is transferred under this section, having been recorded by a Magistrate who was not qualified to record it, cannot be taken into consideration by the Magistrate who actually tries the case.

[P 677 C 2; P 678 C 1]

The failure to hold the trial de novo in such a case is an illegality which vitiates the trial and not merely an irregularity covered by S. 537.

[P 677 C 1]

S. Sinha and *Parmeshwar Dayal*—for Appellants.

Government Advocate—for the Crown.

Judgment.—The facts and circumstances out of which the present revision arises are as follows :

One Bishun Rai lodged an information before the police to the effect that the petitioner Ambica and his party came to oust him from a bathan and that in the attempt they inflicted injuries on various people and amongst them on Bishun Rai with a deadly weapon, a spear, committing thereby an offence under S. 326, I. P. C. The petitioners Ambica Singh and Bikan Singh have been convicted under S. 323, I. P. C. and the third petitioner has been convicted under S. 326, I. P. C. and sentenced to three months' rigorous imprisonment. Their convictions have been upheld by the Sessions Judge of Chapra.

Mr. Sinha appearing on behalf of the petitioners assails the conviction and sentence passed on these persons principally upon two grounds. Mr. Sinha's contention it that on the finding of the learned Sessions Judge I should hold that there was a right of private defence in the accused and that therefore the conviction should fail. He has drawn my attention to certain portions of the judgment of the lower appellate Court, and it appears that on the findings there can be little doubt that the case for the prosecution was materially false. The learned Judge has held that the story that the accused persons proceeded to the bathan of Bishun Rai to oust him is totally false. He holds that the interference was on the part of Bisnun Rai's men with the accused Ambica and his party, who were peacefully engaged in ploughing or some other agricultural operation on their own land. There is, however, a further finding which very largely affects the contention raised by the learned counsel. The finding is that when Bishun Rai came and interfered with Ambica and his party the right of private defence was exceeded by Ambica and his men. The finding on this question is :

"In fact I find the prosecution story of the actual assault to be true and I am unable to hold that Bishun Rai gave any such provocation or made any such resistance as would justify the use of the force actually employed."

In this connexion Mr. Sinha has drawn my attention to the fact that one of the prosecution witnesses had admitted that the spear wound attributed to Ramdewan had in fact been caused by another man called Kari Singh. This the learned Judge refused to accept and has held that the wound in question was inflicted by Ramdewan himself. On the findings of the learned Judge therefore it is quite evident that although Ambica and his party had the right of private defence as against interference on the part of Bishun Rai, yet that right was exceeded. It is impossible for me, therefore, in the face of this finding to accept the contention of Mr. Sinha that the conviction of these men because of the original right of private

defence having been exercised, is unsustainable. The second branch of the argument of Mr. Sinha however stands on a very different footing. Mr. Sinha raises the question of the illegality of the trial before the Magistrate who tried this case and convicted the accused. In order to explain the position taken by Mr. Sinha it will be necessary to refer to one or two incidents that took place before the trial concluded.

It appears that the Sub-Divisional Magistrate of Chapra who took cognizance of this case made it over for disposal to Mr. A. Amir. This officer proceeded with the recording of the evidence on behalf of the prosecution, and therefore felt that possibly the medical evidence that was to be produced before him might show that it was a case that would fall under Ss. 148 and 326, I. P. C. He, therefore, drew the attention of the Sub Divisional Officer to what he expected. Thereupon the Sub-Divisional Officer desired him to take the medical evidence. The officer in question however, proceeded to take the evidence of a large number of prosecution witnesses and ultimately that of the medical witness. The medical evidence revealed the fact that there was an offence committed under S. 326, I. P. C. The case was then again referred to the Sub-Divisional Officer, who transferred it to his own file and then made it over to Mr. J. C. Bose for trial. This is the officer who tried the case. Before however sending the case to Mr. J C. Bose for trial, the Sub-Divisional Officer appears to have satisfied himself as regards the disposition of the accused with reference to a de novo trial. I find in his order sheet of 25th January the following words:—"The accused will not apply for a de novo trial." On the same day from an order passed by M. J. C. Bose it appears that he received the seizin of the case from the Sub-Divisional Officer. In this order sheet also it is recorded that the accused did not desire to have de novo trial. The trial before Mr. J. C. Bose proceeded from the stage at which it had been stopped by Mr. Amir.

Mr. Sinha's contention is that the accused are not permitted to waive any right which under the law is given to them. Reliance is placed by Mr. Sinha on *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (1), *Upendra Nath Mandal* v. *Rampal* (2), *Muhammad* v. *Emperor* (3), *King-Emperor* v. *Sakharam Pandurang* (4). Mr. Sinha contends that the case is not covered by S. 350, Criminal P. C. and that the removal of the case from the file of Mr. Amir to that of Mr. Bose was made under S. 346 of that Code. The learned Government Advocate, who appears in support of the conviction, concedes the proposition that S. 350 of the Code is inapplicable to the present case. It is pointed out by Mr. Sinha that S. 346 contemplates a case where a Magistrate proceeding with an enquiry or trial before him finds on the evidence that the case is one as to warrant a presumption that it should be tried by some other Magistrate in the district. He contends, therefore, that the language of S. 346 clearly establishes the proposition that the Magistrate who originally proceeded with the trial was one that was not qualified to go on with it. With reference to S. 350 on the other hand Mr. Sinha points out that the Magistrate who ceased to have jurisdiction was qualified to try the case and was succeeded by another Magistrate who couln exercise the same powers as his predecessor. On a careful examination of the language of these two sections I am of opinion that there is considerable force in the contention raised by Mr. Sinha. It is quite evident that in this case Mr. Amir, when he had the medical evidence placed before him, found that he being a Second Class Magistaate was not qualified to proceed with the trial. Therefore the position occupied by Mr. Amir in this case would be a position distinct from the position of a Magistrate who ceased to have jurisdiction under S. 350 and was succeeded by another Magistrate of equal qualification.

Keeping this distinction in view Mr. Sinha contends that in a case falling under S. 350 of the Code the law provides that the accused should have the option of demanding a de novo trial or of proceeding with it from the stage at which it was left by the Magistrate who ceased to exercise jurisdiction. In this connexion it is urged that the facility that has been afforded to the accused in such cases to

1. (1908) 12 C W N 140=6 Cr L J 434.
2. (1909) 4 I C 436=11 Cr L J 1.
3. (1905) 25 P R 1905 Cr=2 Cr L J 369.
4. (1902) 26 Bom 50=3 Bom L R 558.

choose a de novo trial or not is based upon the consideration that the Magistrate who ceased to have jurisdiction was competent equally with the succeeding Magistrate to try them. S. 346 of the Code, according to Mr. Sinha, stands altogether on a different plane. He urges that the Magistrate who was succeeded by a competent Magistrate was one who had not the qualification and therefore was not competent to proceed with the case. In this connexion Mr. Sinha has also drawn my attention to the section of the Code which provides for the recording of evidence. The section says that the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate. The learned Government Advocate contends that even if the view taken by Mr. Sinha be correct, the defect pointed out by him is only an irregularity and not an illegality. He, therefore, suggests that the irregularity is one that is covered by S. 537 of the Code. He also points out that the evidence recorded by Mr. Amir and used by the Magistrate who tried the case would at the very worst mean an irregularity covered by Cl. (a), S. 537 and is curable by that section. I am unable to accept the contention of the learned Government Advocate and I do not regard the defect under consideration as a mere irregularity. I look upon it as an illegality.

It is the very mode of trial that in this case has been affected. The evidence recorded by Mr. Amir in the case was not evidence recorded by a Magistrate who was qualified to try it. On the authority of *Subrahmania Ayyar* v. *King-Emperor* (5), it is an illegality that cannot be cured by S. 537. My attention has been drawn to the case reported as *Ram Subhag Singh* v. *Emperor* (6). I have carefully gone through the judgments delivered in that case. They do not seem to affect the point raised by Mr. Sinha. In the circumstances I hold that the trial of the petitioners was not in accordance with law. I therefore set aside the conviction and sentences passed on Ambica, Bikan and Ramdewan and send back the case to the District Magistrate of Chapra with the direction that the accused should be re tried in accordance with law.

V.S /R.K. *Retrial ordered.*

5. (1902) 25 Mad 61=28 I A 257 (P C).
6. (1915) 19 C. W N 972=30 I C 465=16 Cr L J 641.

A. I. R. 1918 Patna 678

ATKINSON AND JWALA PRASAD, JJ.

Dilan Singh and *others*—Plaintiffs—Appellants.

v.

Choa Singh and *others*— Defendants—Respondents.

Second Appeals Nos. 1134 to 1143 of 1916, Decided on 13th June 1917, from a decision of Dist. Judge, Darbhanga, D/- 7th April 1916.

(a) Limitation— Starting point—Suit for declaration and khas possession with incidental prayer for declaration that entry in Record of Rights was wrong—Limitation commences from date of final publication of Record of Rights.

Plaintiffs sued for a declaration that the lands in dispute were their zerait land, and asked that they be given khas possession, and incidentally prayed that it be declared that the entry in the Record of Rights recording the defendants as occupancy raiyat in respect of the lands in dispute was incorrect:

Held: that the period of limitation in respect of the suit commenced to run from the date of the final publication of the entry in the Record of Rights. [P 679 C 2]

(b) Civil P. C. (1908), S. 100—Finding of fact.

A finding of fact which has not been arrived at after a fair, honest and full consideration of the evidence on the record is not binding on the High Court in second appeal. [P 680 C 1]

Fakhruddin—for Appellants.

Kailaspati and *Mustafa Khan*—for Respondents.

Judgment.—The plaintiffs in these cases originally instituted 13 suits in the Court of the Munsif of Darbhanga. Four suits, to wit 842, 843, 845 and 854 were cognizant with the claim of the plaintiffs that the lands in dispute covered by these suits fell within the plaintiffs' patti and not within the patti of the second party defendants, who are the maliks of a patti adjoining that of the plaintiffs in Mauza Madanpur. In respect of Original Suits Nos. 842 and 854, no appeals were presented to the learned District Judge; but there were appeals in respect of Suits Nos. 843 and 845. The sole question in these two cases out of which Second Appeals Nos. 1134 and 1135 arise is: within whose patti do the lands covered by these two suits fall? Are they within the plaintiffs' patti or are they within

the patti of the second party defendants? The Munsif dismissed these two suits of the plaintiffs on the ground that the Commissioner, who was sent out to enquire and report, was unable to trace the property in question as being within the plaintiffs' patti. On appeal the learned Judge gave these two cases a very scant consideration. He wholly disregarded the Commissioner's report and declined to discuss it. There does not appear to us to have been a fair consideration of the plaintiffs' appeal in respect of these two suits, viz., Original Suits Nos. 843 and 845, and in directing the issues which we intend to send down to the lower appellate Court for consideration, we would ask the lower Court to ascertain whether the plots of land covered by Suits Nos. 843 and 845 fall within the patti of the second party defendants or whether they fall within the patti of the plaintiffs. Out of the remaining suits there were appeals in eight other cases, There was no appeal in Suit No. 848 but there were appeals in Suits Nos. 841, 844, 846, 847, 849, 852, 851 and 853. In these suits the plaintiffs asked by their prayer in their plaint that the lands to which these suits were referable should be declared to be their zerait and that they be given khas possession; and incidentally that it be declared that the entry in the Record of Rights recording the first party defendants as occupancy raiyats in respect of these lands was incorrect.

The issue which was set out prominently for consideration was, whether the lands in these suits were the zerait lands of the plaintiffs or whether they formed the occupancy holdings of the first party defendants. The plaintiffs alleged that the lands were their zerait lands and that at the partition which took place in 1896 the lands were described in the batwara khasra papers as their zerait lands. The learned Munsif sent out a Commissioner to report from a comparison of the lands in suit with the batwara khasra, and the Commissioner reported that the lands covered by these suits were the zerait lands described as such in the batwara khasra, that they fell within the patti of the plaintiffs and that having once been zerait that status could not be lost unless title by adverse possession had been satisfactorily established. The learned Munsif held that the lands were the zerait lands of the plaintiffs and gave them a decree accordingly. An appeal was then preferred from the decision of the learned Munsif by the defendants; and the learned Judge on appeal seems to have tried the case in a most unsatisfactory manner. The learned Judge in the first place disregarded entirely the finding of fact arrived at by the learned Munsif that the lands were the zerait lands of the plaintiffs, which finding was arrived at upon the most satisfactory evidence that could be adduced, namely, the batwara khasra and the report of the Commissioner after inspection.

In addition to their claim for a declaration that the lands were their zerait the plaintiffs also asked that, in the event of their being held not entitled to such a declaration, the lands in suit might be assessed with a fair and equitable rent. That aspect of the case has been wholly disregarded by the lower appellate Court. The learned Judge thinks that because the plaintiffs have come just before the expiry of twelve years from the date of publication of the Record of Rights to establish their title to a declaration that the lands in suit were their zerait, they are barred from asserting their title. The learned Munsif held that the period of limitation commenced to run from the time of the final publication of the entry in the Record of Rights which was published on 14th December 1906; that the plaintiffs had come for redress within twelve years, even though it be twelve years but one day; and that their claim was therefore not barred in point of law. The learned Judge has held that this is not the point of time from which the period of limitation commenced to run; but the learned Judge gives us no date upon which we could hold that the period of limitation began to run from a date other than the date of the final publication of the Record of Rights.

We agree with the learned Munsif that the period of limitation commenced to run from the date of the entry in the Record of Rights when the title of the defendants was proclaimed as occpuancy raiyats in respect of the lands which the plaintiffs claim to be their zerait. The plaintiffs came within time to have their rights declared. The learned Judge has devoted very scanty attention to the questions arising for decision in these suits and we think that his judgment is unsatisfactory and cannot be allowed to

stand. The learned Judge also holds that the entry in the Record of Rights has not been rebutted. It is contended on behalf of the first party defendants that this is a finding of fact so unequivocal and certain that we are bound by it. We would be bound by the finding of fact if that finding of fact had been arrived at after a fair, honest and full consideration of the evidence before the learned Judge, but we think that that finding of fact has not been arrived at after a full and careful review of the evidence, and we are therefore entitled to say that in point of law the finding of fact is so unsatisfactory that it cannot stand and we think that the plaintiffs have not received from the Judge a judgment of the nature to which they were entitled in point of law. In the case of *Mubarak Hussain* v. *Syed Shah Hamid Hussain* (1) Mullick, J., and I were not satisfied that the lower appellate Court had applied its mind to the evidence before it. It appeared to us that there had been injustice done to the parties in that case by the Court's failure to weigh all the evidence before it and we therefore felt ourselves compelled and coerced to remand the case to the lower appellate Court for retrial. In the present case we think that the decision of the learned Judge is not a decision arrived at after a fair and reasonable consideration of the evidence before him and as such it cannot be allowed to stand. Accordingly we shall set aside the judgment and order of the lower appellate Court. We shall retain the case in this Court and send down the following issues to the lower appellate Court for re-consideration and decision:

With regard to Original Suits Nos. 843 and 845, the lower appellate Court is directed to determine whether the lands covered by these two suits fall within the patti of the plaintiffs or whether they fall within the patti of the second party defendants. With regard to Original Suits Nos 841, 844, 846, 847, 849, 851, 852 and 853 the lower appellate Court is directed to consider and decide the following issues: (1) Are the lands covered by these suits the zerait lands of the plaintiffs? (2) Have the defendants in these suits acquired occupancy rights in the lands covered by these suits? If the answer to Issue 2 is in the affirmative, the Court will proceed to fix a fair and equitable rent in respect of these lands to be paid by the first party defendants to the plaintiffs. We wish to make one more observation in addition to what has been paid above. The learned Judge has said great stress upon Ex. E. Ex E is a judgment in a S. 103A case and is referable only to the lands covered by Suit No. 853, but the learned Judge has apparently adopted it as the standard of evidence applicable to all the cases. We think that the learned Judge has acted erroneously in placing reliance upon Ex. E for the purpose of his decision in all suits. The lower appellate Court is requested to return its findings upon the issues enumerated above together with the record to this Court for final disposal of these appeals. Costs of this hearing will abide the result.

V.S./R.K. *Cases remanded.*

1. (1917) 2 P L J 8=38 I C 509.

A. I. R. 1918 Patna 680

CHAMIER, C. J. AND CHAPMAN AND JWALA PRASAD, JJ.

Bara Estate Ltd.—Defendants—Appellants.

v.

Anup Chandra—Plaintiff—Respondent.

Letters Patent Appeal No. 44 of 1917, Decided on 3rd July 1917, from decision of Atkinson, J., in Second Appeal No. 2309 of 1915.

(a) Letters Patent (Patna)—Order of Single Judge directing trial of certain issue is not appealable.

There is no right of appeal under the Letters Patent against the order of a Single Judge of the High Court directing the trial of a certain issue. [P 682 C 1]

(b) Evidence Act, (1872), S. 101—Contract unconscionable on face of it—Party seeking enforcement must prove no undue influence.

Where a contract is on the face of it unconscionable it is the duty of the party seeking to enforce it to prove that the contract was not induced by undue influence. [P 682 C 2]

P. Kennedy and *Saroshi Charan Mitter* —for Appellants.

Sushil Madhab Mullick, Mustafa Khan, Harnarain Prasad and *Sambhu Saran* —for Respondent.

Chamier, C. J.—This appeal arise out of a suit brought by the respondent to have a satta executed by him on September 25th, 1913, in favour of the appellant set aside on the ground that it was obtained from him under what he described in his plaint as "dabao najaiz." The satta binds the respondent for a period of fifteen years to grow sugarcane on 12

cottas of his holding every year according to the directions of the servants of the appellant. The Respondent was to get 3 annas per maund for the sugarcane produced and was to receive Rs. 30 as taccavi in certain instalments. If he failed in any year to cultivate the requisite area with sugarcane, he was to pay damages at the rate of Rs. 50 per bigha. The satta expressly provides that the appellant's servants shall be entitled to select the land on which the respondent was to grow the sugarcane. The respondent in his plaint alleged that there was a dispute between him and a pattidar named Jagan Choudhuri, that Jagan Choudhuri went to Mr. MacDonald, the Manager of the appellant company and that Mr. MacDonald sent for a Sub Inspector of Police, who took the respondent to the Factory and directed him to go to the Manager and settle the dispute. The respondent accordingly went to the Manager's bungalow. When he arrived there the Manager was told by the Munshi of the Factory that the respondent was not willing to pay damages on account of the sugarcane. Thereupon the Manager asked the respondent to put his thump-impression upon a certain stamped paper. The respondent refused to do so and thereupon the Manager threatened him and said that he would cite the respondent's wife and daughter as witnesses in the case with Jagen Chondhuri. The respondent says that he was alone when the employees of the Factory and the Manager himself threatened him that it was in that state of affairs that he put his thumb-impression on the printed stamped paper. Ultimately the Manager let the respondent go after taking Rs. 6 from him as a fine. The respondent says that he subsequently learned that the stamped paper was in fact satta binding him to grow sugarcane on the terms above stated. He says that he was not willing to sign any such satta but was induced to do so by "dabao najaiz" and that if the satta were left outstanding it would prejudice him greatly. He therefore asks that the satta may be set aside.

The appellant pleaded that the satta represented a fair contract and denied all the material allegations in the plaint and pleadings. The Munsif fixed four issues one of which was "was the satta in suit executed by the plaintiff under duress or coercion." The Munsif found in favour of the respondent on that issue and decreed the claim. There was an appeal to the Court of the District Judge. Mr. Scroope, who was presiding in that Court at the time examined the satta and gave it as his opinion that it was a "most one-sided arrangement. He declined to accept the respondent's story that he had been forced by Mr. MacDonald or his servants to execute the satta by means of threats but he found that it was proved that just before the satta was executed there was a criminal case pending against the respondent. He points out that Mr. MacDonald himself had stated that there was such a case and that the Sub-Inspector of Police had visited the Factory in connection with it. Mr. Scroope went on to say that in his opinion it was probable that the Factory servants took advantage of the respondent being in a tight place and there master being President of the panch to threaten the respondent and so got the satta out of him. "Anyhow," said the learned District Judge:

> having regard to the fact that the plaintiff was mixed up in a criminal case at the time that the said company was his immediate landlord and that its Manager Mr. MacDonald was a president of the bench in the habit of dealing with such criminal cases, one must hold that the defendant company was in a position to dominate the will of the plaintiff and that it was in such circumstances that the satta was executes"

In the opinion of the learned Judge, the relative position of the parties being such as he describes, the appellant was bound to show that the terms of the satta were fair and reasonable under S. 16, Contract Act. Mr. Scroope was of opinion that there was no proof that the terms were fair and reasonable and he accordingly dismissed the appeal. There was then a second appeal to this Court which came before Kingsford. J., That learned Judge was of opinion that a case had been made out for the present respondent which had not been put forward by him in his plaint and that what the Munsif and the District Judge should have done was to set themselves to enquire whether the respondent had proved the allegations contained in the plaint which amounted in the opinion of Kingsford, J., to a definite charge of coercion, whereas they had disposed of the case as if it was one of undue influence. Kingsford, J., therefore directed that the record should be returned for a fresh finding upon the third issue, which I have set out above. The case then came before Mr. Sheepshanks. He

also was of opinion that the circumstances afforded good gocund for supposing that the execution of the satta was not altogether a voluntary one but had been induced by pressure of one kind or another. He went on to carry out the orders of this Court and see whether the respondent had proved the allegations made by him in his plaint. He came to the conclusion that the respondent had not proved that the Manager had taken any part in obtaining the execution of the satta, or had used any threats of the kind suggested in the plaint and he therefore founded that the definite case of coercion had not been established. The case was then returned to this Court and it came before Atkinson. J., That learned Judge was of opinion that the case ought not to have been remanded for re-trial of the third issue, that the findings recorded by Mr. Scroope were sufficient and should have been accepted and that the appeal should have been dismissed. He accordingly disregarded the remand order made by Kingsford J.. and accepting the findings recorded by Mr. Scroope he dismissed the appeal.

The case now comes before us as an appeal under the Letters Petent. The first point taken in appeal was that if the respondent was dissatisfied with the order of remand made by Kingsford, J., he should have appealed against it. In my opinion there was no right of appeal under the Letters Patent against the order of Kingsford, J., which was not an order of remand at all but merely an order directing the trial of a certain issue. The learned vakil, for the appellant, admits that he is unable to produce any authority to the effect that an appeal could have been maintained against the order of Kingsford, J., In my opinion no appeal could have been filed under the Letters Patent and therefore the question whether the order made by Kingsford J., was right or wrong may be considered by us. Having heard the arguments on both sides I have come to the conclusion that the judgment under appeal is right and should be affirmed. It is true that the respondent made certain definite allegations against the Manager of the appellant company and the servants of the company which amounted to a charge of coercion as defined in the Contract Act, and that he failed to prove those allegations, but he also pleaded and proved a number of facts and circumstances which in the opinion of Mr. Scroope brought the case within the purview of S. 16, Contract Act. I agree with Mr. Scroope that the facts as found show that the manager of the appellant company was in a position to dominate the will of the respondent at the time when the satta was executed. I agree with him also that the contract is on the face of it unconscionable. In my opinion he was right in holding that it was the duty of the appellant company to prove that the contract was induced by undue influence. The company did not prove this. It is suggested that they were misled by the terms of the third issue into supposing that they had to meet a charge of coercion and nothing else. I cannot accept the suggestion. The respondent's case was that the execution of the satta had been brought about by "dabo najaiz" and he set out the whole of the facts which he proposed to prove. The appellant company must have known that proof of some only of the respondent's allegations would be sufficient to require them to show that the execution of the satta had not been obtained by unfair means. I would affirm the decision of Atkinson, J., and dismiss this appeal with costs.

Chapman J.—I agree.

Jwala Prasad, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1918 Patna 682

MULLICK AND JWALA PRASAD, JJ.

Pertap Mahton and *others*—Appellants.

v.

Mt. Bechan Kuar and *others*—Respondents.

Appeal No. 1116 of 1916, Decided on 18th July 1917, from appellate decree of Dist. Judge, Patna, D/- 23rd August 1916.

(a) Bengal Land Registration Act (1876), S. 44—S 44 does not apply to revenue-free property.

The term 'estate' means and includes revenue-paying lands and not revenue-free lands. S. 44 therefore has no application to a revenue-free property. [P 684 C 1,2]

(b) Bengal Land Registration Act (1876), S. 78—S. 78 is not bar to rent decree being obtained by mortgagee of revenue-free property.

There is no provision for the registration of a mortgagee of a revenue-free property. Therefore S. 78 does not operate as a bar to a rent decree being obtained by the mortgagee of a revenue-free property. [P 685 C 1]

Bimla Charan Singha—for Appellants.

Surendra Nath Das—for Respondents.

Jwala Prasad, J.—This is an appeal from the judgment of the District Judge of Patna, dated 23rd August 1916, decreeing the plaintiff's suit for rent for the years 1319-1322. The tenant defendants have appealed. The only point urged on behalf of the appellants is that the suit for rent should be dismissed inasmuch as the plaintiff's name is not registered as a mortgagee in the Collectorate. This plea was taken by the defendant-appellant in the Courts below. The first Court upheld the plea and dismissed the suit. On appeal the learned District Judge rejected the plea and decreed the suit, holding that S. 78, Land Registration Act, 7 of 1876 B. C., is no bar to the suit; firstly, because the plaintiff is only an ijaradar of the share in respect of which the rent is claimed and as such she is not required to have her name registered under the Act ; and secondly, even if the plaintiff is a mortgagee, the registration of a mortgagee is optional, and as the provision in S. 78 is for the protection of a tenant, no question of protection can arise when the tenant, as in this case, pleads payment of the rent claimed and admits the relationship of landlord and tenant. The first reason given by the learned District Judge is obviously under misapprehension, for the plaint, para. 1, clearly shows that the ijara patta, dated 29th November 1896, on the basis of which the rent is claimed, is an usufructuary mortgage deel in respect of 4 annas 10 dams odd in Mouza Udaini Ajrakha Khaira Toli, District Patna, executed by Mt. Bibi Wazirunnessa the proprietress of the said share, in order to secure the payment of a debt of Rs. 20,000 due to the plaintiff from the said executant Wazirunnessa. The mortgage bond was not produced in the lower Courts. A certified copy has been shown to us by the appellant, which shows that the plaintiff was to appropriate Rs. 1,500, the rent fixed of the village, towards the interest of Rs. 20,000 zarpeshgi year by year, and concludes with the words:

"I have mortgaged and made security and liable (makful, makbuz wa paband) the ticha property for Rs. 20,000, the zarpeshgi money aforesaid, up to the payment of full zarpeshgi."

The plaintiff is thus a mortgagee of the share belonging to Wazirunnessa in respect of which the rent is claimed. This share has been decribed in the mortgage bond as lakhiraj or revenue-free property. No touzi number has been mentioned in the bond, but in the plaint, para. 1, it is stated that the touzi number is 68. The plarintiff alleged in the plaint that her name was registered in Register D as ijaradar in respect of the share and that she is in possession of the same. It has however been held that as a matter of fact her name is not registered. She took several adjournments to produce a certified copy of an extract from Register D but she did not produce it, and then admitted through her vakil that she was not registered and contended that the law does not require her name to be so registered. 'Revenue-free property' has been defined in Cl. 10, S. 2, Act 7 of 1876, Land Registration Act, to mean

"any land not subject to the payment of land revenue which is included under one entry in any part of the general register of revenue-free lands."

Under S. 4 of that Act the Collector of every District is required to prepare and keep up the following registers .

A, a general register of revenue-paying lands ; B. a general register of revenue-free lands ; C, mouzavar register of all lands revenue paying and revenue free ; D, an intermediate register of changes affecting entries in the general and mouzavar Registers.

The property in question being revenue-free would have an entry in Registers B and C. The plaint shows that it has a touzi number assigned to it, namely No. 68. The presumption therefore is that it has an entry in the Collector's Registers B and C. The contention of the respondent that there is no entry relating to the property in question in those registers is not tenable in face of the admission in the plaint, there being no evidence to the contrary.

Section 38 of the Act enacts as follows:

"Every proprietor of an estate or revenue-free property or of any interest therein, respectively, being in possession of such estate, property or interest at the commencement of this Act;

every joint proprietor of an estate or revenue-free property being in charge of such estate or property or of any interest therein, respectively, on behalf of the other proprietors thereof, at the commencement of this Act

and every person being manager of an estate or revenue-free property, or of any interest therein, respectively, on behalf of a proprietor thereof, at the commencement of this Act,

shall, if his name and the character and extent of his interest have not already been re-

gistered, make application in the manner hereinafter provided for the registration of his name and of the character and extent of his interest as such proprietor or manager to the Collector of the District on the general register of which such estate or property is borne,or to any other officer who may have been empowered by the Collector to receive such application within such time as the Lieutenant-Governor may fix as hereinafter provided."

Section 42 of the Act enacts as follows:

"Every person succeeding after the commencement of this Act, to any proprietary right in any estate or revenue-free property, whether by purchase, inheritance, gift or otherwise

every joint proprietor of an estate or revenue-free property assuming charge after such commencement of such estate or property, or of any interest therein respectively, on behalf of the other proprietors thereof ;

and every person assuming charge after such commencement of any estate or revenue-free property, or of any interest therein respectively, as manager,

shall, within six months from the date of such succession or assumption of charge, make application in the manner hereinafter provided to the Collector of the District on the general register of which such estate or property is borne, or to any other officer who may have been empowered by such Collector to receive such applications, for registration of his name and of the character and extent of his interest as such proprietor or manager."

Under these two sections the proprietor of the revenue-free property in question is required to have his name registered. Mt. Wazirunnessa being the proprietress of the revenue-free property must have, therefore her name registered in the Collector's register. These sections have nothing to do with a mortgagee of an estate or a revenue-free property. The section that relates to the registration of a mortgagee is S. 44 of the Act which runs as follows :

"Every person who holds a mortgage of any proprietary right in any estate may apply to the Collector for registration of his name as such mortgagee, and of the interest in respect of which he is such mortgagee, and in such application shall specify whether he or the mortgagor is in possession. On receipt of such application the Collector shall proceed, as far as possible according to the manner hereinafter prescribed in respect of applications for registration as proprietor. The word "estate" mentioned in S. 44 has been defined in Cl. 2, S. 3 of the Act to mean (a) any land subject to the payment of land revenue, either immediately or prospectively, for the discharge of which a separate engagement has been entered into with Government; (b) any land which is entered on the revenue roll as separarely assessed with land revenue . . . . .; (c) any land being the property of Government of which the Board shall have directed a separate entry on the general register hereinafter mentioned. . . . ."

'Estate', therefore, means and includes revenue-paying lands, and not revenue-free lands which have been defined in Cl. 10, S. 3, already adverted to. Therefore S. 44, has no application to a revenue-free property. There is no other section which expressly requires a mortgagee of a revenue-free property to have his name registered in the Collector's register. Section 52 of the Act prescribes the procedure for the inquiry and the order to be made by the Collector on applications for registration of names either as proprietor or as mortgagee. This section refers to applications under Ss. 38, 42 and 44 of the Act. In case of an application by a proprietor, joint proprietor, or manager, of a revenue paying estate or a revenue-free property under S. 38, the Collector will inquire into possession of the applicant, and under S. 42 the Collector shall enquire into the succession or transfer and as to possession in accordance with the alleged succession or transfer. The section further goes on to say that on being satisfied of possession of the applicant under S. 38 and of succession or transfer coupled with possession under S. 42, and not otherwise,

"the Collector shall order the name of the applicant to be registered in the proper registers as proprietor or manager of the said estate or revenue-free property or interest therein."

So far the section does not relate to the registration of mortgages. Then follows the proviso to the section which relates to mortgagees:

"Provided that any person to whom any proprietary right in an estate has been mortgaged may be registered as mortgagee whether he be in actual possession or otherwise."

Mark the word "estate" in the section. "Revenue-free property" has not been mentioned in the proviso, nor in S. 44. It, therefore, follows that whereas the Act provides for the registration of a proprietor of a revenue-free property, it does not provide for the registration of a mortgagee of a revenue free property. The changes affecting entries of a revenue-free property, so far as they relate to proprietors of such property, are noted in the intermediate register called Register "D" of the Collector. It may be that the Legislature intended that only proprietors or managers of a revenue free property under Ss. 38 and 42 of the Act should be registered and not mortgagees of such properties. The reason for this intention may possibly be that as no revenue is payable for revenue-free properties, there is no necessity of requiring the mort-

gagees' name to be registered. Be that as it may, we have to construe the Act as it is, and we find as a matter of fact that there is no provision for the registration of a mortgagee of a revenue-free property in the Act. S. 78 of the Act runs as follows:

"No person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act."

It is not necessary to quote the Cl. 2 of this section.

No doubt a person is not bound to pay rent to a mortgagee unless his name is registered, whether the registration be optional or not. The view of the Court below that S. 78 of the Act will not operate as a bar to a rent decree as the registration of a mortgagee is optional is in my opinion, not correct. I am also of opinion that the learned District Judge is not correct when he says that S. 78 should not apply where a tenant pleads payment and admits the relationship of a landlord and a tenant; for it is well settled that there can be no estoppel against an act of the legislature [*Vide Abdul Aziz* v. *Kanthu Mullick*(1) and the authorities quoted thereunder.] But in order to apply the statutory bar of S. 78 to a mortgagee claiming rent, there must be a provision in the Act for the registration of his name as mortgagee. The words in Cl. 1 of the section, "unless the name of such claimant shall have been registered under this Act" are important to show that the registration of the name must be under the Act. If there is no provision in the Act for the registration of the mortgagee of a revenue-free property, I do not think that the section will operate as a bar to a suit by the mortgagee of a revenue-free property. The corresponding S. 60, Ben. Ten. Act, which debars the person liable for the rent from pleading, in defence to the claim of the person registered under the Land Registration Act, that the rent is due to any third person as also the words "the person registered under the Land Registration Act," as I said above, imply that there must be a provision in the Land Registration Act for the registration of a mortgagee of a revenue-free property before his claim for rent can be rejected on the ground that his name is not registered under the Land Registration Act.

It is settled by decisions that a lessee or an ijaradar is entitled to recover rent although his name is not registered under the Land Registration Act, the principle being that he is not required under the Act to be registered. Same principle should apply, to my mind to the case of a mortgagee of a revenue-free property, as he is not required by the Act to have his name registered. In this view of the matter I think that the plaintiff's suit cannot be dismissed on the ground that her name is not registered as a mortgagee of the revenue-free property in respect of which the rent has been claimed by her and I would dismiss the appeal. My learned brother, however, desires that the question, whether the property in suit was a revenue-free property or an estate should be decided by the Court below. I agree to the order of remand made by my learned brother.

Mullick, J.—This second appeal arises out of a suit for rent in respect of a property which is described in the plaint as a share in Mauza Udaini Ajrakha Khaira Toli, bearing touzi No. 68. It has been admitted in argument before us that the plaintiff is an usufructuary mortgagee by a mortgage pattah, dated 29th November 1896, and that although the term of the mortgage expired in 1310 Fasli, she is still in possession as the mortgage money has not been paid. The only point argued before us is whether the tenant is entitled by reason of S. 78, Land Registration Act, Act 7 (B. C.) of 1876, to refuse payment of rent on the ground that the plaintiff being a mortgagee was bound to have her name registered in the Collector's books. Although the point is not free from difficulty and although the definition of proprietor in the Act might favour the view that a mortgagee also is included in the definition and is, therefore, required under S. 42 of the Act to register himself upon the execution of the mortgage, still the preamble of the Act, read with S. 44 and S. 52, would seem to indicate that it is only the mortgagee of an estate, as defined in the Act, that is bound to register himself before he can sue for rent. It may be that S. 44 concerned itself with mortgagees of revenue-paying estates, whether in possession or not, for the reason that the interest of such mortgagees passed at a sale for arrears of Government revenue.

1 (1911) 38 Cal 512=10 I C 467.

However that may be, I agree with my learned colleague that the disqualification placed by S. 78 does not extend to revenue-free properties or other lakhiraj properties.

I am not satisfied, however, that we have sufficient materials before us for determining whether the property in suit is an estate or not. The judgment of the lower appellate Court will be set aside and the case will be remanded to him for re-hearing. If the defendants can show, the onus being upon them as they plead a statutory bar, that the property is an estate within the meaning of the Act, then they will succeed. There is no question of any written contract which takes the case out of S. 78, and this point, therefore, will not be opened. Costs will abide the result.

V.S./R.K. *Case remanded.*

A. I. R. 1918 Patna 686

ATKINSON AND JWALA PRASAD, JJ.

Kirpal Singh and *another*—Judgment-debtors—Appellants.

v.

Kedarnath Bose and *another*—Decree-holders—Respondents.

Misc. Appeal No. 267 of 1916, Decided on 14th June 1917, from order of Sub-Judge, Monghyr, D/- 19th September 1916.

Civil P. C. (1908), O. 21, Rr. 69 and 90—Sale adjourned sine die—No fresh sale proclamation—If loss is caused sale is vitiated.

Where in execution proceedings the Court adjourns the sale sine die and thereafter no fresh sale proclamation fixing a new and definite date for holding the sale is issued, it is a material irregularity within the meaning of O. 21, R. 69, in publishing and conducting the sale and the sale is liable to be set aside if substantial injury resulting from the material irregularity is proved.

[P 687 C 1]

Parmeshwar Dyal—for Appellants.

Naresh Chandra Singh—for Respondents.

Judgment.—The Respondents in miscellaneous appeal obtained a decree against the father of the appellants on foot of a mortgage executed in 1894. The mortgage-decree is dated 26th December 1906 and in this year 1917, the mortgage decree is still unsatisfied. Many applications for execution have been made from time to time. The present application is the last of a series of many and is dated 18th November 1914. On 26th January 1916, the sale proclamation was duly published and the date fixed for the sale was 13th March 1916. The present appellants objected to the form of the proclamation inasmuch as it did not set out the value of the property as estimated by them. Accordingly an application was made to the Calcutta High Court, and the High Court at Calcutta was pleased to order that the Subordinate Judge should insert in the sale proclamation the value of the property estimated by the judgment-debtor. The sale proclamation was amended and then duly published in accordance with the requirements of the order of the Calcutta High Court. The decree-holders valued the property at Rs. 6,100 and the judgment-debtors valued it at Rs. 12,000.

The sale was about to be held on 13th March, being the date fixed in the sale proclamation, but immediately before 13th March the present appellants applied to this Court to stay the sale. Notice was allowed to issue by the Registrar to stay the sale pending a formal application being made to this Court for a stay of the sale. The date of the order of the Registrar was 7th March 1916, and it required the respondents to show cause why the sale should not be stayed. The matter came before the learned Chief Justice and Jwala Prasad J., of this Court on 17th March. These learned Judges came to the conclusion that there was no ground whatsoever for staying the sale and they directed that the sale should proceed forthwith. The order of the Registrar reached the Subordinate Judge on 10th March and the Subordinate Judge adjourned the sale sine die. The order of 17th March made by the Divisional Bench of this Court rejecting the application for stay reached the Subordinate Judge on 21st March; and the learned Subordinate Judge, in obedience to the order of this Court, proceeded with the sale of the property there and then on 21st March 1916 and the property was sold to the decree-holders for the sum of Rs. 7,250 for the four denominations of property set out in the sale proclamation. There appear to have been present at the sale the decree-holders and four other persons.

This application is now made to us by the appellants, the judgment-debtors, to set aside the sale on the ground that there was a material irregularity in the publishing and conduct of the sale which resulted in substantial injury to the

petitioners by reason of the property being sold at a very low price. The learned Subordinate Judge, as I have observed, on 10th March adjourned the sale sine die and thereafter he issued no fresh sale proclamation fixing a new and definite date for holding the sale. It appears to us that the learned Subordinate Judge under O. 21, R. 69, should have, strictly speaking, issued a fresh proclamation, after the receipt of the order of the High Court of 17th March, on 21st March and we think that in not issuing a fresh proclamation there was an irregularity in the publication and conduct of the sale.

The question we have to decide is whether from that irregularity substantial injury resulted to the appellants before us. If substantial injury resulted to the appellants by reason of the irregularity, then according to the authorities it appears reasonably clear that the sale ought to be set aside and a fresh sale held. It is contended on behalf of the appellants that by reason of this irregularity there were few bidders at the sale; that no one knew the hour at which the sale would take place and that the price offered by the decree holders was an inadequate price for the property sold. The appellants allege that the property is worth about Rs. 12,000. This estimate of the value of the property is based upon the evidence of the plaintiff and three other witnesses, none of whom I think would carry conviction, so far as their evidence is concerned, to the mind of any Court. The appellant is naturally inclined to inflate the value of the property as much as possible therefore one must view his evidence with some suspicion. But even if we take his evidence as given, and review the prices which have been paid by the purchasers for each lot that was advertised for sale, I do not think that the margin of difference is such as would warrant any Court in holding that the property was sold for an inadequate price.

Property No. 1 was valued by the appellant approximately at Rs. 3,000, while the price paid for it is Rs. 3,800; property No. 2 was valued by the judgment-debtor at Rs. 1,000 and it fetched Rs. 600; property No 3 was valued by the judgment-debtor at Rs. 3,250 and it realized Rs. 2,225; property No. 4 was valued by the judgment-debtor at Rs. 890 and it realized Rs. 625. Comparing these figures given by the judgment-debtor himself with the prices paid by the purchasers, can it be said that the property was sold for an inadequate consideration or that the plaintiff by reason of the non-publication of a second proclamation suffered substantial injury as a result? If we total the figures estimated by the judgment debtor for the four denominations of property the total comes to Rs. 8,140 as against the sum of Rs. 7,250 realized by the proceeds of the sale. Both witnesses 2 and 3 estimate the value of the property that was sold at Rs. 13,000 or thereabouts. Neither of them know what properties have been sold, although they live in the vicinity of the judgment-debtor's property and from the cross examination of these witnesses it appears that they are persons whose evidence cannot be accepted as taustworthy. Witness 2, says :

"I did not know of the sale and do not know what properties have been sold."

He further says :

"I did not go to Pochu Singh, and have no concern with him. I have neither sold nor purchased any land."

It is clear from the evidence of this witness that he has no intrinsic knowledge of the value of land and therefore his evidence is of no value as corroboration of the appellants' evidence. Witness 3 is likewise a person who does not impress us as being a witness that can be relied upon. He states that the property is worth Rs. 13,000. He says his income is Rs. 5 000 or Rs. 6,000 a year, but he further states that all the property belongs to his father and is in his father's name and that he does not know what share he has in the family property. He does not know how much or what property has been sold and finally he says that he has come to depose at the request of Hito Babu, Pleader. It appears to us that this witness also is untrustworthy and unconvincing. The next witness witness 4, we do not think puts the case very much further.

On the other hand witness No. 3 for the decree-holders appears to carry a reasonable sense of conviction by his evidence. He is a four annas malik in the jagir of which six annas have been sold he has also purchased land close to the six bighas in Sher Muhammed Tendail which has been sold; he used to look after the cultivation of the judgment-

debtors' land during their minority and he appears to have a knowledge of the value of land, having himself purchased land within a reasonable time before the present sale took place. He says that he thinks Rs. 3,000 an ample price for lot No. 1 of the property sold Rs. 550 for lot No. 2, Rs. 1,200 for lot No. 3 and Rs. 400 for lot No. 4. If we take the evidence of this witness as reasonably trustworthy, it would appear that the price paid by the purchasers was substantially more than the actual value of the land as estimated by this witness. It is certainly almost equivalent to the value given by the judgment-debtors themselves. The learned Judge who decided this case does not appear to have had present to his mind the proper legal considerations bearing upon the facts of the case. He says :

> " I do not think that his plea of inadequacy of price can have the effect to set aside the sale."

In our opinion it would certainly have that effect if substantial injury had been caused to the judgment-debtors by reason of inadequacy of price following from the non-publication of a fresh proclamation. We hold that there was in this case an irregularity but we further hold that substantial injury has not resulted to the judgment-debtors-appellants by reason of inadequacy of price. The amount of the mortgage decree is Rs. 11,000 odd, so that the amount realized by the sale is insufficient to satisfy the decree-holders' debt. These appellants have been induced for some reason or other to embark upon a sea of litigation. Throughout these execution proceedings these appellants, and those who are behind them, have endeavoured to defeat and delay the execution of the decree-holders' mortgage decree. In 1907 a regular Suit No. 428 of 1907 was instituted by Mt. Bindawati claiming the mortgaged properties as her mikliat right. This lady was grand mother of the appellants. That suit was dismissed. In 1910 a regular Suit No. 4 of 1910 was instituted by the judgment-debtors to set aside the mortgage decree. That suit was also dismissed. Subsequently when the execution of the mortgage decree was proceeding, regular Suit No. 444 of 1914 was instituted to set aside the decree in the Court of the Additional Subordinate Judge of Monghyr, but was dismissed.

After the prayer for injunction was rejected, an appeal was taken to the Calcutta High Court and was also dismissed. After the dismissal of the said appeal by the High Court objections were taken in this execution proceeding which were disallowed both by the lower Court and by the High Court. Then an application for the issue of an injunction was again filed in the Court of the Additional Subordinate Judge at Monghyr on 5th February 1916 and again rejected by that Court and by the High Court. It is clear therefore that at every step the judgment-debtors heve endeavoured to defeat and delay the execution of the mortgage decree and we understand that they contemplate further litigation With this however we are not concerned. We have only to determine whether or not upon the facts stated in the petition the sale ought to be set aside. Upon a careful consideration of the case we have come to the conclusion that although there was an irregularity in the publishing and conduct of the sale that nevertheless no substantial inquiry was caused to the appellants by reason of that irregularity, and that therefore the sale ought not to be set aside. We accordingly dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

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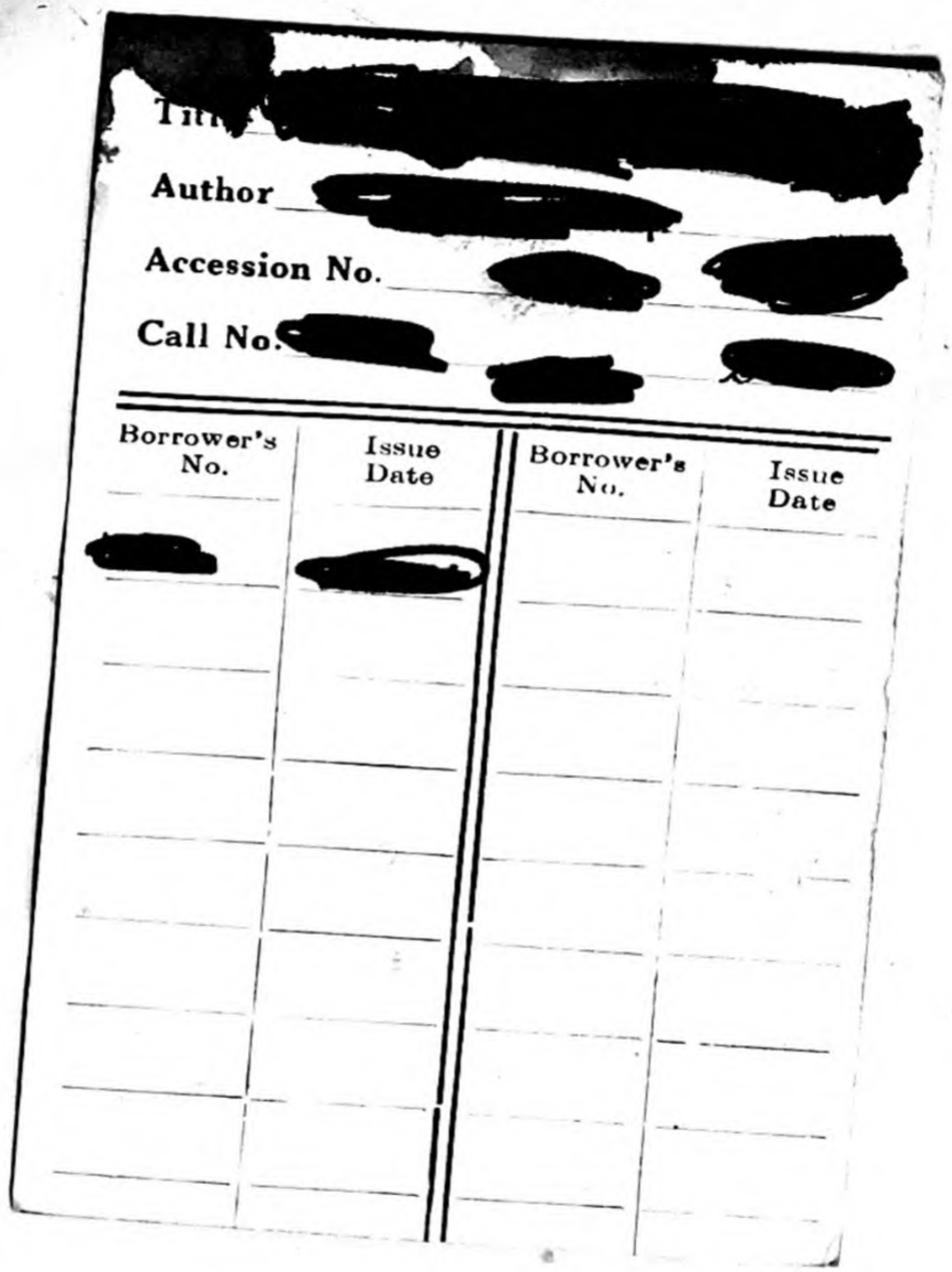
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